

31 MARCH 2014

JUDGMENT

**WHALING IN THE ANTARCTIC (AUSTRALIA v. JAPAN:
NEW ZEALAND INTERVENING)**

**CHASSE À LA BALEINE DANS L'ANTARCTIQUE (AUSTRALIE c. JAPON ;
NOUVELLE-ZÉLANDE (INTERVENANT))**

31 MARS 2014

ARRÊT

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INTERNATIONAL COURT OF JUSTICE

YEAR 2014

2014
31 March
General List
No. 148

31 March 2014

WHALING IN THE ANTARCTIC

(AUSTRALIA v. JAPAN: NEW ZEALAND INTERVENING)

Jurisdiction of the Court — Parties' declarations under Article 36, paragraph 2, of the Statute — Australia's reservation — Disputes "concerning or relating to the delimitation of maritime zones" or "arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation" — Dispute concerning maritime delimitation must exist for the reservation to be applicable — No dispute as to maritime delimitation between the Parties — Reservation not applicable — Japan's objection to the Court's jurisdiction cannot be upheld.

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item — Research Plan provides only limited information regarding basis for calculation of fin and humpback whale sample size — Determination of sample size for minke whales — Research Plan lacks transparency in reasons for selecting particular sample sizes for individual research items — Effect on sample size of using 6-year research period for minke whales — No explanation how disparate research periods for three whale species is compatible with research objectives — Lack of transparency regarding decisions made in selecting sample sizes for individual research items — Evidence provides scant justification for underlying decisions that generate overall sample size — Gap between target sample sizes and actual take — Evidence suggests target sample sizes larger than reasonable in relation to objectives — Open-ended time frame of JARPA II inconsistent with Annex P — Scientific output of JARPA II to date minimal — Co-operation with other research institutions limited — JARPA II involves activities that can broadly be characterized as scientific research — Evidence does not establish that design and implementation of programme are reasonable in relation to stated objectives — Special permits granted in connection with JARPA II not “for purposes of scientific research” pursuant to Article VIII, paragraph 1.

Conclusions regarding alleged violations of paragraphs 7 (b), 10 (d) and 10 (e) of the Schedule — Whaling that falls outside Article VIII, paragraph 1, other than aboriginal subsistence whaling, is subject to these Schedule provisions — No need to evaluate whether JARPA II has attributes of commercial whaling — Moratorium on commercial whaling (paragraph 10 (e)) — Zero catch limit — Japan has not acted in conformity with its obligations in each year it issued special permits — Factory ship moratorium (paragraph 10 (d)) — Japan has not acted in conformity with its obligations in each of the seasons during which fin whales were taken, killed and treated in JARPA II — Southern Ocean Sanctuary (paragraph 7 (b)) — Japan has not acted in conformity with its obligations in each of the seasons of JARPA II during which fin whales have been taken.

Conclusions regarding alleged non-compliance with paragraph 30 of the Schedule — JARPA II Research Plan submitted for review by the Scientific Committee in advance of the granting of the first permit for the programme — JARPA II Research Plan sets forth information specified by paragraph 30 — Duty of co-operation with the Commission and its Scientific Committee — Japan has met the requirements of paragraph 30 as far as JARPA II is concerned.

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Remedies — Measures going beyond declaratory relief warranted — Japan required to revoke any extant authorization, permit or licence to kill, take or treat whales in relation to JARPA II and refrain from granting any further permits in pursuance of that programme — No need to order additional remedy requested by Australia.

JUDGMENT

Present: President TOMKA; Vice-President SEPÚLVEDA-AMOR; Judges OWADA, ABRAHAM, KEITH, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI; Judge ad hoc CHARLESWORTH; Registrar COUVREUR.

In the case concerning whaling in the Antarctic,

between

Australia,

represented by

Mr. Bill Campbell, Q.C., General Counsel (International Law), Attorney-General's Department,

as Agent, Counsel and Advocate;

H.E. Mr. Neil Mules, A.O., Ambassador of Australia to the Kingdom of the Netherlands,

as Co-Agent;

The Honourable Mark Dreyfus, Q.C., M.P., former Attorney-General of Australia,

Mr. Justin Gleeson, S.C., Solicitor-General of Australia,

Mr. James Crawford, A.C., S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institut de droit international, Barrister, Matrix Chambers, London,

Mr. Henry Burmester, A.O., Q.C., Special Counsel, Australian Government Solicitor,

Mr. Philippe Sands, Q.C., Professor of Law, University College London, Barrister, Matrix Chambers, London,

Ms Laurence Boisson de Chazournes, Professor of International Law, University of Geneva,

as Counsel and Advocates;

Ms Kate Cook, Barrister, Matrix Chambers, London,

Mr. Makane Mbengue, Associate Professor, University of Geneva,

as Counsel;

Ms Anne Sheehan, Acting Assistant Secretary, Attorney-General's Department,
Mr. Michael Johnson, Principal Legal Officer, Attorney-General's Department,
Ms Danielle Forrester, Principal Legal Officer, Attorney-General's Department,
Ms Stephanie Ierino, Acting Principal Legal Officer, Attorney-General's Department,
Ms Clare Gregory, Senior Legal Officer, Attorney-General's Department,
Ms Nicole Lyas, Acting Senior Legal Officer, Attorney-General's Department,
Ms Erin Maher, Legal Officer, Attorney-General's Department,
Mr. Richard Rowe, former Senior Legal Adviser, Department of Foreign Affairs and Trade,
Mr. Greg French, Assistant Secretary, Department of Foreign Affairs and Trade,
Mr. Jamie Cooper, Legal Officer, Department of Foreign Affairs and Trade,
Ms Donna Petrachenko, First Assistant Secretary, Department of Sustainability,
Environment, Water, Population and Communities,
Mr. Peter Komidar, Director, Department of Sustainability, Environment, Water, Population
and Communities,
Mr. Bill de la Mare, Scientist, Australian Antarctic Division, Department of Sustainability,
Environment, Water, Population and Communities,
Mr. David Blumenthal, former Senior Adviser, Office of the Attorney-General,
Ms Giulia Baggio, former Senior Adviser, Office of the Attorney-General,
Mr. Todd Quinn, First Secretary, Embassy of Australia in the Kingdom of the Netherlands,
as Advisers;
Ms Mandy Williams, Administration Officer, Attorney-General's Department,
as Assistant,

and

Japan,

represented by

H.E. Mr. Koji Tsuruoka, Ambassador, Chief Negotiator for the Trans-Pacific Partnership Agreement Negotiations,

as Agent;

H.E. Mr. Yasumasa Nagamine, Deputy Minister for Foreign Affairs,

H.E. Mr. Masaru Tsuji, Ambassador Extraordinary and Plenipotentiary of Japan to the Kingdom of the Netherlands,

as Co-Agents;

Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, President of the Société française pour le droit international, member of the Institut de droit international,

Mr. Vaughan Lowe, Q.C., member of the English Bar, Emeritus Professor of International Law, Oxford University, member of the Institut de droit international,

Mr. Alan Boyle, Professor of International Law at the University of Edinburgh, member of the English Bar,

Mr. Yuji Iwasawa, Professor of International Law at the University of Tokyo, member and former Chairperson of the Human Rights Committee,

Mr. Payam Akhavan, LL.M., S.J.D. (Harvard), Professor of International Law, McGill University, member of the Bar of New York and the Law Society of Upper Canada,

Mr. Shotaro Hamamoto, Professor of International Law, Kyoto University,

Ms Yukiko Takashiba, Deputy Director, ICJ Whaling Case Division, Ministry of Foreign Affairs,

as Counsel and Advocates;

Mr. Takane Sugihara, Emeritus Professor of International Law, Kyoto University,

Ms Atsuko Kanehara, Professor of International Law, Sophia University (Tokyo),

Mr. Masafumi Ishii, Director-General, International Legal Affairs Bureau, Ministry of Foreign Affairs,

Ms Alina Miron, Researcher, Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

as Counsel;

Mr. Kenji Kagawa, Deputy Director-General, Fisheries Agency,

Mr. Noriyuki Shikata, Minister, Embassy of Japan in the United Kingdom of Great Britain and Northern Ireland,

Mr. Tomohiro Mikanagi, Director, International Legal Affairs Division, Ministry of Foreign Affairs,

Mr. Joji Morishita, IWC Commissioner, Director-General, National Research Institute of Far Seas Fisheries,

Mr. Tatsuo Hirayama, Director, Fishery Division, Ministry of Foreign Affairs,

Mr. Takero Aoyama, Director, ICJ Whaling Case Division, Ministry of Foreign Affairs,

Mr. Naohisa Shibuya, Deputy Director, ICJ Whaling Case Division, Ministry of Foreign Affairs,

Ms Yuriko Akiyama, Ph.D., ICJ Whaling Case Division, Ministry of Foreign Affairs,

Mr. Masahiro Kato, ICJ Whaling Case Division, Ministry of Foreign Affairs,

Mr. Hideki Moronuki, Senior Fisheries Negotiator, International Affairs Division, Fisheries Agency,

Mr. Takaaki Sakamoto, Assistant Director, International Affairs Division, Fisheries Agency,

Mr. Shinji Hiruma, Assistant Director, International Affairs Division, Fisheries Agency,

Mr. Sadaharu Kodama, Legal Adviser, Embassy of Japan in the Kingdom of the Netherlands,

Mr. Nobuyuki Murai, LL.D., First Secretary, Embassy of Japan in the Kingdom of the Netherlands,

Ms Risa Saijo, LL.M., Researcher, Embassy of Japan in the Kingdom of the Netherlands,

Ms Héloïse Bajer-Pellet, member of the Paris Bar,

as Advisers;

Mr. Douglas Butterworth, Emeritus Professor, University of Cape Town,

Ms Judith E. Zeh, Ph.D., Research Professor Emeritus, University of Washington,

as Scientific Advisers and Experts;

Mr. Martin Pratt, Professor, Department of Geography, Durham University,

as Expert Adviser;

Mr. James Harrison, Ph.D., Lecturer in International Law, University of Edinburgh,

Ms Amy Sander, member of the English Bar,

Mr. Jay Butler, Visiting Associate Professor of Law, George Washington University Law School, member of the New York Bar,

as Legal Advisers,

with New Zealand,

as a State whose Declaration of Intervention has been admitted by the Court,

represented by

Ms Penelope Ridings, International Legal Adviser, Ministry of Foreign Affairs and Trade,
as Agent, Counsel and Advocate;

H.E. Mr. George Troup, Ambassador of New Zealand to the Kingdom of the Netherlands,
as Co-Agent;

The Honourable Christopher Finlayson Q.C., M.P., Attorney-General of New Zealand,
as Counsel and Advocate;

Ms Cheryl Gwyn, Deputy Solicitor-General, Crown Law Office,

Ms Elana Geddis, Barrister, Harbour Chambers, Wellington,
as Counsel;

Mr. Andrew Williams, Legal Adviser, Ministry of Foreign Affairs and Trade,

Mr. James Christmas, Private Secretary, Attorney-General's Office,

Mr. James Walker, Deputy Head of Mission, Embassy of New Zealand in the Kingdom of the Netherlands,

Mr. Paul Vinkenvleugel, Policy Adviser, Embassy of New Zealand in the Kingdom of the Netherlands,

as Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 31 May 2010, Australia filed in the Registry of the Court an Application instituting proceedings against Japan in respect of a dispute concerning

“Japan’s continued pursuit of a large-scale program of whaling under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic (‘JARPA II’), in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling . . . , as well as its other international obligations for the preservation of marine mammals and the marine environment”.

In its Application, Australia invoked as the basis for the jurisdiction of the Court the declarations made, pursuant to Article 36, paragraph 2, of the Statute of the Court, by Australia on 22 March 2002 and by Japan on 9 July 2007.

2. In accordance with Article 40, paragraph 2, of the Statute, the Registrar communicated the Application forthwith to the Government of Japan; and, pursuant to paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. On the directions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the International Convention for the Regulation of Whaling (hereinafter the “ICRW” or the “Convention”) the notification provided for in Article 63, paragraph 1, of the Statute. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar also addressed to the International Whaling Commission (hereinafter the “IWC” or the “Commission”) the notification provided for in Article 34, paragraph 3, of the Statute. The Commission indicated that it did not intend to submit any observations in writing under Article 69, paragraph 3, of the Rules of Court.

4. Since the Court included upon the Bench no judge of Australian nationality, Australia proceeded to exercise its right conferred by Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case; it chose Ms Hilary Charlesworth.

5. By an Order of 13 July 2010, the Court fixed 9 May 2011 and 9 March 2012 as the respective time-limits for the filing of the Memorial of Australia and the Counter-Memorial of Japan; those pleadings were duly filed within the time-limits thus prescribed.

6. On 23 April 2012, the President of the Court met with the Agents of the Parties in order to ascertain their views with regard to the organization of the oral proceedings. At this meeting, the Agent of Australia stated that his Government did not consider it necessary to organize a second round of written pleadings; the Agent of Japan, for his part, requested a second round of written pleadings.

The Court, having regard to Article 45, paragraph 2, of the Rules of Court, decided that a second round of written pleadings was not necessary. By letters dated 2 May 2012, the Registrar informed the Parties accordingly.

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7. On 19 September 2012, the Government of New Zealand, referring to Article 53, paragraph 1, of the Rules of Court, requested the Court to furnish it with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties pursuant to that same provision, the Court decided to grant this request. The documents in question were duly transmitted to New Zealand.

8. On 20 November 2012, New Zealand, pursuant to Article 63, paragraph 2, of the Statute, filed in the Registry of the Court a Declaration of Intervention in the case. In its Declaration, New Zealand stated that it “avail[ed] itself of the right . . . to intervene as a non-party in the proceedings brought by Australia against Japan in this case”.

9. In accordance with Article 83, paragraph 1, of the Rules of Court, the Registrar, by letters dated 20 November 2012, transmitted certified copies of the Declaration of Intervention to the Governments of Australia and Japan, which were informed that the Court had fixed 21 December 2012 as the time-limit for the submission of written observations on that Declaration. In accordance with paragraph 2 of the same Article, the Registrar also transmitted a copy of the Declaration to the Secretary-General of the United Nations, as well as to States entitled to appear before the Court.

10. Australia and Japan each submitted written observations on New Zealand’s Declaration of Intervention within the time-limit thus fixed. The Registrar transmitted to each Party a copy of the other’s observations, and copies of the observations of both Parties to New Zealand.

11. In the light of Article 84, paragraph 2, of the Rules of Court, and considering the absence of objections from the Parties, the Court took the view that it was not necessary to hold hearings on the question of the admissibility of New Zealand’s Declaration of Intervention.

12. By an Order of 6 February 2013, the Court decided that the Declaration of Intervention filed by New Zealand pursuant to Article 63, paragraph 2, of the Statute was admissible. The Court also fixed 4 April 2013 as the time-limit for the filing by New Zealand of the written observations referred to in Article 86, paragraph 1, of the Rules of Court; moreover, it authorized the filing by Australia and Japan of written observations on those submitted by New Zealand, and fixed 31 May 2013 as the time-limit for such filing.

13. New Zealand duly filed its written observations within the time-limit thus fixed. The Registrar transmitted copies of New Zealand's written observations to the Parties.

Japan then filed, within the time-limit prescribed by the Court in its Order of 6 February 2013, its observations on those filed by New Zealand. The Registrar transmitted copies of Japan's written observations to Australia and to New Zealand.

Australia, for its part, notified the Court, by letter dated 31 May 2013, that it would not submit such observations, but that it "reserve[d] its right to address certain points raised in the written observations of New Zealand in the course of oral argument". The Registrar communicated copies of this letter to Japan and to New Zealand.

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14. By letters dated 17 October 2012, the Registrar informed the Parties that the Court had requested that they provide, by 28 December 2012, information regarding expert evidence which they intended to produce, including the details referred to in Article 57 of the Rules of Court. The Registrar informed the Parties, moreover, that each Party would then be given an opportunity to comment on the other's communication, and if necessary to amend the information it had given, including the list of experts to be called at the hearing, by 28 January 2013. Finally, the Registrar informed the Parties that the Court had decided that each Party should communicate to it, by 15 April 2013, the full texts of the statements of the experts whom the Parties intended to call at the hearings.

15. By letters dated 18 December 2012 and 26 December 2012, respectively, the Agents of Australia and Japan each communicated information concerning one expert to be called at the hearing. By a letter dated 25 January 2013, the Co-Agent of Australia communicated such information regarding a second expert.

16. By letters dated 15 April 2013, the Parties communicated the full texts of the statements of the experts whom the Parties intended to call at the hearings. These texts were exchanged between the Parties and transmitted to New Zealand.

17. By letters dated 23 April 2013, the Registrar informed the Parties that the Court had decided that they could submit written statements in response to the statement submitted by each of the other Party's experts, and had fixed 31 May 2013 as the time-limit for such submission. Within the time-limit thus fixed, Australia submitted such statements in response from the two experts it would call at the hearing, and Japan submitted certain observations in response on the statements by the two experts to be called by Australia.

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18. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings. After consulting the Parties and New Zealand, the Court decided that the same should apply to the written observations of the intervening State and of the Parties on the subject-matter of the intervention, as well as to the written statements of experts called to give evidence in the case, and the written statements and observations in response.

19. Public hearings were held between 26 June and 16 July 2013, at which the Court heard the oral arguments and replies of:

For Australia: Mr. Bill Campbell,
Mr. Justin Gleeson,
Ms Laurence Boisson de Chazournes,
Mr. Henry Burmester,
Mr. James Crawford,
Mr. Philippe Sands,
Mr. Mark Dreyfus.

For Japan: Mr. Koji Tsuruoka,
Mr. Alain Pellet,
Mr. Payam Akhavan,
Mr. Shotaro Hamamoto,
Mr. Alan Boyle,
Mr. Vaughan Lowe,
Ms Yukiko Takashiba,
Mr. Yuji Iwasawa.

For New Zealand: Ms Penelope Ridings,
Mr. Christopher Finlayson.

20. During the public hearings of 27 June 2013, Australia called the following experts: Mr. Marc Mangel, Distinguished Research Professor of Mathematical Biology and Director of the Center for Stock Assessment Research, University of California, Santa Cruz; and Mr. Nick Gales, Chief Scientist of the Australian Antarctic Program. Mr. Mangel was examined by Mr. Philippe Sands, counsel for Australia, and cross-examined by Mr. Vaughan Lowe, counsel for Japan. Mr. Gales was examined by Mr. Justin Gleeson, counsel for Australia, and cross-examined by Mr. Vaughan Lowe, counsel for Japan. He was then re-examined by Mr. Gleeson. Several judges put questions to Mr. Mangel and to Mr. Gales, to which they replied orally.

21. During the public hearing on the afternoon of 3 July 2013, Japan called Mr. Lars Walløe, Professor Emeritus of the University of Oslo and Scientific Adviser to the Norwegian Government on Marine Mammals. He was examined by Mr. Vaughan Lowe, counsel for Japan, and cross-examined by Mr. Justin Gleeson, counsel for Australia. Several judges put questions to Mr. Walløe, to which he replied orally.

22. At the hearings, some judges put questions to the Parties, and to New Zealand as intervening State, to which replies were given orally and in writing. The Parties and New Zealand presented their comments on those replies.

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23. In its Application, Australia made the following claims:

“For [the] reasons [set forth in its Application], and reserving the right to supplement, amplify or amend the present Application, Australia requests the Court to adjudge and declare that Japan is in breach of its international obligations in implementing the JARPA II program in the Southern Ocean.

In addition, Australia requests the Court to order that Japan:

- (a) cease implementation of JARPA II;
- (b) revoke any authorizations, permits or licences allowing the activities which are the subject of this application to be undertaken; and
- (c) provide assurances and guarantees that it will not take any further action under the JARPA II or any similar program until such program has been brought into conformity with its obligations under international law.”

24. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Australia,

in the Memorial:

“1. For the reasons given in this Memorial, and reserving the right to supplement, amplify or amend the present submissions, Australia requests the Court to adjudge and declare that Japan is in breach of its international obligations in authorising and implementing JARPA II in the Southern Ocean.

2. In particular, the Court is requested to adjudge and declare that, by its conduct, Japan has violated its international obligations to:

- (a) observe the zero catch limit in relation to the killing of whales for commercial purposes;
- (b) refrain from undertaking commercial whaling of fin whales in the Southern Ocean Sanctuary; and
- (c) observe the moratorium on taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships.

3. Further, the Court is requested to adjudge and declare that JARPA II is not a program for purposes of scientific research within the meaning of Article VIII of the International Convention for the Regulation of Whaling.

4. Further, the Court is requested to adjudge and declare that Japan shall:

- (a) refrain from authorising or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII;
- (b) cease with immediate effect the implementation of JARPA II; and
- (c) revoke any authorisation, permit or licence that allows the implementation of JARPA II.”

On behalf of the Government of Japan,

in the Counter-Memorial:

“On the basis of the facts and arguments set out [in its Counter-Memorial], and reserving its right to supplement or amend these Submissions, Japan requests that the Court adjudge and declare:

- that it lacks jurisdiction over the claims brought against Japan by Australia, referred to it by the Application of Australia of 31 May 2010;
- in the alternative, that the claims of Australia are rejected.”

25. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Australia,

“1. Australia requests the Court to adjudge and declare that the Court has jurisdiction to hear the claims presented by Australia.

2. Australia requests the Court to adjudge and declare that Japan is in breach of its international obligations in authorizing and implementing the *Japanese Whale Research Program under Special Permit in the Antarctic Phase II* (JARPA II) in the Southern Ocean.

3. In particular, the Court is requested to adjudge and declare that, by its conduct, Japan has violated its international obligations pursuant to the International Convention for the Regulation of Whaling to:

- (a) observe the zero catch limit in relation to the killing of whales for commercial purposes in paragraph 10 (e) of the Schedule;
- (b) refrain from undertaking commercial whaling of fin whales in the Southern Ocean Sanctuary in paragraph 7 (b) of the Schedule;
- (c) observe the moratorium on taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships in paragraph 10 (d) of the Schedule; and
- (d) comply with the requirements of paragraph 30 of the Schedule.

4. Further, the Court is requested to adjudge and declare that JARPA II is not a program for purposes of scientific research within the meaning of Article VIII of the International Convention for the Regulation of Whaling.

5. Further, the Court is requested to adjudge and declare that Japan shall:

- (a) refrain from authorizing or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII;
- (b) cease with immediate effect the implementation of JARPA II; and
- (c) revoke any authorization, permit or licence that allows the implementation of JARPA II.”

On behalf of the Government of Japan,

“Japan requests that the Court adjudge and declare:

1. — that it lacks jurisdiction over the claims brought against Japan by Australia, referred to it by the Application of Australia of 31 May 2010; and
— that, consequently, the Application of New Zealand for permission to intervene in the proceedings instituted by Australia against Japan lapses;
2. in the alternative, that the claims of Australia are rejected.”

*

26. At the end of the written observations submitted by it in accordance with Article 86, paragraph 1, of the Rules of Court, New Zealand stated:

“In summary, the provisions of Article VIII must be interpreted in good faith in their context and in light of the object and purpose of the Convention, taking account of subsequent practice of the parties and applicable rules of international law, as confirmed by supplementary means of interpretation. On the basis of those considerations, Article VIII is properly to be interpreted as follows:

- (a) Article VIII forms an integral part of the system of collective regulation established by the Convention, not an exemption from it. As such, it cannot be applied to permit whaling where the effect of that whaling would be to circumvent the other obligations of the Convention or to undermine its object and purpose.
- (b) Only whaling that is conducted ‘in accordance with’ Article VIII is exempt from the operation of the Convention.
- (c) Article VIII only permits a Contracting Government to issue a Special Permit for the exclusive ‘purposes of scientific research’. The purpose for which a Special Permit has been issued is a matter for objective determination, taking account of the programme’s methodology, design and characteristics, including: the scale of the programme; its structure; the manner in which it is conducted; and its results.
- (d) Article VIII requires a Contracting Government issuing a Special Permit to limit the number of whales to be killed under that permit to a level that is the lowest necessary for and proportionate to the objectives of that research, and that can be demonstrated will have no adverse effect on the conservation of stocks.

- (e) A Contracting Government issuing a Special Permit must discharge its duty of meaningful cooperation, and demonstrate that it has taken proper account of the views of the Scientific Committee and the Commission.
- (f) Only whaling under Special Permit that meets all three of the requirements of Article VIII outlined above is permitted under Article VIII.”

27. In the written observations which the Court, by its Order of 6 February 2013, authorized the Parties to submit on those filed by New Zealand, Japan stated *inter alia*:

- “Japan submits that the Court should defer its consideration of New Zealand’s request until it has decided whether it has jurisdiction to examine Australia’s Application”; and
- “New Zealand reaches erroneous conclusions on a number of points that are pertinent to the present case. New Zealand . . . misstates the scope of the discretion expressly reserved to the Contracting Governments by Article VIII of the ICRW, particularly in relation to research methods and sample sizes as well as to the duty of cooperation. New Zealand also attempts to reverse the burden of proof with regard to the precautionary approach, to the procedural duties incumbent upon Contracting Governments issuing special permits, and to the determination of what constitutes ‘scientific purposes’ under Article VIII of the ICRW. Japan submits that New Zealand’s characterization of each of these points is incorrect.

New Zealand implicitly requests the Court to substitute its own judgment for that of the Government of Japan as to the character of the special permits granted by Japan. It is respectfully submitted that the Court does not have such a power and cannot substitute its own appreciation for that of a Contracting Government granting a special permit.”

28. Australia, for its part, did not submit any written observations (see paragraph 13 above).

29. At the end of the oral observations which it presented with respect to the subject-matter of its intervention, in accordance with Article 86, paragraph 2, of the Rules of Court, New Zealand stated *inter alia*:

“[T]he Convention establishes a system of collective regulation for the conservation and management of whale stocks. Article VIII must be interpreted in light of that object and purpose.

Article VIII permits the grant of special permits only to take whales ‘for purposes of scientific research’. Japan has sought to mystify the determination of what is scientific research, and to accord for itself the right to decide whether a programme of whaling is for that purpose . . .

Even where a Contracting Government issues a special permit ‘for purposes of scientific research’, it is still required to ensure that the number of whales to be killed under that permit is the lowest necessary for, and proportionate to, the scientific purpose, and takes into account the collective interests of the parties. This is a matter for objective determination in light of the facts, as evidenced through the Guidelines and Resolutions of the Scientific Committee and the Commission.

There is, in any case, a substantive duty of meaningful co-operation on a Contracting Government which proposes to issue a special permit. This requires it to show that it has taken into account the legitimate interests of the other parties to the Convention; that it has balanced the interests of all the parties in the conservation and management of whale stocks.”

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I. JURISDICTION OF THE COURT

30. In the present case Australia contends that Japan has breached certain obligations under the ICRW to which both States are parties by issuing special permits to take whales within the framework of JARPA II. Japan maintains that its activities are lawful because the special permits are issued for “purposes of scientific research”, as provided by Article VIII of the ICRW. The Court will first examine whether it has jurisdiction over the dispute.

31. Australia invokes as the basis of the Court’s jurisdiction the declarations made by both Parties under Article 36, paragraph 2, of the Court’s Statute. Australia’s declaration of 22 March 2002 reads in relevant part as follows:

“The Government of Australia declares that it recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to the Secretary-General of the United Nations withdrawing this declaration. This declaration is effective immediately.

This declaration does not apply to:

.....

(b) any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation.”

Japan’s declaration of 9 July 2007 reads in relevant part as follows:

“Japan recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation and on condition of reciprocity, the jurisdiction of the International Court of Justice, over all disputes arising on and after 15 September 1958 with regard to situations or facts subsequent to the same date and being not settled by other means of peaceful settlement.”

32. Japan contests the jurisdiction of the Court over the dispute submitted by Australia with regard to JARPA II, arguing that it falls within Australia’s reservation (b), which it invokes on the basis of reciprocity. While acknowledging that this dispute does not concern or relate to the delimitation of maritime zones, Japan maintains that it is a dispute “arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation”.

In Japan’s view, the latter part of Australia’s reservation, introduced by the second conjunction “or”, is separate from the first part, with the consequence that the reservation applies both to disputes on delimitation and to other kinds of disputes involving the exploitation of maritime zones or adjacent areas pending delimitation. Japan adds that this interpretation is in conformity with Australia’s intention when making the declaration. According to Japan, the phrase “pending its delimitation” merely describes a point in time, but not the subject-matter of the dispute excluded from the Court’s jurisdiction.

Japan maintains that the present dispute “relates to the exploitation” of a maritime zone claimed by Australia or of an area adjacent to such a zone. Japan argues that this would be the case under Australia’s characterization of JARPA II as a programme for the commercial exploitation of whales, as well as under Japan’s own characterization of JARPA II as a scientific research programme, given that the research conducted under JARPA II is “an element of the process leading to exploitation”.

33. Japan further contends that the dispute between the Parties relates to a disputed area in the sense of the reservation, given that “the JARPA II programme is taking place in or around maritime areas Australia claims to be part of its exclusive economic zone (EEZ), the rights of which are generated, according to Australia’s claims, by its purported sovereignty over a large part of the Antarctic continent”. In Japan’s view, these maritime areas are disputed since it does not recognize Australia’s claims and considers the areas in question to be part of the high seas. Conceding that the area of operation of JARPA II and the areas of the Southern Ocean claimed by Australia do not overlap precisely, Japan argues that this is irrelevant because the Australian reservation also includes the waters that are “adjacent” to the area in dispute, the term being understood broadly by Australia.

34. Australia rejects Japan's interpretation of its reservation, maintaining that

“the reservation only operates in relation to disputes between Australia and another country with a maritime claim that overlaps with that of Australia — that is, a situation of delimitation. Australia has no delimitation [dispute] with Japan and hence the paragraph (b) reservation can have no operation.”

It adds that “[i]n particular, the reservation does not cover a dispute concerning the validity, or otherwise, under the 1946 Convention, of Japan's JARPA II programme, a dispute entirely unconnected with any delimitation situation”.

According to Australia, the intent underlying the reservation was to give effect to its “belief that its overlapping maritime claims are best resolved by negotiations”, especially the complex maritime boundary delimitations with New Zealand and Timor-Leste that were ongoing at the time the declaration was made. Australia maintains that the wording of the reservation is to be understood against this background. Thus, the purpose of the second part of the reservation “is to make clear [that] the reservation extends beyond disputes over delimitation of maritime zones *per se*, to associated disputes concerning [the] exploitation of resources that may arise between the States with overlapping maritime claims pending delimitation”.

Australia also contests Japan's view that the dispute over JARPA II is about “exploitation” in the sense of its reservation, arguing that the exploitation contemplated by the reservation is “exploitation of resources covered by a potential delimitation arrangement and not any exploitation unrelated to that delimitation situation that happens to occur in the relevant geographic area”.

35. Australia furthermore contends that the geographic area of operation of JARPA II, which in any event extends well outside any waters claimed by it, cannot determine the Court's jurisdiction over a treaty dispute that is unrelated to the status of the waters in which the activity occurs. According to Australia, “[t]he dispute before the Court concerning compliance of JARPA II with the whaling Convention exists whether or not Australia asserts maritime zones adjacent to Antarctica and irrespective of any delimitation with adjacent claimants”. Australia emphasizes that, in the maritime context, the word “delimitation” has a specific meaning, referring solely to “the fixing of boundaries between neighbouring States, whether adjacent or opposite”.

36. The Court recalls that, when interpreting a declaration accepting its compulsory jurisdiction, it “must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention” of the declaring State (*Anglo-Iranian Oil Co. (United Kingdom v. Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 104). The Court noted in the *Fisheries Jurisdiction* case that it had “not hesitated to place a certain emphasis

on the intention of the depositing State” (*Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment*, *I.C.J. Reports 1998*, p. 454, para. 48). The Court further observed that “[t]he intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served” (*ibid.*, p. 454, para. 49).

37. Reservation (b) contained in Australia’s declaration (see paragraph 31 above) refers to disputes concerning “the delimitation of maritime zones” or to those “arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation”. The wording of the second part of the reservation is closely linked to that of the first part. The reservation thus has to be read as a unity. The disputes to which the reservation refers must either concern maritime delimitation in an area where there are overlapping claims or the exploitation of such an area or of an area adjacent thereto. The existence of a dispute concerning maritime delimitation between the Parties is required according to both parts of the reservation.

38. The meaning which results from the text of the reservation is confirmed by the intention stated by Australia when it made its declaration accepting the compulsory jurisdiction of the Court. According to a press release issued by the Attorney-General and the Minister for Foreign Affairs of Australia on 25 March 2002, the reservation excluded “disputes involv[ing] maritime boundary delimitation or disputes concerning the exploitation of an area in dispute or adjacent to an area in dispute”. The same statement is contained in the National Interest Analysis submitted by the Attorney-General to Parliament on 18 June 2002, which referred to “maritime boundary disputes” as the object of the reservation. Thus, the reservation was intended to cover, apart from disputes concerning the delimitation of maritime zones, those relating to the exploitation of an area in respect of which a dispute on delimitation exists, or of a maritime area adjacent to such an area. The condition of a dispute between the parties to the case concerning delimitation of the maritime zones in question was clearly implied.

39. Both Parties acknowledge that the dispute before the Court is not a dispute about maritime delimitation. The question remains whether JARPA II involves the exploitation of an area which is the subject of a dispute relating to delimitation or of an area adjacent to it.

Part of the whaling activities envisaged in JARPA II take place in the maritime zone claimed by Australia as relating to the asserted Australian Antarctic Territory or in an adjacent area. Moreover, the taking of whales, especially in considerable numbers, could be viewed as a form of exploitation of a maritime area even if this occurs according to a programme for scientific research. However, while Japan has contested Australia’s maritime claims generated by the asserted Australian Antarctic Territory, it does not claim to have any sovereign rights in those areas. The fact that Japan questions those maritime entitlements does not render the delimitation of these maritime areas under dispute as between the Parties. As the Court stated in the *Territorial and*

Maritime Dispute case, “the task of delimitation consists in resolving the overlapping claims by drawing a line of separation between the maritime areas concerned” (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Judgment*, *I.C.J. Reports 2012 (II)*, pp. 674-675, para. 141). There are no overlapping claims of the Parties to the present proceedings which may render reservation (b) applicable.

40. Moreover, it is significant that Australia alleges that Japan has breached certain obligations under the ICRW and does not contend that JARPA II is unlawful because the whaling activities envisaged in the programme take place in the maritime zones over which Australia asserts sovereign rights or in adjacent areas. The nature and extent of the claimed maritime zones are therefore immaterial to the present dispute, which is about whether or not Japan’s activities are compatible with its obligations under the ICRW.

41. The Court therefore concludes that Japan’s objection to the Court’s jurisdiction cannot be upheld.

II. ALLEGED VIOLATIONS OF INTERNATIONAL OBLIGATIONS UNDER THE CONVENTION

1. Introduction

A. General overview of the Convention

42. The present proceedings concern the interpretation of the International Convention for the Regulation of Whaling and the question whether special permits granted for JARPA II are for purposes of scientific research within the meaning of Article VIII, paragraph 1, of the Convention. Before examining the relevant issues, the Court finds it useful to provide a general overview of the Convention and its origins.

43. The ICRW was preceded by two multilateral treaties relating to whaling. The Convention for the Regulation of Whaling, adopted in 1931, was prompted by concerns over the sustainability of the whaling industry. This industry had increased dramatically following the advent of factory ships and other technological innovations that made it possible to conduct extensive whaling in areas far from land stations, including in the waters off Antarctica. The 1931 Convention prohibited the killing of certain categories of whales and required whaling operations by vessels of States parties to be licensed, but failed to address the increase in overall catch levels.

This increase in catch levels and a concurrent decline in the price of whale oil led to the adoption of the 1937 International Agreement for the Regulation of Whaling. The preamble of this Agreement expressed the desire of the States parties “to secure the prosperity of the whaling industry and, for that purpose, to maintain the stock of whales”. The treaty prohibited the taking of certain categories of whales, designated seasons for different types of whaling, closed certain

geographic areas to whaling and imposed further regulations on the industry. As had already been the case under the 1931 Convention, States parties were required to collect from all the whales taken certain biological information which, together with other statistical data, was to be transmitted to the International Bureau for Whaling Statistics in Norway. The Agreement also provided for the issuance by a “Contracting Government . . . to any of its nationals [of] a special permit authorising that national to kill, take and treat whales for purposes of scientific research”. Three Protocols to the 1937 Agreement subsequently placed some additional restrictions on whaling activities.

44. In 1946, an international conference on whaling was convened on the initiative of the United States. The aims of the conference, as described by Mr. Dean Acheson, then Acting Secretary of State of the United States, in his opening address, were “to provide for the coordination and codification of existant regulations” and to establish an “effective administrative machinery for the modification of these regulations from time to time in the future as conditions may require”. The conference adopted, on 2 December 1946, the International Convention for the Regulation of Whaling, the only authentic text of which is in the English language. The Convention entered into force for Australia on 10 November 1948 and for Japan on 21 April 1951. New Zealand deposited its instrument of ratification on 2 August 1949, but gave notice of withdrawal on 3 October 1968; it adhered again to the Convention with effect from 15 June 1976.

45. In contrast to the 1931 and 1937 treaties, the text of the ICRW does not contain substantive provisions regulating the conservation of whale stocks or the management of the whaling industry. These are to be found in the Schedule, which “forms an integral part” of the Convention, as is stated in Article I, paragraph 1, of the latter. The Schedule is subject to amendments, to be adopted by the IWC. This Commission, established under Article III, paragraph 1, of the Convention, is given a significant role in the regulation of whaling. It is “composed of one member from each Contracting Government”. The adoption by the Commission of amendments to the Schedule requires a three-fourths majority of votes cast (Art. III, para. 2). An amendment becomes binding on a State party unless it presents an objection, in which case the amendment does not become effective in respect of that State until the objection is withdrawn. The Commission has amended the Schedule many times. The functions conferred on the Commission have made the Convention an evolving instrument.

Among the objects of possible amendments, Article V, paragraph 1, of the Convention lists “fixing (a) protected and unprotected species . . . (c) open and closed waters, including the designation of sanctuary areas . . . (e) time, methods, and intensity of whaling (including the maximum catch of whales to be taken in any one season), (f) types and specifications of gear and apparatus and appliances which may be used”. Amendments to the Schedule “shall be such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources” and “shall be based on scientific findings” (Art. V, para. 2).

46. Article VI of the Convention states that “[t]he Commission may from time to time make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention”. These recommendations, which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule.

47. In 1950, the Commission established a Scientific Committee (hereinafter the “Scientific Committee” or “Committee”). The Committee is composed primarily of scientists nominated by the States parties. However, advisers from intergovernmental organizations and scientists who have not been nominated by States parties may be invited to participate in a non-voting capacity.

The Scientific Committee assists the Commission in discharging its functions, in particular those relating to “studies and investigations relating to whales and whaling” (Article IV of the Convention). It analyses information available to States parties “with respect to whales and whaling” and submitted by them in compliance with their obligations under Article VIII, paragraph 3, of the Convention. It contributes to making “scientific findings” on the basis of which amendments to the Schedule may be adopted by the Commission (Art. V, para. 2 (b)). According to paragraph 30 of the Schedule, adopted in 1979, the Scientific Committee reviews and comments on special permits before they are issued by States parties to their nationals for purposes of scientific research under Article VIII, paragraph 1, of the Convention. The Scientific Committee has not been empowered to make any binding assessment in this regard. It communicates to the Commission its views on programmes for scientific research, including the views of individual members, in the form of reports or recommendations. However, when there is a division of opinion, the Committee generally refrains from formally adopting the majority view.

Since the mid-1980s, the Scientific Committee has conducted its review of special permits on the basis of “Guidelines” issued or endorsed by the Commission. At the time that JARPA II was proposed in 2005, the applicable Guidelines had been collected in a document entitled “Annex Y: Guidelines for the Review of Scientific Permit Proposals” (hereinafter “Annex Y”). The current Guidelines, which were elaborated by the Scientific Committee and endorsed by the Commission in 2008 (and then further revised in 2012), are set forth in a document entitled “Annex P: Process for the Review of Special Permit Proposals and Research Results from Existing and Completed Permits” (hereinafter “Annex P”).

B. Claims by Australia and response by Japan

48. Australia alleges that JARPA II is not a programme for purposes of scientific research within the meaning of Article VIII of the Convention. In Australia’s view, it follows from this that Japan has breached and continues to breach certain of its obligations under the Schedule to the ICRW. Australia’s claims concern compliance with the following substantive obligations: (1) the obligation to respect the moratorium setting zero catch limits for the killing of whales from all stocks for commercial purposes (para. 10 (e)); (2) the obligation not to undertake commercial

whaling of fin whales in the Southern Ocean Sanctuary (para. 7 (b)); and (3) the obligation to observe the moratorium on the taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships (para. 10 (d)). Moreover, according to Australia's final submissions, when authorizing JARPA II, Japan also failed to comply with the procedural requirements set out in paragraph 30 of the Schedule for proposed scientific permits.

49. Japan contests all the alleged breaches. With regard to the substantive obligations under the Schedule, Japan argues that none of the obligations invoked by Australia applies to JARPA II, because this programme has been undertaken for purposes of scientific research and is therefore covered by the exemption provided for in Article VIII, paragraph 1, of the Convention. Japan also contends that there has been no breach of the procedural requirements stated in paragraph 30 of the Schedule.

50. The issues concerning the interpretation and application of Article VIII of the Convention are central to the present case and will be examined first.

2. Interpretation of Article VIII, paragraph 1, of the Convention

A. The function of Article VIII

51. Article VIII, paragraph 1, of the Convention reads as follows:

“Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.”

52. Japan initially argued that “special permit whaling under Article VIII is entirely outside the scope of the ICRW”. Article VIII, paragraph 1, it contended, was to be regarded as “free-standing” and would have to be read in isolation from the other provisions of the Convention. Japan later acknowledged that Article VIII “must . . . be interpreted and applied consistently with the Convention's other provisions”, but emphasized that a consistent reading would consider Article VIII, paragraph 1, as providing an exemption from the Convention.

53. According to Australia, Article VIII needs to be read in the context of the other provisions of the Convention, to which it provides a limited exception. In particular, Australia maintained that conservation measures adopted in pursuance of the objectives of the Convention,

“including the Moratorium and the Sanctuary”, are relevant also for whaling for scientific purposes, given that the reliance on Article VIII, paragraph 1, cannot have the effect of undermining the effectiveness of the regulatory régime as a whole.

54. New Zealand observed that the phrase “notwithstanding anything contained in this Convention”, which opens paragraph 1 of Article VIII, “provide[s] a limited discretion for Contracting Governments to issue special permits for the specific articulated purpose of scientific research”. It “do[es] not constitute a blanket exemption for Special Permit whaling from all aspects of the Convention”. New Zealand pointed out that the provision in paragraph 1 setting out that the taking of whales in accordance with Article VIII is “exempt from the operation of this Convention” “would have been unnecessary if the opening words of the paragraph, ‘notwithstanding anything in the Convention’, were intended to cover all aspects of Special Permit whaling”.

55. The Court notes that Article VIII is an integral part of the Convention. It therefore has to be interpreted in light of the object and purpose of the Convention and taking into account other provisions of the Convention, including the Schedule. However, since Article VIII, paragraph 1, specifies that “the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention”, whaling conducted under a special permit which meets the conditions of Article VIII is not subject to the obligations under the Schedule concerning the moratorium on the catching of whales for commercial purposes, the prohibition of commercial whaling in the Southern Ocean Sanctuary and the moratorium relating to factory ships.

B. The relationship between Article VIII and the object and purpose of the Convention

56. The preamble of the ICRW indicates that the Convention pursues the purpose of ensuring the conservation of all species of whales while allowing for their sustainable exploitation. Thus, the first preambular paragraph recognizes “the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks”. In the same vein, the second paragraph of the preamble expresses the desire “to protect all species of whales from further over-fishing”, and the fifth paragraph stresses the need “to give an interval for recovery to certain species now depleted in numbers”. However, the preamble also refers to the exploitation of whales, noting in the third paragraph that “increases in the size of whale stocks will permit increases in the number of whales which may be captured without endangering these natural resources”, and adding in the fourth paragraph that “it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress” and in the fifth that “whaling operations should be confined to those species best able to sustain exploitation”. The objectives of the ICRW are further indicated in the final paragraph of the preamble, which states that the Contracting Parties “decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the

orderly development of the whaling industry”. Amendments to the Schedule and recommendations by the IWC may put an emphasis on one or the other objective pursued by the Convention, but cannot alter its object and purpose.

57. In order to buttress their arguments concerning the interpretation of Article VIII, paragraph 1, Australia and Japan have respectively emphasized conservation and sustainable exploitation as the object and purpose of the Convention in the light of which the provision should be interpreted. According to Australia, Article VIII, paragraph 1, should be interpreted restrictively because it allows the taking of whales, thus providing an exception to the general rules of the Convention which give effect to its object and purpose of conservation. New Zealand also calls for “a restrictive rather than an expansive interpretation of the conditions in which a Contracting Government may issue a Special Permit under Article VIII”, in order not to undermine “the system of collective regulation under the Convention”. This approach is contested by Japan, which argues in particular that the power to authorize the taking of whales for purposes of scientific research should be viewed in the context of the freedom to engage in whaling enjoyed by States under customary international law.

58. Taking into account the preamble and other relevant provisions of the Convention referred to above, the Court observes that neither a restrictive nor an expansive interpretation of Article VIII is justified. The Court notes that programmes for purposes of scientific research should foster scientific knowledge; they may pursue an aim other than either conservation or sustainable exploitation of whale stocks. This is also reflected in the Guidelines issued by the IWC for the review of scientific permit proposals by the Scientific Committee. In particular, the Guidelines initially applicable to JARPA II, Annex Y, referred not only to programmes that “contribute information essential for rational management of the stock” or those that are relevant for “conduct[ing] the comprehensive assessment” of the moratorium on commercial whaling, but also those responding to “other critically important research needs”. The current Guidelines, Annex P, list three broad categories of objectives. Besides programmes aimed at “improv[ing] the conservation and management of whale stocks”, they envisage programmes which have as an objective to “improve the conservation and management of other living marine resources or the ecosystem of which the whale stocks are an integral part” and those directed at “test[ing] hypotheses not directly related to the management of living marine resources”.

C. The issuance of special permits

59. Japan notes that, according to Article VIII, paragraph 1, the State of nationality of the person or entity requesting a special permit for purposes of scientific research is the only State that is competent under the Convention to issue the permit. According to Japan, that State is in the best position to evaluate a programme intended for purposes of scientific research submitted by one of its nationals. In this regard it enjoys discretion, which could be defined as a “margin of appreciation”. Japan argues that this discretion is emphasized by the part of the paragraph which specifies that the State of nationality may grant a permit “subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit”.

60. According to Australia, while the State of nationality of the requesting entity has been given the power to authorize whaling for purposes of scientific research under Article VIII, this does not imply that the authorizing State has the discretion to determine whether a special permit for the killing, taking and treating of whales falls within the scope of Article VIII, paragraph 1. The requirements for granting a special permit set out in the Convention provide a standard of an objective nature to which the State of nationality has to conform. New Zealand also considers that Article VIII states “an objective requirement”, not “something to be determined by the granting Contracting Government”.

61. The Court considers that Article VIII gives discretion to a State party to the ICRW to reject the request for a special permit or to specify the conditions under which a permit will be granted. However, whether the killing, taking and treating of whales pursuant to a requested special permit is for purposes of scientific research cannot depend simply on that State’s perception.

D. The standard of review

62. The Court now turns to the standard that it will apply in reviewing the grant of a special permit authorizing the killing, taking and treating of whales on the basis of Article VIII, paragraph 1, of the Convention.

63. Australia maintains that the task before the Court in the present case is to determine whether Japan’s actions are consistent with the ICRW and the decisions taken under it. According to Australia, the Court’s power of review should not be limited to scrutiny for good faith, with a strong presumption in favour of the authorizing State, as this would render the multilateral régime for the collective management of a common resource established by the ICRW ineffective. Australia urges the Court to have regard to objective elements in evaluating whether a special permit has been granted for purposes of scientific research, referring in particular to the “design and implementation of the whaling programme, as well as any results obtained”.

64. New Zealand maintains that the interpretation and application of Article VIII entail the “simple question of compliance” by Contracting Governments with their treaty obligations, a question which is to be decided by the Court. New Zealand also emphasizes objective elements, stating that the question whether a programme is for purposes of scientific research can be evaluated with reference to its “methodology, design and characteristics”.

65. Japan accepts that the Court may review the determination by a State party to the ICRW that the whaling for which a special permit has been granted is “for purposes of scientific research”. In the course of the written and oral proceedings, Japan emphasized that the Court is

limited, when exercising its power of review, to ascertaining whether the determination was “arbitrary or capricious”, “manifestly unreasonable” or made in bad faith. Japan also stressed that matters of scientific policy cannot be properly appraised by the Court. It added that the role of the Court therefore is “to secure the integrity of the process by which the decision is made, [but] not to review the decision itself”.

66. Near the close of the oral proceedings, however, Japan refined its position regarding the standard of review to be applied in this case as follows:

“Japan agrees with Australia and New Zealand in regarding the test as being whether a State’s decision is objectively reasonable, or ‘supported by coherent reasoning and respectable scientific evidence and . . . , in this sense, objectively justifiable”.

67. When reviewing the grant of a special permit authorizing the killing, taking and treating of whales, the Court will assess, first, whether the programme under which these activities occur involves scientific research. Secondly, the Court will consider if the killing, taking and treating of whales is “for purposes of” scientific research by examining whether, in the use of lethal methods, the programme’s design and implementation are reasonable in relation to achieving its stated objectives. This standard of review is an objective one. Relevant elements of a programme’s design and implementation are set forth below (see paragraph 88).

68. In this regard, the Court notes that the dispute before it arises from a decision by a State party to the ICRW to grant special permits under Article VIII of that treaty. Inherent in such a decision is the determination by the State party that the programme’s use of lethal methods is for purposes of scientific research. It follows that the Court will look to the authorizing State, which has granted special permits, to explain the objective basis for its determination.

69. The Court observes that, in applying the above standard of review, it is not called upon to resolve matters of scientific or whaling policy. The Court is aware that members of the international community hold divergent views about the appropriate policy towards whales and whaling, but it is not for the Court to settle these differences. The Court’s task is only to ascertain whether the special permits granted in relation to JARPA II fall within the scope of Article VIII, paragraph 1, of the ICRW.

E. Meaning of the phrase “for purposes of scientific research”

70. The Parties address two closely related aspects of the interpretation of Article VIII — the meaning of the terms “scientific research” and “for purposes of” in the phrase “for purposes of scientific research”. Australia analysed the meaning of these terms separately and observed that these two elements are cumulative. Japan did not contest this approach to the analysis of the provision.

71. In the view of the Court, the two elements of the phrase “for purposes of scientific research” are cumulative. As a result, even if a whaling programme involves scientific research, the killing, taking and treating of whales pursuant to such a programme does not fall within Article VIII unless these activities are “for purposes of” scientific research.

72. The Court first considers the arguments of the Parties and the intervening State regarding the meaning of the term “scientific research” and then turns to their arguments regarding the meaning of the term “for purposes of” in the phrase “for purposes of scientific research”.

(a) *The term “scientific research”*

73. At the outset, the Court notes that the term “scientific research” is not defined in the Convention.

74. Australia, relying primarily on the views of one of the scientific experts that it called, Mr. Mangel, maintains that scientific research (in the context of the Convention) has four essential characteristics: defined and achievable objectives (questions or hypotheses) that aim to contribute to knowledge important to the conservation and management of stocks; “appropriate methods”, including the use of lethal methods only where the objectives of the research cannot be achieved by any other means; peer review; and the avoidance of adverse effects on stock. In support of these criteria, Australia also draws on resolutions of the Commission and the Guidelines related to the review of special permits by the Scientific Committee (see paragraph 47 above).

75. Japan does not offer an alternative interpretation of the term “scientific research”, and stresses that the views of an expert cannot determine the interpretation of a treaty provision. As a matter of scientific opinion, the expert called by Japan, Mr. Walløe, agreed in certain respects with the criteria advanced by Mr. Mangel, while differing on certain important details. Japan disputes the weight that Australia assigns to resolutions of the Commission that were adopted without Japan’s support, and notes that resolutions are recommendatory in nature.

76. The Court makes the following observations on the criteria advanced by Australia with regard to the meaning of the term “scientific research”.

77. As to the question whether a testable or defined hypothesis is essential, the Court observes that the experts called by both Parties agreed that scientific research should proceed on the basis of particular questions, which could take the form of a hypothesis, although they disagreed about the level of specificity required of such a hypothesis. In short, the opinions of the experts reveal some degree of agreement, albeit with important nuances, regarding the role of hypotheses in scientific research generally.

78. As to the use of lethal methods, Australia asserts that Article VIII, paragraph 1, authorizes the granting of special permits to kill, take and treat whales only when non-lethal methods are not available, invoking the views of the experts it called, as well as certain IWC resolutions and Guidelines. For example, Australia refers to Resolution 1986-2 (which recommends that when considering a proposed special permit, a State party should take into account whether “the objectives of the research are not practically and scientifically feasible through non-lethal research techniques”) and to Annex P (which provides that special permit proposals should assess why non-lethal methods or analyses of existing data “have been considered to be insufficient”). Both of these instruments were approved by consensus. Australia also points to Resolution 1995-9, which was not adopted by consensus, and which recommends that the killing of whales “should only be permitted in exceptional circumstances where the questions address critically important issues which cannot be answered by the analysis of existing data and/or use of non-lethal research techniques”.

79. Australia claims that IWC resolutions must inform the Court’s interpretation of Article VIII because they comprise “subsequent agreement between the parties regarding the interpretation of the treaty” and “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”, within the meaning of subparagraphs (a) and (b), respectively, of paragraph 3 of Article 31 of the Vienna Convention on the Law of Treaties.

80. Japan disagrees with the assertion that special permits authorizing lethal methods may be issued under Article VIII only if non-lethal methods are not available, calling attention to the fact that Article VIII authorizes the granting of permits for the killing of whales and thus expressly contemplates lethal methods. Japan states that it does not use lethal methods “more than it considers necessary” in conducting scientific research, but notes that this restraint results not from a legal limitation found in the ICRW, but rather from “reasons of scientific policy”. Japan notes that the resolutions cited by Australia were adopted pursuant to the Commission’s power to make recommendations. Japan accepts that it has a duty to give due consideration to these recommendations, but emphasizes that they are not binding.

81. New Zealand asserts that special permits must be granted in a “reasonable and precautionary way”, which requires that “whales may be killed only where that is necessary for scientific research and it is not possible to achieve the equivalent objectives of that research by non-lethal means”. Like Australia, New Zealand refers to IWC resolutions and Guidelines to support this assertion.

82. The Court observes that, as a matter of scientific opinion, the experts called by the Parties agreed that lethal methods can have a place in scientific research, while not necessarily agreeing on the conditions for their use. Their conclusions as scientists, however, must be distinguished from the interpretation of the Convention, which is the task of this Court.

83. Article VIII expressly contemplates the use of lethal methods, and the Court is of the view that Australia and New Zealand overstate the legal significance of the recommendatory resolutions and Guidelines on which they rely. First, many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of subparagraphs (a) and (b), respectively, of paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties.

Secondly, as a matter of substance, the relevant resolutions and Guidelines that have been approved by consensus call upon States parties to take into account whether research objectives can practically and scientifically be achieved by using non-lethal research methods, but they do not establish a requirement that lethal methods be used only when other methods are not available.

The Court however observes that the States parties to the ICRW have a duty to co-operate with the IWC and the Scientific Committee and thus should give due regard to recommendations calling for an assessment of the feasibility of non-lethal alternatives. The Court will return to this point when it considers the Parties' arguments regarding JARPA II (see paragraph 137).

84. As to the criterion of peer review advanced by Australia, even if peer review of proposals and results is common practice in the scientific community, it does not follow that a programme can be said to involve scientific research only if the proposals and the results are subjected to peer review. The Convention takes a different approach (while certainly not precluding peer review). Paragraph 30 of the Schedule requires prior review of proposed permits by the Scientific Committee and the current Guidelines (Annex P) also contemplate Scientific Committee review of ongoing and completed programmes.

85. Regarding the fourth criterion advanced by Australia, Japan and New Zealand agree with Australia that scientific research must avoid an adverse effect on whale stocks.

Thus, the Parties and the intervening State appear to be in agreement in respect of this criterion. In the particular context of JARPA II, however, Australia does not maintain that meeting the target sample sizes would have an adverse effect on the relevant stocks, so this criterion does not appear to be of particular significance in this case.

86. Taking into account these observations, the Court is not persuaded that activities must satisfy the four criteria advanced by Australia in order to constitute "scientific research" in the context of Article VIII. As formulated by Australia, these criteria appear largely to reflect what

one of the experts that it called regards as well-conceived scientific research, rather than serving as an interpretation of the term as used in the Convention. Nor does the Court consider it necessary to devise alternative criteria or to offer a general definition of “scientific research”.

(b) *The meaning of the term “for purposes of” in Article VIII, paragraph 1*

87. The Court turns next to the second element of the phrase “for purposes of scientific research”, namely the meaning of the term “for purposes of”.

88. The stated research objectives of a programme are the foundation of a programme’s design, but the Court need not pass judgment on the scientific merit or importance of those objectives in order to assess the purpose of the killing of whales under such a programme. Nor is it for the Court to decide whether the design and implementation of a programme are the best possible means of achieving its stated objectives.

In order to ascertain whether a programme’s use of lethal methods is for purposes of scientific research, the Court will consider whether the elements of a programme’s design and implementation are reasonable in relation to its stated scientific objectives (see paragraph 67 above). As shown by the arguments of the Parties, such elements may include: decisions regarding the use of lethal methods; the scale of the programme’s use of lethal sampling; the methodology used to select sample sizes; a comparison of the target sample sizes and the actual take; the time frame associated with a programme; the programme’s scientific output; and the degree to which a programme co-ordinates its activities with related research projects (see paragraphs 129-132; 149; 158-159; 203-205; 214-222 below).

89. The Parties agree that the design and implementation of a programme for purposes of scientific research differ in key respects from commercial whaling. The evidence regarding the programme’s design and implementation must be considered in light of this distinction. For example, according to Japan, in commercial whaling, only species of high commercial value are taken and larger animals make up the majority of the catch, whereas in scientific whaling “species of less or no commercial value” may be targeted and individual animals are taken based on random sampling procedures.

90. Australia raises two features of a programme that, in its view, bear on the distinction between the grant of a special permit that authorizes whaling “for purposes of” scientific research and whaling activities that do not fit within Article VIII and thus, in Australia’s view, violate paragraphs 7 (b), 10 (d) and 10 (e) of the Schedule.

91. First, Australia acknowledges that Article VIII, paragraph 2, of the Convention allows the sale of whale meat that is the by-product of whaling for purposes of scientific research. That provision states:

“Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.”

However, Australia considers that the quantity of whale meat generated in the course of a programme for which a permit has been granted under Article VIII, paragraph 1, and the sale of that meat, can cast doubt on whether the killing, taking and treating of whales is for purposes of scientific research.

92. Japan states in response that the sale of meat as a means to fund research is allowed by Article VIII, paragraph 2, and is commonplace in respect of fisheries research.

93. On this point, New Zealand asserts that Article VIII, paragraph 2, can be read to permit the sale of whale meat, but that such sale is not required.

94. As the Parties and the intervening State accept, Article VIII, paragraph 2, permits the processing and sale of whale meat incidental to the killing of whales pursuant to the grant of a special permit under Article VIII, paragraph 1.

In the Court’s view, the fact that a programme involves the sale of whale meat and the use of proceeds to fund research is not sufficient, taken alone, to cause a special permit to fall outside Article VIII. Other elements would have to be examined, such as the scale of a programme’s use of lethal sampling, which might suggest that the whaling is for purposes other than scientific research. In particular, a State party may not, in order to fund the research for which a special permit has been granted, use lethal sampling on a greater scale than is otherwise reasonable in relation to achieving the programme’s stated objectives.

95. Secondly, Australia asserts that a State’s pursuit of goals that extend beyond scientific objectives would demonstrate that a special permit granted in respect of such a programme does not fall within Article VIII. In Australia’s view, for example, the pursuit of policy goals such as providing employment or maintaining a whaling infrastructure would indicate that the killing of whales is not for purposes of scientific research.

96. Japan accepts that “special permits may be granted only for whaling that has scientific purposes, and not for commercial purposes”. Japan points to the fact that the Schedule provision establishing the moratorium on commercial whaling, paragraph 10 (*e*), calls for the “best scientific advice” in order for the moratorium to be reviewed and potentially lifted. Japan further asserts that a State party is within its rights to conduct a programme of scientific research that aims to advance its objective of resuming commercial whaling on a sustainable basis.

97. The Court observes that a State often seeks to accomplish more than one goal when it pursues a particular policy. Moreover, an objective test of whether a programme is for purposes of scientific research does not turn on the intentions of individual government officials, but rather on whether the design and implementation of a programme are reasonable in relation to achieving the stated research objectives. Accordingly, the Court considers that whether particular government officials may have motivations that go beyond scientific research does not preclude a conclusion that a programme is for purposes of scientific research within the meaning of Article VIII. At the same time, such motivations cannot justify the granting of a special permit for a programme that uses lethal sampling on a larger scale than is reasonable in relation to achieving the programme’s stated research objectives. The research objectives alone must be sufficient to justify the programme as designed and implemented.

3. JARPA II in light of Article VIII of the Convention

98. The Court will now apply the approach set forth in the preceding section to enquire into whether, based on the evidence, the design and implementation of JARPA II are reasonable in relation to achieving its stated objectives.

99. JARPA II was preceded by the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA). The legality of JARPA is not at issue in this case. In the course of presenting their views about JARPA II, however, the Parties draw a variety of comparisons between JARPA II and the predecessor programme. Therefore, the Court begins with a description of JARPA.

A. Description of the programmes

(a) *JARPA*

100. In 1982, the IWC amended the Schedule to adopt a moratorium on commercial whaling. Japan made a timely objection to the amendment, which it withdrew in 1986. Australia asserts that Japan withdrew that objection under pressure from other countries, and, in particular, in light of the prospect of trade sanctions being imposed against Japan by the United States. Following withdrawal of the objection, the moratorium entered into force for Japan after the 1986-1987 whaling season. Japan commenced JARPA in the next season. Like JARPA II, JARPA was a programme for which Japan issued special permits pursuant to Article VIII, paragraph 1, of the Convention.

101. Australia takes the position that JARPA was conceived in order to continue commercial whaling under the “guise” of scientific research. It points to various statements that Japanese authorities made after the adoption of the commercial whaling moratorium. For example, in 1983 a Japanese official stated that the Government’s goal in the face of the adoption of the commercial whaling moratorium was “to ensure that our whaling can continue in some form or another”. In 1984, a study group commissioned by the Government of Japan recommended that Japan pursue scientific whaling “in order to continue whaling in the Southern Ocean”.

102. Japan rejects Australia’s characterization of the factors that led to the establishment of JARPA and asserts that Australia has taken the statements by Japanese authorities out of context. It explains that JARPA was started following Japan’s acceptance of the commercial whaling moratorium because “the justification for the moratorium was that data on whale stocks was inadequate to manage commercial whaling properly” and it was therefore “best to start the research program as soon as possible”.

103. JARPA commenced during the 1987-1988 season and ran until the 2004-2005 season, after which it was followed immediately by JARPA II in the 2005-2006 season. Japan explains that JARPA was launched “for the purpose of collecting scientific data to contribute to the ‘review’ and ‘comprehensive assessment’” of the moratorium on commercial whaling, as envisaged by paragraph 10 (e) of the Schedule. It was designed to be an 18-year research programme, “after which the necessity for further research would be reviewed”.

104. The 1987 JARPA Research Plan described JARPA as, *inter alia*, “a program for research on the southern hemisphere minke whale and for preliminary research on the marine ecosystem in the Antarctic”. It was “designed to estimate the stock size” of southern hemisphere minke whales in order to provide a “scientific basis for resolving problems facing the IWC” relating to “the divergent views on the moratorium”. To those ends, it proposed annual lethal sample sizes of 825 Antarctic minke whales and 50 sperm whales from two “management areas” in the Southern Ocean. Later, the proposal to sample sperm whales by lethal methods was dropped from the programme and the sample size for Antarctic minke whales was reduced to 300 for JARPA’s first seven seasons (1987-1988 to 1993-1994). Japan explains that the decision to reduce the sample size from 825 to 300 resulted in the extension of the research period, which made it possible to obtain accurate results with smaller sample sizes. Beginning in the 1995-1996 season, the maximum annual sample size for Antarctic minke whales was increased to 400, plus or minus 10 per cent. More than 6,700 Antarctic minke whales were killed over the course of JARPA’s 18-year history.

105. In January 2005, during JARPA’s final season, Japan independently convened a meeting, outside the auspices of the IWC, to review the then-available data and results from the programme. In December 2006, the Scientific Committee held a “final review” workshop to

review the entirety of JARPA's data and results and to assess the extent to which JARPA had accomplished or made progress towards its stated objectives; several recommendations were made for the further study and analysis of the data collected under JARPA. Japan submitted its Research Plan for JARPA II to the IWC in March 2005, and launched JARPA II, in November 2005, after the January 2005 meeting convened by Japan but prior to the December 2006 final review of JARPA by the Scientific Committee.

106. Australia describes the "primary purpose" of JARPA as the estimation of the natural mortality rate of Antarctic minke whales (i.e., the chance that a whale will die from natural causes in any particular year). Australia also maintains that Japan purported to be collecting biological data that it viewed as relevant to the New Management Procedure (the "NMP") — the model in use by the Commission to regulate whaling activity at the time of JARPA's launch — but abandoned its initial approach after five years. According to Australia, the goal to estimate natural mortality was "practically unachievable" and the "irrelevance" of JARPA was confirmed in 1994 when the Commission agreed to replace the NMP with another management tool, the Revised Management Procedure (the "RMP"), which did not require the type of information that JARPA obtained by lethal sampling.

107. The RMP requires a brief explanation. The Parties agree that the RMP is a conservative and precautionary management tool and that it remains the applicable management procedure of the IWC, although its implementation has not been completed. Australia maintains that the RMP "overcomes the difficulties faced by the NMP" — the mechanism that the Commission previously developed to set catch limits — because it takes uncertainty in abundance estimates into account and "does not rely on biological parameters that are difficult to estimate". Japan disputes this characterization of the RMP and argues that its implementation requires "a huge amount of scientific data" at each step. Thus, the Parties disagree on whether data collected by JARPA and JARPA II contribute to the RMP.

108. With regard to JARPA, Australia asserts that the Scientific Committee was unable to conclude at the final review workshop held in 2006 that any of JARPA's stated objectives had been met, including an adequately precise estimate of natural mortality rate. Japan maintains that recommendations made in the course of JARPA's final review led to further analysis of the JARPA data and that in 2010 the Scientific Committee accepted an estimate of natural mortality rate based on those data. Overall, the Parties disagree whether JARPA made a scientific contribution to the conservation and management of whales. The Court is not called upon to address that disagreement.

(b) JARPA II

109. In March 2005, Japan submitted to the Scientific Committee a document entitled “Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) — Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources” (hereinafter the “JARPA II Research Plan”). Following review of the JARPA II Research Plan by the Scientific Committee, Japan granted the first set of annual special permits for JARPA II in November 2005, after which JARPA II became operational. As was the case under JARPA, the special permits for JARPA II are issued by Japan to the Institute of Cetacean Research, a foundation established in 1987 as a “public-benefit corporation” under Japan’s Civil Code. The evidence indicates that the Institute of Cetacean Research has historically been subsidized by Japan and that Japan exercises a supervisory role over the institute’s activities. Japan has granted special permits to that institute for JARPA II for each season since 2005-2006.

110. The JARPA II Research Plan describes key elements of the programme’s design: the research objectives, research period and area, research methods, sample sizes, and the expected effect on whale stocks. As further discussed below, the programme contemplates the lethal sampling of three whale species: Antarctic minke whales, fin whales and humpback whales (see paragraph 123). This Judgment uses the terms “Antarctic minke whales” and “minke whales” interchangeably.

111. Minke whales, fin whales and humpback whales are all baleen whales, meaning they have no teeth; baleen whales instead use baleen plates in the mouth to filter their food from sea water. Antarctic minke whales are among the smallest baleen whales: an average adult is between 10 and 11 metres long and weighs between 8 and 10 tons. The fin whale is the second largest whale species (after the blue whale): an average adult is between 25 and 26 metres long and its body mass is between 60 and 80 tons. Humpback whales are larger than minke whales but smaller than fin whales: adults are between 14 and 17 metres long.

112. The Court will now outline the key elements of JARPA II, as set forth in the Research Plan and further explained by Japan in these proceedings.

(i) Research objectives

113. The JARPA II Research Plan identifies four research objectives: (1) Monitoring of the Antarctic ecosystem; (2) Modelling competition among whale species and future management objectives; (3) Elucidation of temporal and spatial changes in stock structure; and (4) Improving the management procedure for Antarctic minke whale stocks.

114. *Objective No. 1.* The JARPA II Research Plan states that JARPA II will monitor changes relating to whale abundance and biological parameters, prey density and abundance, and the effects of contaminants on cetaceans, and the cetaceans' habitat, in three whale species — Antarctic minke whales, humpback whales and fin whales — and that “[t]he obtained data will be indicators of changes in the Antarctic ecosystem”. The Research Plan stresses the importance of detecting changes in the whale populations and their habitat “as soon as possible” in order “to predict their effects on the stocks, and to provide information necessary for the development of appropriate management policies”. Specifically, JARPA II will monitor “changes in recruitment, pregnancy rate, age at maturity and other biological parameters by sampling survey”, while “abundance” will be monitored through “sighting surveys”. JARPA II will also monitor prey consumption and changes in blubber thickness over time, as well as contaminant accumulation and the effects of toxins on cetaceans.

115. *Objective No. 2.* The second objective refers to “modelling competition among whale species and future management objectives”. The JARPA II Research Plan states that “[t]here is a strong indication of competition among whale species in the research area” and that JARPA II therefore seeks to explore “hypotheses related to this competition”. The Research Plan refers to the “krill surplus hypothesis”. As presented to the Court, this hypothesis refers to two interrelated ideas: first, that the previous overhunting of certain whale species (including fin and humpback whales) created a surplus of krill (a shared food source) for other predators, including the smaller minke whale, which led to an increase in the abundance of that species; and, secondly, that a subsequent recovery in the humpback and fin whale populations (since the commercial catch of those species was banned in 1963 and 1976, respectively) has resulted in increased competition among these larger whales and minke whales for krill. The JARPA II Research Plan suggests that Antarctic minke whale stocks may decrease as a result of current conditions.

116. Japan explains that “JARPA II . . . does not purport to verify the validity of the krill surplus hypothesis” but instead seeks “to incorporate data on other animals/fish that prey on krill in order to develop a ‘model of competition among whale species’” that may help to explain changes in the abundance levels of different whale species. In Japan’s view, the “krill surplus hypothesis” is just one of several ideas (in addition to, for example, the effects of climate change) that JARPA II is designed to explore in connection with its construction of “an ecosystem model” for the Antarctic. The JARPA II Research Plan further explains that such a model may contribute to establishing “new management objectives” for the IWC, such as finding ways to accelerate the recovery of blue and fin whales, and will examine “the possible effects of the resumption of commercial whaling on the relative numbers of the various species and stocks”. Mr. Mangel, the expert called by Australia, referred to the “krill surplus hypothesis” as the “only clearly identifiable hypothesis” in JARPA II.

117. *Objective No. 3.* The third objective concerns stock structure. With regard to fin whales, the programme's objective is to compare current stock structure to historic information on that species. With regard to humpback whales and Antarctic minke whales, the plan describes a need "to investigate shifts in stock boundaries" on a yearly basis.

118. *Objective No. 4.* The fourth objective concerns the management procedure for Antarctic minke whale stocks and builds upon the other three objectives. The JARPA II Research Plan states that the first objective will provide information on biological parameters "necessary for managing the stocks more efficiently under a revised RMP", the second objective "will lead to examining a multi-species management model for the future", and the third "will supply information for establishing management areas in the Antarctic Ocean". According to the Research Plan, the information relating to the "effects arising from inter-species relationships among the whale species" could demonstrate that the determination of a catch quota for Antarctic minke whales under the RMP would be too low, perhaps even set unnecessarily at zero. As noted above (see paragraph 107), the Parties disagree about the type of information necessary to implement the RMP.

(ii) Research period and area

119. Japan explains that JARPA II is "a long-term research programme and has no specified termination date because its primary objective (i.e., monitoring the Antarctic ecosystem) requires a continuing programme of research". JARPA II is structured in six-year phases. After each six-year phase, a review will be held to consider revisions to the programme. The first such six-year phase was completed after the 2010-2011 season. Following some delay, the first periodic review of JARPA II by the Scientific Committee is scheduled to take place in 2014.

120. The JARPA II Research Plan operates in an area that is located within the Southern Ocean Sanctuary established in paragraph 7 (b) of the Schedule to the Convention.

(iii) Research methods and sample size

121. The Research Plan indicates that JARPA II is designed to use a mix of lethal and non-lethal methods to pursue the research objectives, a point that Japan also made in these proceedings.

122. Japan asserts that lethal sampling is "indispensable" to JARPA II's first two objectives, relating to ecosystem monitoring and multi-species competition modelling. The JARPA II Research Plan explains that the third objective will rely on "genetic and biological markers" taken from whales that have been lethally sampled in connection with the first two objectives, as well as non-lethal methods, namely biopsy sampling from blue, fin and humpback whales.

123. The Research Plan provides that in each season the sample sizes for fin and humpback whales will be 50 and the sample size for Antarctic minke whales will be 850, plus or minus 10 per cent (i.e., a maximum of 935 per season). These target sample sizes are discussed in greater detail below (see paragraphs 157-198).

124. With regard to non-lethal methods, the JARPA II Research Plan describes the intended use of biopsy sampling and satellite tagging in addition to whale sighting surveys. According to Japan, it makes extensive use of non-lethal methods to obtain data and information to the extent practicable.

125. As to JARPA II's operation, Japan explains that JARPA II vessels follow "scientifically determined tracklines", including in areas "where the density of the target species is low", to obtain a proper distribution of samples and observations. Whales from the targeted species are taken if they are encountered within 3 nautical miles of the predetermined trackline being followed by a JARPA II vessel. If a lone whale is encountered, it will be taken; if a school of whales is encountered, two whales will be taken at random.

(iv) Effect on whale stocks

126. The JARPA II Research Plan sets out the bases for Japan's conclusion that the lethal sample sizes described above are designed to avoid having any adverse effect on the targeted whale stocks. The Research Plan states that, based on current abundance estimates, the planned take of each species is too small to have any negative effect. Japan also explains that the JARPA II Research Plan used conservative estimates of Antarctic minke whale abundance to assess the effects of the target sample size for that species.

B. Whether the design and implementation of JARPA II are reasonable in relation to achieving the programme's stated research objectives

127. The Court observes that the JARPA II Research Plan describes areas of inquiry that correspond to four research objectives and presents a programme of activities that involves the systematic collection and analysis of data by scientific personnel. The research objectives come within the research categories identified by the Scientific Committee in Annexes Y and P (see paragraph 58 above). Based on the information before it, the Court thus finds that the JARPA II activities involving the lethal sampling of whales can broadly be characterized as "scientific research". There is no need therefore, in the context of this case, to examine generally the concept of "scientific research". Accordingly, the Court's examination of the evidence with respect to JARPA II will focus on whether the killing, taking and treating of whales in pursuance of

JARPA II is *for purposes of* scientific research and thus may be authorized by special permits granted under Article VIII, paragraph 1, of the Convention. To this end and in light of the applicable standard of review (see paragraph 67 above), the Court will examine whether the design and implementation of JARPA II are reasonable in relation to achieving the programme's stated research objectives, taking into account the elements identified above (see paragraph 88).

(a) Japan's decisions regarding the use of lethal methods

128. Lethal methods are central to the design of JARPA II. However, it should be noted that the Parties disagree as to the reasons for that.

129. Japan states that it does not use lethal methods more than it considers necessary to meet research objectives and that lethal methods are "indispensable" in JARPA II because the programme's first two objectives require data that can only realistically be obtained from internal organs and stomach contents. Japan accepts that non-lethal biopsies and satellite tagging have been used for certain larger species of whales but states that these methods are not practical for minke whales. Japan also points out that, while certain relevant data may be obtainable by non-lethal means, such data would be of lesser quality or reliability, and, in some cases, would involve "unrealistic" amounts of time and expense.

130. By contrast, Australia maintains that Japan has an "unbending commitment to lethal take" and that "JARPA II is premised on the killing of whales". According to Australia, JARPA II, like JARPA before it, is "merely a guise" under which to continue commercial whaling. One of the experts called by Australia, Mr. Mangel, stated that JARPA II "simply assert[s] but [does] not demonstrate that lethal take is required". Australia further contends that a variety of non-lethal research methods, including satellite tagging, biopsy sampling and sighting surveys, are more effective ways to gather information for whale research and that the available technology has improved dramatically over the past quarter century since JARPA was first launched.

131. As previously noted, Australia does not challenge the use of lethal research methods per se. Australia accepts that there may be situations in which research objectives can, in fact, require lethal methods, a view also taken by the two experts that it called. However, it maintains that lethal methods must be used in a research programme under Article VIII only when "no other means are available" and the use of lethal methods is thus "essential" to the stated objectives of a programme.

132. In support of their respective contentions about the use of lethal methods in JARPA II, the Parties address three points: first, whether non-lethal methods are feasible as a means to obtain

data relevant to the JARPA II research objectives; secondly, whether the data that JARPA II collects through lethal methods are reliable or valuable; and thirdly, whether before launching JARPA II Japan considered the possibility of making more extensive use of non-lethal methods. The Court considers these points in turn.

133. The Court notes that the Parties agree that non-lethal methods are not a feasible means to examine internal organs and stomach contents. The Court therefore considers that the evidence shows that, at least for some of the data sought by JARPA II researchers, non-lethal methods are not feasible.

134. Turning to the reliability and value of data collected in JARPA II, the Court heard conflicting evidence. For example, the experts called by Australia questioned the reliability of age data obtained from ear plugs and the scientific value of the examination of stomach contents, given pre-existing knowledge of the diet of the target species. The expert called by Japan disputed Australia's contentions regarding the reliability and value of data collected in JARPA II. This disagreement appears to be about a matter of scientific opinion.

135. Taking into account the evidence indicating that non-lethal alternatives are not feasible, at least for the collection of certain data, and given that the value and reliability of such data are a matter of scientific opinion, the Court finds no basis to conclude that the use of lethal methods is per se unreasonable in the context of JARPA II. Instead, it is necessary to look more closely at the details of Japan's decisions regarding the use of lethal methods in JARPA II, discussed immediately below, and the scale of their use in the programme, to which the Court will turn at paragraph 145 below.

136. The Court next examines a third aspect of the use of lethal methods in JARPA II, which is the extent to which Japan has considered whether the stated objectives of JARPA II could be achieved by making greater use of non-lethal methods, rather than by lethal sampling. The Court recalls that the JARPA II Research Plan sets lethal sample sizes at 850 minke whales (plus or minus 10 per cent), 50 fin whales and 50 humpback whales (see paragraph 123 above), as compared to a lethal sample size in JARPA of 400 minke whales (plus or minus 10 per cent) and no whales of the other two species (see paragraph 104 above).

137. As previously indicated, the fact that a programme uses lethal methods despite the availability of non-lethal alternatives does not mean that a special permit granted for such a programme necessarily falls outside Article VIII, paragraph 1 (see paragraph 83). There are, however, three reasons why the JARPA II Research Plan should have included some analysis of the feasibility of non-lethal methods as a means of reducing the planned scale of lethal sampling in the new programme. First, IWC resolutions and Guidelines call upon States parties to take into

account whether research objectives can be achieved using non-lethal methods. Japan has accepted that it is under an obligation to give due regard to such recommendations. Secondly, as noted above (see paragraphs 80 and 129), Japan states that, for reasons of scientific policy, “[i]t does not . . . use lethal means more than it considers necessary” and that non-lethal alternatives are not practical or feasible in all cases. This implies the undertaking of some type of analysis in order to ascertain that lethal sampling is not being used to a greater extent than is necessary in relation to achieving a programme’s stated research objectives. Thirdly, the two experts called by Australia referred to significant advances in a wide range of non-lethal research techniques over the past 20 years and described some of those developments and their potential application with regard to JARPA II’s stated objectives. It stands to reason that a research proposal that contemplates extensive lethal sampling would need to analyse the potential applicability of these advances in relation to a programme’s design.

138. The Court did not hear directly from Japanese scientists involved in designing JARPA II. During the oral proceedings, however, a Member of the Court asked Japan what analysis it had conducted of the feasibility of non-lethal methods prior to setting the sample sizes for each year of JARPA II, and what bearing, if any, such analysis had had on the target sample sizes. In response, Japan referred to two documents: (1) Annex H to the 1997 interim review of JARPA by the Scientific Committee and (2) an unpublished paper that Japan submitted to the Scientific Committee in 2007.

139. The first of these documents is not an analysis of JARPA II and is not a study by Japan. It is a one-page summary by the Scientific Committee of opposing views within the Committee on the need to use lethal methods to collect information relating to stock structure. Japan stated that this document “formed the basis of section IX of the 2005 JARPA II Research Plan”. Section IX, entitled “Necessity of Lethal Methods”, comprises two short paragraphs that contain no reference to feasibility studies by Japan or to any consideration by Japan of developments in non-lethal research methods since the 1997 JARPA review. Japan identified no other analysis that was included in, or was contemporaneous with, the JARPA II Research Plan.

140. The 2007 document to which Japan refers the Court discusses the necessity of lethal methods in JARPA, not JARPA II. It states in summary format the authors’ conclusions as to why certain biological parameters (listed in relation to particular JARPA objectives) required (or did not require) lethal sampling, without any analysis and without reference to the JARPA II objectives.

141. Thus, there is no evidence of studies of the feasibility or practicability of non-lethal methods, either in setting the JARPA II sample sizes or in later years in which the programme has

maintained the same sample size targets. There is no evidence that Japan has examined whether it would be feasible to combine a smaller lethal take (in particular, of minke whales) and an increase in non-lethal sampling as a means to achieve JARPA II's research objectives. The absence of any evidence pointing to consideration of the feasibility of non-lethal methods was not explained.

142. Decisions about the use of lethal methods in JARPA II must also be evaluated in light of the Court's previous conclusion that a programme for purposes of scientific research may not use lethal methods on a larger scale than is reasonable in relation to achieving its stated objectives in order to fund that research (see paragraph 94 above).

143. The 2007 paper that Japan called to the Court's attention (see paragraphs 138 and 140 above) states that JARPA's research objectives, which required the examination of internal organs and a large number of samples, meant that non-lethal methods were "impractical, cost ineffective and prohibitively expensive". It also states that "whale research is costly and therefore lethal methods which could recover the cost for research [are] more desirable". No analysis is included in support of these conclusions. There is no explanation of the relative costs of any methods or a comparison of how the expense of lethal sampling, as conducted under JARPA (or under JARPA II, which by 2007 was already operational), might be measured against the cost of a research programme that more extensively uses non-lethal alternatives.

144. The Court concludes that the papers to which Japan directed it reveal little analysis of the feasibility of using non-lethal methods to achieve the JARPA II research objectives. Nor do they point to consideration of the possibility of making more extensive use of non-lethal methods in order to reduce or eliminate the need for lethal sampling, either when JARPA II was proposed or in subsequent years. Given the expanded use of lethal methods in JARPA II, as compared to JARPA, this is difficult to reconcile with Japan's obligation to give due regard to IWC resolutions and Guidelines and its statement that JARPA II uses lethal methods only to the extent necessary to meet its scientific objectives. In addition, the 2007 paper to which Japan refers the Court suggests a preference for lethal sampling because it provides a source of funding to offset the cost of the research.

(b) *The scale of the use of lethal methods in JARPA II*

145. The scale of lethal methods used in JARPA II is determined by sample sizes, that is, the number of whales of each species to be killed each year. The Parties introduced extensive evidence on this topic, relying in particular on the JARPA II Research Plan, the actions taken under it in its implementation, and the opinions of the experts that each Party called.

146. Taking into account the Parties' arguments and the evidence presented, the Court will begin by comparing the JARPA II sample sizes to the sample sizes set in JARPA. It will then describe how sample sizes were determined in the JARPA II Research Plan and present the Parties' views on the sample sizes set for each of the three species. Finally, the Court will compare the target sample sizes set in the JARPA II Research Plan with the actual take of each species during the programme. Each of these aspects of the sample sizes selected for JARPA II was the subject of extensive argument by Australia, to which Japan responded in turn.

(i) A comparison of JARPA II sample sizes to JARPA sample sizes

147. The question whether the lethal sampling of whales under JARPA was "for purposes of scientific research" under Article VIII, paragraph 1, of the Convention is not before the Court. The Court draws no legal conclusions about any aspect of JARPA, including the sample sizes used in that programme. However, the Court notes that Japan has drawn comparisons between JARPA and JARPA II in addressing the latter programme and, in particular, the sample sizes that were chosen for JARPA II.

148. As noted above (see paragraph 104), JARPA originally proposed an annual sample size of 825 minke whales per season. This was reduced to 300 at JARPA's launch, and after a number of years was increased to 400 (plus or minus 10 per cent). Thus, the JARPA II sample size for minke whales of 850 (plus or minus 10 per cent) is approximately double the minke whale sample size for the last years of JARPA. As also noted above (see paragraph 110), JARPA II also sets sample sizes for two additional species — fin and humpback whales — that were not the target of lethal sampling under JARPA.

149. To explain the larger minke whale sample size and the addition of sample sizes for fin and humpback whales in JARPA II generally, Japan stresses that the programme's research objectives are "different and more sophisticated" than those of JARPA. Japan also asserts that the emergence of "a growing concern about climate change, including global warming, necessitated research whaling of a different kind from JARPA". In particular, Japan argues that "JARPA was focused on a one-time estimation of different biological parameters for minke whales, but JARPA II is a much more ambitious programme which tries to model competition among whale species and to detect changes in various biological parameters and the ecosystem". It is on this basis, Japan asserts, that the "new objectives" of JARPA II — "notably ecosystem research" — dictate the larger sample size for minke whales and the addition of sample size targets for fin and humpback whales.

150. Given Japan's emphasis on the new JARPA II objectives — particularly ecosystem research and constructing a model of multi-species competition — to explain the larger JARPA II sample size for minke whales and the addition of two new species, the comparison between JARPA and JARPA II deserves close attention.

151. At the outset, the Court observes that a comparison of the two research plans reveals considerable overlap between the subjects, objectives, and methods of the two programmes, rather than dissimilarity. For example, the research proposals for both programmes describe research broadly aimed at elucidating the role of minke whales in the Antarctic ecosystem. One of the experts called by Australia, Mr. Mangel, stated that JARPA II “almost exclusively focuses data collection on minke whales”, which, the Court notes, was also true of JARPA. Specifically, both programmes are focused on the collection of data through lethal sampling to monitor various biological parameters in minke whales, including, in particular, data relevant to population trends as well as data relating to feeding and nutrition (involving the examination of stomach contents and blubber thickness). JARPA included both the study of stock structure to improve stock management and research on the effect of environmental change on whales (objectives that were not included in the original research proposal for JARPA, but were added later), and JARPA II also includes the study of these issues.

152. The Court notes that Japan states that “the research items and methods” of JARPA II are “basically the same as those employed for JARPA”, which is why “the explanation for the necessity of lethal sampling provided regarding JARPA also applies to JARPA II”. Australia makes the point that “in practice Japan collects the same data” under JARPA II “that it collected under JARPA”. Japan also asserts broadly that both programmes “are designed to further proper and effective management of whale stocks and their conservation and sustainable use”.

153. Taken together, the overall research objectives of JARPA and JARPA II, as well as the subjects of study and methods used (i.e., extensive lethal sampling of minke whales) thus appear to have much in common, even if certain aspects differ. These similarities cast doubt on Japan’s argument that the JARPA II objectives relating to ecosystem monitoring and multi-species competition are distinguishing features of the latter programme that call for a significant increase in the minke whale sample size and the lethal sampling of two additional species.

154. There is another reason to question whether the increased minke whale sample size in the JARPA II Research Plan is accounted for by differences between the two programmes. As previously noted, Japan launched JARPA II without waiting for the results of the Scientific Committee’s final review of JARPA. Japan’s explanation to the Court was that “it was important to keep the consistency and continuity in data obtained in the research area” and that waiting to commence JARPA II only following the final review of JARPA would have meant “no survey in one or two years”. The JARPA II Research Plan also frames the monitoring of whale abundance trends and biological parameters as designed “to secure continuity with the data collected in JARPA”.

155. This emphasis on the importance of continuity confirms the overlap in the focus of the two programmes and further undermines Japan’s reliance on JARPA II’s objectives to explain the

larger minke whale sample size in JARPA II. Japan does not explain, for example, why it would not have been sufficient to limit the lethal take of minke whales during the “feasibility” phase of JARPA II (its first two years) to 440 minke whales, the maximum number of minke whales that were targeted during the final season of JARPA. Instead, 853 minke whales were taken during the first year of JARPA II, in addition to ten fin whales. This also meant that JARPA II began using the higher sample size for minke whales, and similar research methods (e.g., the examination of ear plugs to obtain age data and the examination of blubber thickness to assess nutritional conditions) without having yet received the benefit of any feedback from the final review of JARPA by the Scientific Committee.

156. These weaknesses in Japan’s explanation for the decision to proceed with the JARPA II sample sizes prior to the final review of JARPA lend support to the view that those sample sizes and the launch date for JARPA II were not driven by strictly scientific considerations. These weaknesses also give weight to the contrary theory advanced by Australia — that Japan’s priority was to maintain whaling operations without any pause, just as it had done previously by commencing JARPA in the first year after the commercial whaling moratorium had come into effect for it.

(ii) Determination of species-specific sample sizes

157. Bearing in mind these observations regarding Japan’s general explanation for the difference between the JARPA and JARPA II sample sizes, the Court turns next to the evidence regarding the way that Japan determined the specific target sample sizes for each of the three species in JARPA II.

158. As a general matter, Australia asserts that Japan has failed to provide “a coherent scientific rationale” for the JARPA II sample sizes. One of the experts called by Australia, Mr. Mangel, took the view that “[i]t is very difficult to understand the statistical basis for setting the level of lethal take” in JARPA II. He focused in particular on the determination of the particular sample sizes that would be required to study different parameters, stating that “a range is given and then a particular number is picked without any explanation for that number”. In Australia’s view, the JARPA II Research Plan fails adequately to provide the rationales for the choices made therein and employs inconsistent methodologies. In essence, Australia’s contention is that Japan decided that it wished to take approximately 850 minke whales for purposes other than scientific research and then “retro-fitted” individual sample sizes to justify the overall sample size.

159. Japan asserts that, contrary to Australia’s characterization of the programme, the JARPA II sample sizes “were calculated on the basis of carefully selected parameters, using a standard scientific formula, whilst also taking into account the potential effects of research on whale populations”. Japan also argues that the sample sizes are based on “norms used by the Scientific Committee”, which has never expressed “any specific concern about the JARPA II sample size”.

The expert called by Japan, Mr. Walløe, also addressed the setting of sample sizes in JARPA II. He stated that “Japanese scientists have not always given completely transparent and clear explanations of how sample sizes were calculated or determined”. He indicated, however, that the minke whale sample size seemed to be “of the right magnitude” on the basis of his own calculations (which were not provided to the Court). In addition, Professor Walløe stated his impression that JARPA II sample sizes had been “influenced by funding considerations”, although he found this unobjectionable.

160. Based on Japan’s arguments and the evidence that it has presented, including, in particular, the JARPA II Research Plan, the Court discerns five steps to this process of sample size determination.

161. The first step is to identify the types of information that are relevant to the broader objectives of the research. Japan refers to these as “research items”. For example, the research items of interest in JARPA II include pregnancy rate, the age at which whales reach sexual maturity and feeding patterns.

162. The second step is to identify a means to obtain the data relevant to a given research item. For example, Japan maintains that it is necessary to collect ear plugs from whales in order to determine age, that stomach contents can be examined to evaluate eating habits, and that measuring blubber thickness is a means to study changes in prey conditions (e.g., the availability of krill as a food source).

163. After it has been determined that information relevant to a research item is to be obtained from lethal sampling, the third step is to determine how many whales are necessary in order to have a sufficiently large number of samples to detect changes relevant to the particular research item. For several research items, the determination of this number takes into account at least three variables: (i) the level of accuracy sought; (ii) the change to be measured; and (iii) the research period (i.e., the time within which a change is to be detected). This means that the number of whales needed for a particular research item depends, for example, on how accurate the results are required to be, on whether the change to be measured is large or small, and on the period over which one seeks to detect that change.

164. For a given research item, a standard equation is used to perform a calculation that shows the effect that differences in these variables would have on sample size. Australia did not challenge Japan’s use of that equation.

165. To illustrate this third step, the Court calls attention to one example from the JARPA II Research Plan that shows how the researchers approached the selection of a sample size for a particular research item: the change in the proportion of pregnant minke whales in the population

of mature female whales. The relevant table from the Research Plan, which appears as Table 2 to Appendix 6 (“Sample sizes of Antarctic minke, humpback and fin whales required for statistical examination of yearly trend in biological parameters”) to that document, is reproduced below. The far-left column shows that the JARPA II researchers considered using either a six-year or a 12-year research period and the second column shows that they considered using either of two estimates of the “initial rate” (i.e., whether the proportion of pregnant minke whales in the population of mature female whales at the start of the research was 80 or 90 per cent). The researchers then calculated how many whales would be required — depending on the research period and the estimated “initial rate” — to detect different rates of change in the proportion of pregnant minke whales (shown in percentages in the top row of the chart). The table is set forth below:

Table 2. Total sample size of Antarctic minke whales required for statistical examination of yearly trend [in the proportion of pregnant minke whales in the population of mature female whales]

Research period	Initial rate (%)	Rate of change									
		+1%	-1%	+1.5%	-1.5%	+2%	-2%	+2.5%	-2.5%	+3%	-3%
6 years	80%	2022	2544	984	1089	618	591	462	369	402	249
	90%	912	1617	609	663	-	348	-	210	-	138
12 years	80%	189	312	129	132	-	72	-	45	-	30
	90%	-	213	-	87	-	45	-	27	-	18

(Source: Counter-Memorial of Japan, Vol. IV, Ann. 150, App. 6.)

166. This table illustrates how the selection of a particular value for each variable affects the sample size. For example, the decision to use a particular research period has a pronounced effect on the sample size. In order to detect a rate of change of minus 1.5 per cent and assuming an initial rate of 90 per cent (which were the criteria ultimately chosen by JARPA II researchers), a six-year period requires an annual sample size of 663 whales while the 12-year period requires an annual sample size of 87 whales. The table also illustrates that small differences in the rate of change to detect can have a considerable effect on sample size. For example, in order to detect a change of minus 1 per cent over a six-year period (assuming an initial rate of 90 per cent), the required yearly sample size is 1,617 whales. To detect a change of minus 2 per cent under the same circumstances, the required yearly sample size is 348 whales.

167. The fourth step is the selection of a particular sample size for each research item from the range of sample sizes that have been calculated depending on these different underlying decisions relating to level of accuracy, rate of change and research period. With respect to the

above example, the JARPA II researchers recommended a sample size in the range of 663 to 1,617 whales in order to detect a rate of change from minus 1 to minus 1.5 per cent within a six-year period.

168. Based on the evidence presented by Japan, after the JARPA II researchers select a particular sample size for each research item, the fifth and final step in the calculation of sample size is to choose an overall sample size in light of the different sample sizes (or ranges of sample sizes, as in the above example) required for different aspects of the study. Because different research items require different sample sizes, it is necessary to select an overall sample size for each species that takes into account these different research requirements.

169. To determine the overall sample size for Antarctic minke whales in JARPA II, for example, Japan asserts that it looked at the possible sample size ranges for each research item and selected the sample size of 850 (plus or minus 10 per cent) because that number of whales can provide sufficient data on most research items with “a reasonable level of statistical accuracy overall”, but “will cause no harm to the stock”.

170. It is important to clarify which steps in the above-described process give rise to disagreement between the Parties, in order to bring into focus the reasons for the Parties’ detailed arguments in relation to sample sizes. As discussed above, there is disagreement about whether lethal methods are warranted and whether the information being gathered through the use of lethal methods is reliable and valuable (the first and second steps), but that disagreement is addressed elsewhere in this Judgment (see paragraphs 128-144). The proceedings revealed some areas of methodological agreement in respect of the third step. For example, the equation and the calculations used to create tables like the one shown above are not in dispute. There is also agreement that researchers need to make choices about variables such as the rate of change to detect or the length of a research period as part of the design of a scientific programme.

171. For present purposes, the critical differences between the Parties emerge at the fourth and fifth steps of the process of setting sample sizes. These differences are reflected in the arguments of the Parties summarized above (see paragraphs 157-159).

172. In considering these contentions by the Parties, the Court reiterates that it does not seek here to pass judgment on the scientific merit of the JARPA II objectives and that the activities of JARPA II can broadly be characterized as “scientific research” (see paragraphs 88 and 127 above). With regard to the setting of sample sizes, the Court is also not in a position to conclude whether a particular value for a given variable (e.g., the research period or rate of change to detect) has

scientific advantages over another. Rather, the Court seeks here only to evaluate whether the evidence supports a conclusion that the sample sizes are reasonable in relation to achieving JARPA II's stated objectives.

173. The Court begins by considering the way that Japan set the target sample sizes for fin and humpback whales.

(1) *Fin and humpback whales*

174. For fin whales and humpback whales, the annual JARPA II lethal sample size is 50 per species. The JARPA II Research Plan states that the same conditions and criteria were used to set sample sizes for the two species, so the Court considers them together.

175. Sample sizes for both species were calculated on the basis of two "research items": apparent pregnancy rate and age at sexual maturity. The JARPA II Research Plan describes these research items, which according to Japan involve the examination of ear plugs and reproductive organs, as essential to the objectives of the programme. The Research Plan does not indicate the reason for using only two parameters to establish the sample sizes for these two species, as compared to the larger number of parameters used to calculate the minke whale sample size (see paragraph 182 below). As noted above, however (see paragraphs 165-166), a review of the JARPA II Research Plan establishes that decisions concerning, for example, the particular rate of change to detect, among other relevant variables, have a pronounced impact on the resulting sample size.

176. Although the JARPA II Research Plan sets forth possible sample sizes for fin and humpback whales that contemplate both six-year and 12-year research periods, the plan explains that researchers chose to use the 12-year research period for both species. It states that a six-year period would be "preferable since the research programme will be reviewed every six years" but would require "large" sample sizes. The Research Plan states that a 12-year period was thus chosen as a "precautionary approach". In the oral proceedings, Japan offered an additional reason for the choice of a 12-year period: that a shorter period is unnecessary for these two species because implementation of the RMP for fin and humpback whales is not yet under consideration.

177. The Court does not need to decide whether a particular research period, taken in isolation, is more or less appropriate for a given species of whales. The selection of a 12-year period for two of three species, however, must be considered in light of other aspects of the design of JARPA II, including the selection of a six-year research period for detecting various changes in minke whales. In particular, Japan emphasizes multi-species competition and ecosystem research as explanations for the minke whale sample size of 850, as well as for including fin and humpback whales in the programme. JARPA II was designed with a six-year

“research phase” after which a review will be held and revisions may be made. It is difficult to see how there could be a meaningful review of JARPA II in respect of these two critical objectives after six years if the research period for two of three species is 12 years.

178. Thus, the selection of a 12-year research period for fin whales and humpback whales is one factor that casts doubt on the centrality of the objectives that Japan highlights to justify the minke whale sample size of 850 (plus or minus 10 per cent).

179. Another factor casts doubt on whether the design of JARPA II is reasonable in relation to achieving the programme’s stated objectives. The overall sample sizes selected for fin and humpback whales — 50 whales of each species per year — are not large enough to allow for the measurement of all the trends that the programme seeks to measure. Specifically, the JARPA II Research Plan states that at least 131 whales of each species should be taken annually to detect a particular rate of change in age at sexual maturity. The Research Plan does not indicate whether the researchers decided to accept a lower level of accuracy or instead adjusted the rate of change that they sought to detect by targeting fewer whales, nor did Japan explain this in the present proceedings. In light of the calculations of its own scientists, JARPA II does not appear designed to produce statistically relevant information on at least one central research item to which the JARPA II Research Plan gives particular importance.

180. The Court also notes that the expert called by Japan, Mr. Walløe, raised concerns about the fin whale component of JARPA II that go beyond the sample size. Mr. Walløe testified that the fin whale proposal was “not very well conceived” for two reasons. He stated that random sampling of fin whales within the JARPA II research area is not possible, first, because the main fin whale population is beyond the JARPA II research area — further to the north — and, secondly, because the JARPA II vessels can only accommodate the lethal take of smaller fin whales (a point also raised by Australia). The Court recalls that Japan identified random sampling as an element of a programme for purposes of scientific research.

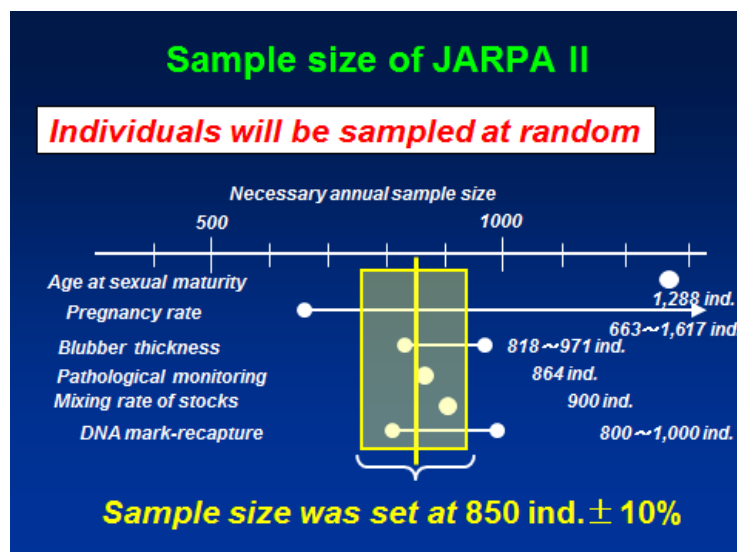
181. The Court finds that the JARPA II Research Plan overall provides only limited information regarding the basis for the decisions used to calculate the fin and humpback whale sample size. These sample sizes were set using a 12-year period, despite the fact that a shorter six-year period is used to set the minke whale sample size and that JARPA II is to be reviewed after each six-year research phase. Based on Japan’s own calculations, the sample sizes for fin and humpback whales are too small to produce statistically useful results. These shortcomings, in

addition to the problems specific to the decision to take fin whales, as noted in the preceding paragraph, are important to the Court’s assessment of whether the overall design of JARPA II is reasonable in relation to the programme’s objectives, because Japan connects the minke whale sample size (discussed below) to the ecosystem research and multi-species competition objectives that, in turn, are premised on the lethal sampling of fin and humpback whales.

(2) Antarctic minke whales

182. The Court turns next to the design of the sample size for Antarctic minke whales in JARPA II. The JARPA II Research Plan indicates that the overall sample size for minke whales was chosen following Japan’s calculation of the minimum sample size for a number of different research items, including age at sexual maturity, apparent pregnancy rate, blubber thickness, contaminant levels, mixing patterns between different stocks, and population trends. The plan further states that for most parameters “the sample sizes calculated were in a range of 800-1,000 animals with more than 800 being desirable”. Japan describes the process that it followed to determine the overall sample size for minke whales with reference to the following illustration that appears as Figure 5-4 in its Counter-Memorial:

— Figure 5-4: “Necessary annual sample sizes for respective research items under JARPA II, which was calculated by the established statistical procedures (*source*: Institute of Cetacean Research).”



(*Source*: Counter-Memorial of Japan, Vol. I, p. 261.)

183. As depicted in this illustration, the overall sample size falls within a range that corresponds to what the JARPA II Research Plan sets forth as the minimum requirements for most of the research that JARPA II is designed to undertake. Japan asserts that for this reason, the overall annual lethal sample size was set at 850 (plus or minus 10 per cent, which allows for a maximum of 935 minke whales per year). As noted above (see paragraphs 159 and 169), Japan considered this number of whales to be sufficient for purposes of research, taking into account the need to avoid causing harm to the stocks.

184. In contrast, in Australia's view, Japan started with the goal of establishing a sample size of approximately 850 minke whales per year and then "retro-fitted" the programme's design by selecting values designed to generate sample sizes for particular research items that corresponded to Japan's desired overall sample size. Australia emphasizes that the JARPA II Research Plan is not clear in stating the reasons for the selection of the particular sample size appertaining to each research item. Australia also notes that different choices as to values for certain variables would have led to dramatically smaller sample sizes, but that, in general, the JARPA II Research Plan provides no explanation for the underlying decisions to use values that generate larger sample sizes. These shortcomings, in Australia's view, support its conclusion that the minke whale sample size was set not for purposes of scientific research, but instead to meet Japan's funding requirements and commercial objectives.

185. In light of these divergent views, the Court will consider the evidence regarding Japan's selection of the various minimum sample sizes that it chose for different individual research items, which form the basis for the overall sample size for minke whales. As noted above (see paragraph 172), the purpose of such an inquiry is not to second-guess the scientific judgments made by individual scientists or by Japan, but rather to examine whether Japan, in light of JARPA II's stated research objectives, has demonstrated a reasonable basis for annual sample sizes pertaining to particular research items, leading to the overall sample size of 850 (plus or minus 10 per cent) for minke whales.

186. In the JARPA II Research Plan, individual sample size calculations are presented with respect to each of the items referred to in the above illustration: age at sexual maturity, apparent pregnancy rate, blubber thickness, pathological monitoring (i.e., monitoring of contaminant levels), mixing patterns between different stocks, and "DNA mark-recapture", which Japan describes as a method for researching population trends.

187. The Court notes at the outset that the JARPA II Research Plan states that for all parameters, "a sample size needed to detect changes in a six-year period . . . has been adopted as the pertinent criterion". The JARPA II Research Plan does not explain the reason for this threshold decision, but Japan offered some explanations during these proceedings, which are discussed below (see paragraph 192).

188. The evidence shows that the JARPA II Research Plan lacks transparency in the reasons for selecting particular sample sizes for individual research items. This is a matter on which the experts called by the two Parties agreed, as described above (see paragraphs 158-159). With the exception of one variable (discussed in the next paragraph), the JARPA II Research Plan provides very limited information regarding the selection of a particular value for a given variable. For example, in the Court's view, there is no consistent effort to explain why, for the various research items relating to the monitoring of biological parameters, JARPA II is designed to detect one particular rate or degree of change over another that would result in a lower sample size. These shortcomings of the JARPA II Research Plan have particular prominence in light of the fact that the particular choices of rate and degree of change consistently lead to a sample size of approximately 850 minke whales per year.

189. An exception to this pattern is arguably the discussion of the sample size applicable to the study of the age at sexual maturity of minke whales, as to which the JARPA II Research Plan furnishes some details about the factors that Japan considered in selecting the particular rate of change to detect. For this research item, the Research Plan also offers an indication of the relationship between the data sought and the first two JARPA II research objectives. The Court finds no comparable reasoning given as to the five other research items that were expressly used to set the overall sample size of 850 whales (i.e., those research items set forth in Figure 5-4 from Japan's Counter-Memorial above). This highlights the absence of evidence, at least in the JARPA II Research Plan, that could support a finding that the sample size for the lethal take of minke whales, a key component of the design of JARPA II, is reasonable in relation to achieving the programme's objectives.

190. The Court also recalls that one of the experts called by Australia, Mr. Mangel, asserted that nearly the same level of accuracy that JARPA II seeks could be obtained with a smaller lethal take of minke whales and further posited that a smaller take and higher margin of error might be acceptable, depending on the hypothesis under study. Japan did not refute this expert opinion.

191. The Court turns next to the evidence regarding Japan's decision to use a six-year period to calculate the sample sizes for research items corresponding to minke whales, rather than a 12-year period as was used for fin and humpback whales. That decision has a considerable effect on sample size because the shorter time-period generally requires a higher figure, as the JARPA II Research Plan demonstrates (see paragraph 165 above).

192. Japan, in discussing one research item (age at sexual maturity) in the Counter-Memorial, attributes the use of a six-year period to the need to obtain at least three data points from each JARPA II research area (since whales are taken from each area in alternating

seasons), because it would be “highly uncertain” to detect a trend on the basis of only two data points. Japan also refers to the desirability of detecting change “as promptly as possible”. In the oral proceedings, Japan offered two different rationales for the six-year period. After initially suggesting that the six-year period was intended to coincide with JARPA II’s six-year review by the Scientific Committee, Japan withdrew that explanation and asserted that the six-year period for minke whales was chosen because it “coincides with the review period for the RMP”. This corresponds to the explanation given by the expert called by Japan, Mr. Walløe, in his oral testimony, although Mr. Walløe also described the use of a six-year period to calculate sample sizes as “arbitrary”.

193. In light of the evidence, the Court has no basis to conclude that a six-year research period for minke whales is not reasonable in relation to achieving the programme’s objectives. However, the Court finds it problematic that, first, the JARPA II Research Plan does not explain the reason for choosing a six-year period for one of the whale species (minke whales) and, secondly, Japan did not offer a consistent explanation during these proceedings for the decision to use that research period to calculate the minke whale sample size.

194. Moreover, Japan does not address how disparate research time frames for the three whale species are compatible with JARPA II’s research objectives relating to ecosystem modelling and multi-species competition. JARPA II is apparently designed so that statistically useful information regarding fin and humpback whales will only be available after 12 years of research (and the evidence indicates that, even after 12 years, sample sizes would be insufficient to be statistically reliable based on the minimum requirements set forth in the JARPA II Research Plan). As noted above (see paragraph 181), this casts doubt on whether it will be meaningful to review the programme in respect of its two primary objectives after six years of operation, which, in turn, casts doubt on whether the minke whale target sample size is reasonable in relation to achieving the programme’s objectives.

195. The Court thus identifies two overarching concerns with regard to the minke whale sample size. First, Figure 5-4 shows that the final sample size of 850 minke whales (plus or minus 10 per cent) falls within a range derived from the individual sample sizes for various research items, but there is a lack of transparency regarding the decisions made in selecting those individual sample sizes. The Court notes that a lack of transparency in the JARPA II Research Plan and in Japan’s subsequent efforts to defend the JARPA II sample size do not necessarily demonstrate that the decisions made with regard to particular research items lack scientific justification. In the context of Article VIII, however, the evidence regarding the selection of a minimum sample size should allow one to understand why that sample size is reasonable in relation to achieving the programme’s objectives, when compared with other possible sample sizes that would require killing far fewer whales. The absence of such evidence in connection with most of the sample size

calculations described in the JARPA II Research Plan lends support to Australia's contention that a predetermined overall sample size has dictated the choice of the research period and the rate of change to be detected, rather than the other way around.

196. Secondly, as noted above (see paragraph 149), Japan justifies the increase in the minke whale sample size in JARPA II (as compared to the JARPA sample size) by reference to the research objectives relating to ecosystem research and multi-species competition. However, the evidence suggests that the programme's capacity to achieve these objectives has been compromised because of shortcomings in the programme's design with respect to fin and humpback whales. As such, it is difficult to see how these objectives can provide a reasonable basis for the target sample size for minke whales in JARPA II.

197. In addition, the Court recalls that Japan describes a number of characteristics that, in its view, distinguish commercial whaling from research whaling. Japan notes, in particular, that high-value species are taken in commercial whaling, whereas species of both high value and of less or no commercial value (such as sperm whales) may be taken in research whaling (see paragraph 89 above). The use of lethal methods in JARPA II focuses almost exclusively on minke whales. As to the value of that species, the Court takes note of an October 2012 statement by the Director-General of Japan's Fisheries Agency. Addressing the Subcommittee of the House of Representatives Committee on Audit and Oversight of Administration, he stated that minke whale meat is "prized because it is said to have a very good flavour and aroma when eaten as sashimi and the like". Referring to JARPA II, he further stated that "the scientific whaling program in the Southern Ocean was necessary to achieve a stable supply of minke whale meat". In light of these statements, the fact that nearly all lethal sampling under JARPA II concerns minke whales means that the distinction between high-value and low-value species, advanced by Japan as a basis for differentiating commercial whaling and whaling for purposes of scientific research, provides no support for the contention that JARPA II falls into the latter category.

198. Taken together, the evidence relating to the minke whale sample size, like the evidence for the fin and humpback whale sample sizes, provides scant analysis and justification for the underlying decisions that generate the overall sample size. For the Court, this raises further concerns about whether the design of JARPA II is reasonable in relation to achieving its stated objectives. These concerns must also be considered in light of the implementation of JARPA II, which the Court turns to in the next section.

(iii) Comparison of sample size to actual take

199. There is a significant gap between the JARPA II target sample sizes and the actual number of whales that have been killed in the implementation of the programme. The Parties disagree as to the reasons for this gap and the conclusions that the Court should draw from it.

200. The Court recalls that, for both fin whales and humpback whales, the target sample size is 50 whales, following a two-year feasibility study during which the target for humpback whales was zero and the target for fin whales was ten.

201. As to actual take, the evidence before the Court indicates that a total of 18 fin whales have been killed over the first seven seasons of JARPA II, including ten fin whales during the programme's first year when the feasibility of taking larger whales was under study. In subsequent years, zero to three fin whales have been taken annually. No humpback whales have been killed under JARPA II. Japan recounts that after deciding initially not to sample humpback whales during the first two years of JARPA II, it "suspended" the sampling of humpback whales as of 2007. The Court observes, however, that the permits issued for JARPA II since 2007 continue to authorize the take of humpback whales.

202. Notwithstanding the target sample size for minke whales of 850 (plus or minus 10 per cent), the actual take of minke whales under JARPA II has fluctuated from year to year. During the 2005-2006 season, Japan caught 853 minke whales, a number within the targeted range. Actual take has fallen short of the JARPA II sample size target in all subsequent years. On average, approximately 450 minke whales have been killed in each year. The evidence before the Court indicates that 170 minke whales were killed in the 2010-2011 season and that 103 minke whales were killed in the 2012-2013 season.

203. As to the reasons for the gap between target sample sizes and actual take, Japan states that it decided not to take any humpback whales in response to a request by the then-Chair of the IWC. With respect to fin whales, Japan points to sabotage activities by anti-whaling non-governmental organizations, noting in particular the Sea Shepherd Conservation Society, and to the inability of the main JARPA II research vessel, the *Nisshin Maru*, to pull on board larger whales. As to minke whales, Japan offers two reasons that actual sample sizes have been smaller than targets: a fire on board the *Nisshin Maru* in the 2006-2007 season and the aforementioned sabotage activities.

204. Japan refers in particular to incidents of sabotage during the 2008-2009 season (the ramming of vessels in February 2009 and the throwing of bottles of acid at Japanese vessels), the unauthorized boarding of the vessel *Shonan-Maru* in February 2010, which resulted in the withdrawal of that vessel from the fleet for the remainder of the 2009-2010 season for crime scene investigation, and additional harassment during the 2012-2013 season. Japan notes that the IWC has condemned such violent sabotage activities in a series of resolutions adopted by consensus.

205. Australia takes issue with Japan's account of the reasons for the gap between target sample sizes and actual take. Australia does not dispute that the decision to take no humpback whales was made in response to a request from the Chair of the IWC, but points out that this was a political decision, not a decision taken for scientific reasons. With respect to fin whales, Australia emphasizes the undisputed fact that Japan's vessels are not equipped to catch larger whales. As to minke whales, Australia points to evidence that, in its view, demonstrates that actual take is a function of the commercial market for whale meat in Japan, not the factors identified by Japan. According to Australia, Japan has adjusted the operations of JARPA II in response to lower demand for whale meat, resulting in shorter seasons and fewer whales being taken. Australia also invokes press reports of statements by Japanese officials indicating that JARPA II's research objectives do not actually require the amount of lethal sampling described in the Research Plan and can be accomplished with a smaller actual take.

206. Taking into account all the evidence, the Court considers that no single reason can explain the gap between the target sample sizes and the actual take. As to humpback whales, the gap results from Japan's decision to accede to a request from the Chair of the IWC but without making any consequential changes to the objectives or sample sizes of JARPA II. The shortfall in fin whales can be attributed, at least in part, to Japan's selection of vessels, an aspect of the design of JARPA II criticized by the expert called by Japan (see paragraph 180 above). As to the fire on board a ship in one season, Japan did not provide information regarding the extent of the damage or the amount of time during which the vessel was compromised. The Court considers it plausible that sabotage activities could have contributed to the lower catches of minke whales in certain seasons, but it is difficult to assess the extent of such a contribution. In this regard, the Court notes that the actual take of minke whales in the 2006-2007 and 2007-2008 seasons was 505 and 551, respectively, prior to the regrettable sabotage activities that Japan has brought to the Court's attention. In this context, the Court recalls IWC Resolution 2011-2, which was adopted by consensus. That resolution notes reports of the dangerous actions by the Sea Shepherd Conservation Society and condemns "any actions that are a risk to human life and property in relation to the activities of vessels at sea".

207. The Court turns next to Australia's contention that the gap between the target sample sizes and the actual take undermines Japan's position that JARPA II is a programme for purposes of scientific research. Australia states that it welcomes the fact that the actual take under JARPA II

has been smaller than the programme's target sample sizes. Australia asserts, however, that Japan has made no effort to explain how this discrepancy affects the JARPA II research objectives and has not adapted the programme to account for the smaller actual sample size. Japan also has not explained how the political decision not to take humpback whales, as well as the small number of fin whales that have been killed, can be reconciled with the emphasis of the JARPA II Research Plan on the need for the lethal sampling of those two species. Australia asks how a multi-species competition model can be constructed on the basis of data only from minke whales, if, as stated in the JARPA II Research Plan, information based on lethal sampling is required from all three species to construct such a model or to explore the "krill surplus hypothesis". Australia emphasizes that Japan has asserted that the information it needs can be obtained only by lethal take but that the actual take has been entirely different from the sample sizes on which JARPA II was premised. Citing these factors, Australia describes JARPA II's multi-species competition model goal as "illusory".

208. Japan asserts that the discrepancy between sample size and actual take, at least with regard to minke whales, likely means that "it will take several additional years of research to achieve the required sample sizes before the research objectives can be met". Along these lines, Japan states that "if we conduct the research over a longer time or are willing to accept a lower degree of accuracy then a smaller sample size will also give viable results, but it might delay the ability to detect potentially important changes in a stock's dynamics". Japan also takes the position that the under-take to date of fin and humpback whales "does not preclude existing ecosystem models . . . from being improved by use of data that JARPA II has collected in respect of these species by non-lethal means".

209. The Court observes that, despite the number of years in which the implementation of JARPA II has differed significantly from the design of the programme, Japan has not made any changes to the JARPA II objectives and target sample sizes, which are reproduced in the special permits granted annually. In the Court's view, two conclusions can be drawn from the evidence regarding the gap between the target sample sizes and actual take. First, Japan suggests that the actual take of minke whales does not compromise the programme, because smaller numbers of minke whales can nonetheless generate useful information, either because the time frame of the research can be extended or because less accurate results could be accepted. The Court recalls, however, that the minke whale sample sizes for particular research items were based on a six-year research period and on levels of accuracy that were not explained in the JARPA II Research Plan or in these proceedings. Japan's statement that the programme can achieve scientifically useful results with a longer research period or a lower level of accuracy thus raises further doubts about whether the target sample size of 850 whales is reasonable in relation to achieving the stated objectives of JARPA II. This adds force to Australia's contention that the target sample size for minke whales was set for non-scientific reasons.

210. Secondly, despite the fact that no humpback whales and few fin whales have been caught during JARPA II, Japan's emphasis on multi-species competition and ecosystem research as the bases for the JARPA II sample sizes for all three species is unwavering. In the view of the Court, the gap between the target sample sizes for fin and humpback whales in the JARPA II Research Plan and the actual take of these two species undermines Japan's argument that the objectives relating to ecosystem research and multi-species competition justify the larger target sample size for minke whales, as compared to that in JARPA.

211. The Court also notes Japan's contention that it can rely on non-lethal methods to study humpback and fin whales to construct an ecosystem model. If this JARPA II research objective can be achieved through non-lethal methods, it suggests that there is no strict scientific necessity to use lethal methods in respect of this objective.

212. Japan's continued reliance on the first two JARPA II objectives to justify the target sample sizes, despite the discrepancy between the actual take and those targets, coupled with its statement that JARPA II can obtain meaningful scientific results based on the far more limited actual take, cast further doubt on the characterization of JARPA II as a programme for purposes of scientific research. This evidence suggests that the target sample sizes are larger than are reasonable in relation to achieving JARPA II's stated objectives. The fact that the actual take of fin and humpback whales is largely, if not entirely, a function of political and logistical considerations, further weakens the purported relationship between JARPA II's research objectives and the specific sample size targets for each species — in particular, the decision to engage in the lethal sampling of minke whales on a relatively large scale.

(c) *Additional aspects of the design and implementation of JARPA II*

213. The Court now turns to several additional aspects of JARPA II to which the Parties called attention.

(i) *Open-ended time frame*

214. Japan asserts that "JARPA II is a long-term research programme and has no specified termination date because its primary objective (i.e., monitoring the Antarctic ecosystem) requires a continuing programme of research". The programme is organized into six-year "research phases" and "a review will be held and revisions made to the programme if required" after each such period. The first review by the Scientific Committee is scheduled to take place in 2014 (see paragraph 119 above). According to Japan, Article VIII, paragraph 4, of the Convention contemplates such open-ended research when it states that "continuous collection and analysis of biological data... are indispensable to sound and constructive management of the whale fisheries".

215. Australia draws two conclusions from the absence of any specified termination date in JARPA II. First, Australia contends that this demonstrates that the design of JARPA II is geared towards the perpetuation of whaling by any means until the commercial whaling moratorium is lifted. Secondly, Australia maintains that the open-ended nature of JARPA II precludes a meaningful assessment of whether it has achieved its research objectives, distorts the process of sample size selection, and therefore renders the design of JARPA II unscientific.

216. The Court notes the open-ended time frame of JARPA II and observes that with regard to a programme for purposes of scientific research, as Annex P indicates, a “time frame with intermediary targets” would have been more appropriate.

(ii) Scientific output of JARPA II to date

217. Japan maintains that, prior to the periodic review of JARPA II, no meaningful evaluation of JARPA II’s scientific output can be made. Japan does assert, however, that the Scientific Committee has recognized the value of data derived from JARPA II, including genetic data and age data derived from lethal whaling. In addition, the expert called by Japan, Mr. Walløe, testified that in his view JARPA II has already provided valuable information relating to the RMP and the Antarctic ecosystem.

218. Australia acknowledges that JARPA II has produced some results in the form of data that has been considered by the Scientific Committee. The Parties disagree about this output, however, in the sense that Australia argues that the data obtained from lethal sampling and provided to the Scientific Committee has not proven useful or contributed “significant knowledge” relating to the conservation and management of whales.

219. The Court notes that the Research Plan uses a six-year period to obtain statistically useful information for minke whales and a 12-year period for the other two species, and that it can be expected that the main scientific output of JARPA II would follow these periods. It nevertheless observes that the first research phase of JARPA II (2005-2006 to 2010-2011) has already been completed (see paragraph 119 above), but that Japan points to only two peer-reviewed papers that have resulted from JARPA II to date. These papers do not relate to the JARPA II objectives and rely on data collected from respectively seven and two minke whales caught during the JARPA II feasibility study. While Japan also refers to three presentations made at scientific symposia and to eight papers it has submitted to the Scientific Committee, six of the latter are JARPA II cruise reports, one of the two remaining papers is an evaluation of the JARPA II feasibility study and the other relates to the programme’s non-lethal photo identification of blue whales. In light of the fact that JARPA II has been going on since 2005 and has involved the killing of about 3,600 minke whales, the scientific output to date appears limited.

(iii) Co-operation with other research institutions

220. Australia points to limited co-operation between JARPA II researchers and other scientists as evidence for its contention that JARPA II is not a programme for purposes of scientific research. One of the experts called by Australia, Mr. Gales, stated that JARPA II “operates in complete isolation” from other Japanese and international research projects concerning the Antarctic ecosystem.

221. In response to a question put by a Member of the Court, Japan cited co-operation with other Japanese research institutions. The expert called by Japan, Mr. Walløe, suggested that co-operation with international research programmes “would be difficult for personal and political reasons”, given that the use of lethal methods is contentious among scientists. He acknowledged that co-operation with other Japanese research institutions, such as the National Institute for Polar Research, could be improved.

222. The Court notes that the evidence invoked by Japan to demonstrate co-operation with Japanese research institutions relates to JARPA, not JARPA II. It observes that some further evidence of co-operation between JARPA II and other domestic and international research institutions could have been expected in light of the programme’s focus on the Antarctic ecosystem and environmental changes in the region.

(d) Conclusion regarding the application of Article VIII, paragraph 1, to JARPA II

223. In light of the standard of review set forth above (see paragraph 67), and having considered the evidence with regard to the design and implementation of JARPA II and the arguments of the Parties, it is now for the Court to conclude whether the killing, taking and treating of whales under the special permits granted in connection with JARPA II is “for purposes of scientific research” under Article VIII of the Convention.

224. The Court finds that the use of lethal sampling per se is not unreasonable in relation to the research objectives of JARPA II. However, as compared to JARPA, the scale of lethal sampling in JARPA II is far more extensive with regard to Antarctic minke whales, and the programme includes the lethal sampling of two additional whale species. Japan states that this expansion is required by the new research objectives of JARPA II, in particular, the objectives relating to ecosystem research and the construction of a model of multi-species competition. In the view of the Court, however, the target sample sizes in JARPA II are not reasonable in relation to achieving the programme’s objectives.

225. First, the broad objectives of JARPA and JARPA II overlap considerably. To the extent that the objectives are different, the evidence does not reveal how those differences lead to the considerable increase in the scale of lethal sampling in the JARPA II Research Plan. Secondly, the

sample sizes for fin and humpback whales are too small to provide the information that is necessary to pursue the JARPA II research objectives based on Japan's own calculations, and the programme's design appears to prevent random sampling of fin whales. Thirdly, the process used to determine the sample size for minke whales lacks transparency, as the experts called by each of the Parties agreed. In particular, the Court notes the absence of complete explanations in the JARPA II Research Plan for the underlying decisions that led to setting the sample size at 850 minke whales (plus or minus 10 per cent) each year. Fourthly, some evidence suggests that the programme could have been adjusted to achieve a far smaller sample size, and Japan does not explain why this was not done. The evidence before the Court further suggests that little attention was given to the possibility of using non-lethal research methods more extensively to achieve the JARPA II objectives and that funding considerations, rather than strictly scientific criteria, played a role in the programme's design.

226. These problems with the design of JARPA II must also be considered in light of its implementation. First, no humpback whales have been taken, and Japan cites non-scientific reasons for this. Secondly, the take of fin whales is only a small fraction of the number that the JARPA II Research Plan prescribes. Thirdly, the actual take of minke whales has also been far lower than the annual target sample size in all but one season. Despite these gaps between the Research Plan and the programme's implementation, Japan has maintained its reliance on the JARPA II research objectives — most notably, ecosystem research and the goal of constructing a model of multi-species competition — to justify both the use and extent of lethal sampling prescribed by the JARPA II Research Plan for all three species. Neither JARPA II's objectives nor its methods have been revised or adapted to take account of the actual number of whales taken. Nor has Japan explained how those research objectives remain viable given the decision to use six-year and 12-year research periods for different species, coupled with the apparent decision to abandon the lethal sampling of humpback whales entirely and to take very few fin whales. Other aspects of JARPA II also cast doubt on its characterization as a programme for purposes of scientific research, such as its open-ended time frame, its limited scientific output to date, and the absence of significant co-operation between JARPA II and other related research projects.

227. Taken as a whole, the Court considers that JARPA II involves activities that can broadly be characterized as scientific research (see paragraph 127 above), but that the evidence does not establish that the programme's design and implementation are reasonable in relation to achieving its stated objectives. The Court concludes that the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II are not "for purposes of scientific research" pursuant to Article VIII, paragraph 1, of the Convention.

4. Conclusions regarding alleged violations of the Schedule

228. The Court turns next to the implications of the above conclusion, in light of Australia's contention that Japan has breached three provisions of the Schedule that set forth restrictions on the killing, taking and treating of whales: the obligation to respect zero catch limits for the killing for commercial purposes of whales from all stocks (para. 10 *(e)*); the factory ship moratorium (para. 10 *(d)*); and the prohibition on commercial whaling in the Southern Ocean Sanctuary (para. 7 *(b)*).

229. The Court observes that the precise formulations of the three Schedule provisions invoked by Australia (reproduced in pertinent part below, see paragraphs 231-233) differ from each other. The "factory ship moratorium" makes no explicit reference to commercial whaling, whereas the requirement to observe zero catch limits and the provision establishing the Southern Ocean Sanctuary express their prohibitions with reference to "commercial" whaling. In the view of the Court, despite these differences in wording, the three Schedule provisions are clearly intended to cover all killing, taking and treating of whales that is neither "for purposes of scientific research" under Article VIII, paragraph 1, of the Convention, nor aboriginal subsistence whaling under paragraph 13 of the Schedule, which is not germane to this case. The reference to "commercial" whaling in paragraphs 7 *(b)* and 10 *(e)* of the Schedule can be explained by the fact that in nearly all cases this would be the most appropriate characterization of the whaling activity concerned. The language of the two provisions cannot be taken as implying that there exist categories of whaling which do not come within the provisions of either Article VIII, paragraph 1, of the Convention or paragraph 13 of the Schedule but which nevertheless fall outside the scope of the prohibitions in paragraphs 7 *(b)* and 10 *(e)* of the Schedule. Any such interpretation would leave certain undefined categories of whaling activity beyond the scope of the Convention and thus would undermine its object and purpose. It may also be observed that at no point in the present proceedings did the Parties and the intervening State suggest that such additional categories exist.

230. The Court therefore proceeds on the basis that whaling that falls outside Article VIII, paragraph 1, other than aboriginal subsistence whaling, is subject to the three Schedule provisions invoked by Australia. As this conclusion flows from the interpretation of the Convention and thus applies to any special permit granted for the killing, taking and treating of whales that is not "for purposes of scientific research" in the context of Article VIII, paragraph 1, the Court sees no reason to evaluate the evidence in support of the Parties' competing contentions about whether or not JARPA II has attributes of commercial whaling.

231. The moratorium on commercial whaling, paragraph 10 (*e*), provides:

“Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.”

From 2005 to the present, Japan, through the issuance of JARPA II permits, has set catch limits above zero for three species — 850 for minke whales, 50 for fin whales and 50 for humpback whales. As stated above (see paragraphs 229-230), the Court considers that all whaling that does not fit within Article VIII of the Convention (other than aboriginal subsistence whaling) is subject to paragraph 10 (*e*) of the Schedule. It follows that Japan has not acted in conformity with its obligations under paragraph 10 (*e*) in each of the years in which it has granted permits for JARPA II (2005 to the present) because those permits have set catch limits higher than zero.

232. The factory ship moratorium, paragraph 10 (*d*), provides:

“Notwithstanding the other provisions of paragraph 10, there shall be a moratorium on the taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships. This moratorium applies to sperm whales, killer whales and baleen whales, except minke whales.”

The Convention defines a “factory ship” as a ship “in which or on which whales are treated either wholly or in part” and defines a “whale catcher” as a ship “used for the purpose of hunting, taking, towing, holding on to, or scouting for whales” (Art. II, paras. 1 and 3). The vessel *Nisshin Maru*, which has been used in JARPA II, is a factory ship, and other JARPA II vessels have served as whale catchers. As stated above (see paragraphs 229-230), the Court considers that all whaling that does not fit within Article VIII of the Convention (other than aboriginal subsistence whaling) is subject to paragraph 10 (*d*) of the Schedule. It follows that Japan has not acted in conformity with its obligations under paragraph 10 (*d*) in each of the seasons during which fin whales were taken, killed and treated in JARPA II.

233. Paragraph 7 (*b*), which establishes the Southern Ocean Sanctuary, provides in pertinent part:

“In accordance with Article V (1) (*c*) of the Convention, commercial whaling, whether by pelagic operations or from land stations, is prohibited in a region designated as the Southern Ocean Sanctuary.”

As previously noted, JARPA II operates within the Southern Ocean Sanctuary (see paragraph 120). Paragraph 7 (*b*) does not apply to minke whales in relation to Japan, as a consequence of Japan's objection to the paragraph. As stated above (see paragraphs 229-230), the Court considers that all whaling that does not fit within Article VIII of the Convention (other than aboriginal subsistence whaling) is subject to paragraph 7 (*b*) of the Schedule. It follows that Japan has not acted in conformity with its obligations under paragraph 7 (*b*) in each of the seasons of JARPA II during which fin whales have been taken.

5. Alleged non-compliance by Japan with its obligations under paragraph 30 of the Schedule

234. In its final submissions, Australia asks the Court to adjudge and declare that Japan violated its obligation to comply with paragraph 30 of the Schedule, which requires Contracting Governments to make proposed permits available to the IWC Secretary before they are issued, in sufficient time to permit review and comment by the Scientific Committee. Paragraph 30 states that the proposed permits should specify: the objectives of the research, the number, sex, size and stock of the animals to be taken; opportunities for participation in the research by scientists of other nations; and the possible effect on conservation of the stock.

235. Although the alleged violation of paragraph 30 was not framed as a submission in Australia's Memorial, the Memorial addressed the issue, as did Japan's Counter-Memorial.

236. Australia raises two complaints with regard to paragraph 30 — that Japan has failed to provide proposed permits for review prior to the commencement of each season of JARPA II and that the annual permits do not contain the information required by paragraph 30.

237. In response, Japan points out that, prior to the present proceedings, Australia had not complained within the Scientific Committee regarding this alleged breach of paragraph 30. Japan explained that the JARPA II Research Plan was submitted two months in advance of the IWC's June 2005 meeting, prior to the issuance of any special permits for JARPA II, and that the Scientific Committee reviewed and commented on the proposal, in keeping with the then-applicable Guidelines, reflected in Annex Y. Japan asserts that for a multi-year programme such as JARPA II, only the initial proposal is reviewed by the Scientific Committee and that "ongoing unchanged proposals that have already been reviewed" are not subject to annual review. According to Japan, this had been the practice of the Scientific Committee prior to the submission of the JARPA II Research Plan and it has been formalized by Annex P.

238. As regards the question of timing, the Court observes that Japan submitted the JARPA II Research Plan for review by the Scientific Committee in advance of granting the first permit for the programme. Subsequent permits that have been granted on the basis of that proposal

must be submitted to the Commission pursuant to Article VIII, paragraph 1, of the Convention, which states that “[e]ach Contracting Government shall report at once to the Commission all such authorizations which it has granted”. Australia does not contest that Japan has done so with regard to each permit that has been granted for JARPA II.

239. As regards the substantive requirements of paragraph 30, the Court finds that the JARPA II Research Plan, which constitutes the proposal for the grant of special permits, sets forth the information specified by that provision. This was also recognized by the Scientific Committee in 2005 in its review of the JARPA II Research Plan. The lack of detail in the permits themselves is consistent with the fact that the programme is a multi-year programme, as described in the JARPA II Research Plan. Japan’s approach accords with the practice of the Scientific Committee.

240. The Court observes that paragraph 30 and the related Guidelines regarding the submission of proposed permits and the review by the Scientific Committee (currently, Annex P) must be appreciated in light of the duty of co-operation with the IWC and its Scientific Committee that is incumbent upon all States parties to the Convention, which was recognized by both Parties and the intervening State. As has been discussed above (see paragraphs 199-212), the implementation of JARPA II differs in significant respects from the original design of the programme that was reflected in the JARPA II Research Plan. Under such circumstances, consideration by a State party of revising the original design of the programme for review would demonstrate co-operation by a State party with the Scientific Committee.

241. The Court notes that 63 Scientific Committee participants declined to take part in the 2005 review of the JARPA II Research Plan, citing the need for the Scientific Committee to complete its final review of JARPA before the new proposal could be assessed. Those scientists submitted a separate set of comments on the JARPA II Research Plan, which were critical of its stated objectives and methodology, but did not assert that the proposal fell short of Scientific Committee practice under paragraph 30.

242. For these reasons, the Court is persuaded that Japan has met the requirements of paragraph 30 as far as JARPA II is concerned.

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243. In view of the conclusions that the Court has reached regarding the characterization of JARPA II in relation to Article VIII, as well as the implications of these conclusions for Japan's obligations under the Schedule, the Court does not need to address other arguments invoked by Australia in support of its claims.

III. REMEDIES

244. In addition to asking the Court to find that the killing, taking and treating of whales under special permits granted for JARPA II is not for purposes of scientific research within the meaning of Article VIII and that Japan thus has violated three paragraphs of the Schedule, Australia asks the Court to adjudge and declare that Japan shall:

- “(a) refrain from authorizing or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII;
- (b) cease with immediate effect the implementation of JARPA II; and
- (c) revoke any authorization, permit or licence that allows the implementation of JARPA II.”

245. The Court observes that JARPA II is an ongoing programme. Under these circumstances, measures that go beyond declaratory relief are warranted. The Court therefore will order that Japan shall revoke any extant authorization, permit or licence to kill, take or treat whales in relation to JARPA II, and refrain from granting any further permits under Article VIII, paragraph 1, of the Convention, in pursuance of that programme.

246. The Court sees no need to order the additional remedy requested by Australia, which would require Japan to refrain from authorizing or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII. That obligation already applies to all States parties. It is to be expected that Japan will take account of the reasoning and conclusions contained in this Judgment as it evaluates the possibility of granting any future permits under Article VIII, paragraph 1, of the Convention.

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247. For these reasons,

THE COURT,

(1) Unanimously,

Finds that it has jurisdiction to entertain the Application filed by Australia on 31 May 2010;

(2) By twelve votes to four,

Finds that the special permits granted by Japan in connection with JARPA II do not fall within the provisions of Article VIII, paragraph 1, of the International Convention for the Regulation of Whaling;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Keith, Skotnikov, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; *Judge ad hoc* Charlesworth;

AGAINST: *Judges* Owada, Abraham, Bennouna, Yusuf;

(3) By twelve votes to four,

Finds that Japan, by granting special permits to kill, take and treat fin, humpback and Antarctic minke whales in pursuance of JARPA II, has not acted in conformity with its obligations under paragraph 10 (e) of the Schedule to the International Convention for the Regulation of Whaling;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Keith, Skotnikov, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; *Judge ad hoc* Charlesworth;

AGAINST: *Judges* Owada, Abraham, Bennouna, Yusuf;

(4) By twelve votes to four,

Finds that Japan has not acted in conformity with its obligations under paragraph 10 (d) of the Schedule to the International Convention for the Regulation of Whaling in relation to the killing, taking and treating of fin whales in pursuance of JARPA II;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Keith, Skotnikov, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; *Judge ad hoc* Charlesworth;

AGAINST: *Judges* Owada, Abraham, Bennouna, Yusuf;

(5) By twelve votes to four,

Finds that Japan has not acted in conformity with its obligations under paragraph 7 (b) of the Schedule to the International Convention for the Regulation of Whaling in relation to the killing, taking and treating of fin whales in the “Southern Ocean Sanctuary” in pursuance of JARPA II;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Keith, Skotnikov, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; *Judge ad hoc* Charlesworth;

AGAINST: *Judges* Owada, Abraham, Bennouna, Yusuf;

(6) By thirteen votes to three,

Finds that Japan has complied with its obligations under paragraph 30 of the Schedule to the International Convention for the Regulation of Whaling with regard to JARPA II;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja;

AGAINST: *Judges* Sebutinde, Bhandari; *Judge ad hoc* Charlesworth;

(7) By twelve votes to four,

Decides that Japan shall revoke any extant authorization, permit or licence granted in relation to JARPA II, and refrain from granting any further permits in pursuance of that programme.

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Keith, Skotnikov, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; *Judge ad hoc* Charlesworth;

AGAINST: *Judges* Owada, Abraham, Bennouna, Yusuf.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this thirty-first day of March, two thousand and fourteen, in four copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Australia, the Government of Japan and the Government of New Zealand, respectively.

(Signed) Peter TOMKA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judges OWADA and ABRAHAM append dissenting opinions to the Judgment of the Court; Judge KEITH appends a declaration to the Judgment of the Court; Judge BENNOUNA appends a dissenting opinion to the Judgment of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judge YUSUF appends a dissenting opinion to the Judgment of the Court; Judges GREENWOOD, XUE, SEBUTINDE and BHANDARI append separate opinions to the Judgment of the Court; Judge *ad hoc* CHARLESWORTH appends a separate opinion to the Judgment of the Court.

(Initialed) P. T.

(Initialed) Ph. C.

DISSENTING OPINION OF JUDGE OWADA

1. To my greatest regret, I cannot associate myself with the present Judgment in terms of the conclusions stated in paragraphs 2, 3, 5 and 7 of its operative part, as well as the reasoning stated in the reasoning part. My disagreement lies with the understanding of the Judgment on the basic character of the International Convention for the Regulation of Whaling (hereinafter “the Convention”), with the methodology the Judgment employs for interpreting and applying the provisions of the Convention, and thus with a number of conclusions that it reaches.

2. In this opinion, I shall try to deal with some of the salient aspects of these points of disagreement. In view of the fundamental disagreement on some basic points, I shall be setting out my understanding on these points to clarify the differences that I have with the Judgment, rather than focusing on each and every concrete point on which I disagree.

I. JURISDICTION OF THE COURT

3. With regard to jurisdiction, while I maintain certain reservations on some aspects of the reasoning of the Judgment, I am not going to discuss this issue in this opinion, inasmuch as I have concurred with the conclusion of the Judgment that the Court has jurisdiction in this case. I wish, however, to place on record my reservation that under the somewhat unfortunate procedural circumstances, the Parties were not provided in the proceedings with ample opportunities to develop their respective arguments on the issue of jurisdiction, with the result that I could not but come to the conclusion that the Respondent has not succeeded in establishing that the Court lacks the jurisdiction to hear the present case under the Optional Clause declarations of the two Parties.

II. THE OBJECT AND PURPOSE OF THE CONVENTION

4. It is my view that this case has come to present controversies on which the opinions of Judges have come to be divided, mainly due to the difference between the Parties on the perceived evolution in the situation surrounding whales and whaling that has come to emerge during the period between the time when the Convention was concluded and the present. A discrepancy in perception has come to develop between two opposing views. It is argued on the one hand that there has been an evolution in the economic-social vista of the world surrounding whales and whaling over the years since 1946, and

that this is to be reflected in the interpretation and the application of the Convention. It is argued, on the other hand, that the juridico-institutional basis of the Convention has not changed since it was drafted, based as it was on the well-established principles of international law relating to the conservation and management of fishing resources, including whales, and that this basic character of the Convention should essentially be maintained. This to my mind is the fundamental divide that separates the legal positions of the Applicant, Australia, and New Zealand as an intervener under Article 63 of the Statute, and that of the Respondent, Japan.

5. In order to have a proper understanding of the dispute, therefore, one has to look to the essential characteristics of the legal régime created under the Convention, in light of its object and purpose.

6. The history of modern whaling dates back to the nineteenth century, when many nations of the world, including in particular the United States and Great Britain, were actively participating in catching and killing whales in the oceans, primarily for their oil which was indispensable in those days for civilized urban people who depended upon oil extracted from whales for their lighting. In the days when natural resources of the sea, especially fishing resources, were thought to be inexhaustible, rampant taking and slaughtering of whales went unchecked all over the world, motivated primarily by the desire for economic gains. Concern about overfishing led whaling nations of the world to conclude the International Agreement for the Regulation of Whaling of 1937, in order to regulate whaling and avoid the depletion of whale stocks. This agreement, however, turned out to be less than effective, lacking a strong regulatory régime on whaling, except for a system basically of monitoring whale catches. It was against such a state of affairs that the Convention of 1946 came to be concluded in order to improve this devastating situation which came to threaten the sustainability of whale stocks and thus the viability of the whaling industry. The basic objective to be attained in concluding this Convention was "to develop a sound conservation program which [will] maintain an adequate and healthy breeding stock" (Chair Mr. Kellogg, International Whaling Conference, Minutes of the Second Session, 1946, p. 13, para. 137), by calling for a halt to further overfishing of certain whale stocks that were being depleted.

7. The object and purpose of the Convention is to be understood in the context of this situation. It is clearly enunciated in its Preamble. The objectives of the Convention are listed in its Preamble in the following words:

"The [Contracting] Governments

.....

Considering that the history of whaling has seen overfishing of one area after another and of one species of whale after another to such a degree that it is essential to protect all species of whales from further overfishing;

Recognizing that the whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the number of whales which may be captured without endangering these natural resources;

Recognizing that it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress;

.....
 Desiring to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development;

.....
 Have agreed as follows: . . ." (Preamble, paras. 3, 4, 5, 7.)

8. In explaining the purpose and objectives of the Convention, the Chair of the Conference, Mr. Kellogg, stated as follows:

"The Preamble, as is customary, explains the purpose and the objectives of the Convention . . . The Preamble also points out specifically and primarily that the purpose of this Convention is to develop a sound conservation programme which will maintain an adequate and healthy breeding stock. By restoring depleted stocks, as, for instance, the blue whale and the humpbacked whale, and by wise management of the existing stocks a maximum sustained yield of this natural resource can be assured. That, in a few words, is the general intent of the Preamble." (Minutes of the Second Session, IWC, 1946, p. 13, para. 137.)

9. It is clear from this that the object and purpose of the Convention is to pursue the goal of achieving the twin purposes of the sustainability of the maximum sustainable yield ("MSY") of the stocks in question and the viability of the whaling industry. Nowhere in this Convention is to be found the idea of a total permanent ban on the catch of whales. That this was not the intention of the 1982 proposal for a moratorium can be confirmed by the Verbatim Record of the International Whaling Commission which voted for the Moratorium (IWC 34th Annual Meeting, 19-24 July 1982, pp. 72-86). In introducing this proposal, the Chairman of the Technical Committee stated:

"[The sponsor of the proposal] regards the whales as a trust for the future and has looked for rational management, but this has been difficult to attain. There is scientific uncertainty and lack of data, some of which are not fully available. Recognizing the disruption to the whaling industry and the communities involved it proposed a

phasing out over a fixed period of time during which there would be a diminution of whaling and catches based on scientific advice. This took the form of a new clause to paragraph 10 of the Schedule which has the effect of introducing a three-year period for the industry to accommodate, noting that block quotas will end in 1985." (Verbatim Record, IWC 34th Annual Meeting, 19-24 July 1982, p. 72.)

10. The concept of "conservation of fisheries resources" contains the element of "maximum/optimum sustainable yield" as its integral part as employed in the Convention. This is in line with the accepted approach to high-sea fisheries in general, which is well-established in the contemporary international law on fisheries. For example, the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas defines the term "conservation of the living resources of the high seas" as "the aggregate of the measures rendering possible the *optimum sustainable yield* from those resources *so as to secure a maximum supply of food and other marine products*" (Art. 2; emphasis added).

11. It is therefore of cardinal importance that the Court understands this object and purpose of the Convention in its proper perspective, which defines the essential characteristics of the régime established under the Convention. In this sense, the proper grasp of the essential characteristics of the régime created by the Convention should be the starting-point that constitutes the key to the proper understanding of the precise nature and structure of the regulatory régime contained in the concrete provisions of the Convention, and the legal scope of the rights and obligations prescribed for a contracting State engaging in scientific activities under Article VIII as its central element.

12. In other words, the present Judgment has failed in my view to engage in analysing the essential characteristics of the régime of the Convention. The Judgment in its subsection on "General Overview of the Convention" (paras. 42-50), does no more than reproduce what is contained in the provisions of the Convention, without trying to analyse the *raison d'être* of the Convention as reflected in its Preamble, except for the laconic statement that "[t]he functions conferred on the Commission have made the Convention *an evolving instrument*" (Judgment, para. 45; emphasis added). It does not specify what this implies. Any international agreement can be evolving inasmuch as it is susceptible to modification by the agreement of the parties. The fact that the Commission is given the power to adopt amendments to the Schedule as an integral part of the Convention, which can become binding upon those States parties which do not raise an objection, and that the Commission has amended the Schedule many times in this sense would not support the thesis that the Convention is an "evolving instrument" as such. The Convention is not malleable as such in the legal sense, according to the changes in the surrounding socio-economic environments.

III. THE ESSENTIAL CHARACTERISTICS OF THE REGULATORY RÉGIME UNDER THE CONVENTION

13. For the purpose of understanding the essential characteristics of the régime established under the Convention, the structure of the Convention has to be analysed in somewhat greater detail. It can be summarized roughly as follows:

- (1) the Contracting Governments have created an International Whaling Commission (hereinafter "IWC") as its executive organ (Art. III). The IWC can take a decision by a three-fourths majority, if action is required in pursuance of Article V;
- (2) under Article V, the IWC may amend the provisions of the Schedule, which forms an integral part of the Convention (Art. I), by adopting regulations with respect to the conservation and utilization of whale resources (Art. V, para. 1), with the conditions that these amendments of the Schedule, *inter alia*, (a) shall be such as are necessary to carry out the objectives and purposes of the Convention and to provide for the conservation, development, and optimum utilization of the whale resources; (b) shall be based on scientific findings; and (c) shall take into consideration the interests of the consumers of whale products and the whaling industry (Art. V, para. 2). Each of such amendments shall become effective with respect to those Contracting Governments which have not presented objection, but shall not be effective with respect to a Government which has so objected until such date as the objection is withdrawn (Art. V, para. 3);
- (3) the IWC may also make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of the Convention (Art. VI);
- (4) notwithstanding anything contained in the Convention, a Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research, subject to such restrictions as to number, and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking and treating of whales in accordance with the provisions of Article VIII shall be exempt from the operation of the Convention (Art. VIII, para. 1).

14. It seems fair to conclude from what has been summarized above that the Convention has created a kind of self-contained regulatory régime on whales and whaling — somewhat comparable to the self-contained system of an intergovernmental international organization with its own administrative autonomy — equipped with its regulatory régime for matters within the purview of its jurisdiction. It goes without saying that such a system providing for the autonomy of the parties, while created

inter se, is not free from the process of judicial review by the Court in accordance with the power given to it for interpreting and applying its constitutional document, namely, the Convention.

15. Within this self-contained regulatory régime, no power of decision-making by a majority is given to the IWC automatically to bind the Contracting Parties, except through a mechanism of consent to be given by each of the Parties as specified in Article V, paragraph 3. In this regulatory régime created by the Parties, no amendments to the Schedule will become effective in relation to the Contracting Party who objects to the amendments in question. Nor can any recommendation adopted by the IWC acquire a binding character in relation to a Contracting Party.

16. Following the 1982 meeting of the IWC, when an amendment proposed by the Seychelles and supported by Australia and several other member States was adopted, amending paragraph 10 of the Schedule to ban commercial whaling of all species beginning in the 1985-1986 season, Japan did eventually exercise this right to raise objection under Article V, which it later withdrew under pressure from the United States. The argument advanced with regard to this situation by the Applicant, and developed further by the Intervener, that the Convention has gone through an evolution during these 60 years in accordance with the change in the environment surrounding whales and whaling, and especially in the growth in the community interest of the world that whales be preserved as precious animals, would seem to be an argument that would be tantamount to an attempt to change the rules of the game as provided for in the Convention and accepted by the Contracting Parties in 1946. (The argument could be qualitatively different, if it were advanced on the ground, based on scientific evidence, that whales were being overfished to severe depletion or even extinction and that therefore precautionary measures would have to be taken to prevent this happening — an argument which would legitimately fall within the ambit of the Convention. It is my understanding, however, that such an argument has not been seriously advanced by the Applicant with supporting credible scientific evidence in the present case.)

17. The Respondent claims that, faced with this new situation of the adoption of a moratorium on whaling for commercial purposes, it became necessary for the Respondent to advance a programme of activities for purposes of scientific research so that scientific evidence could be collected for the consideration of the IWC (or its Scientific Committee), with a view to enabling the IWC to lift or review the moratorium, which professedly was a measure adopted to be of not unlimited duration and subject to future review. The moratorium explicitly provided that the provision setting catch limits at zero “will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the

establishment of other catch limits” (Schedule, para. 10 (*e*)). It would seem difficult to see anything wrong in the Respondent’s course of action.

18. Setting aside passing judgment on this argument of the Respondent, it is to be noted that the Convention prescribes that

- (1) “[the] amendments of the Schedule . . . shall be such as are necessary to carry out the objectives and purposes of [the] Convention and to provide for the conservation, development, and optimum utilization of the whale resources; [and] shall be based on scientific findings [and]
- (2) any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research” (Art. V, para. 2, and Art. VIII, para. 1).

In this sense what the Respondent embarked upon under JARPA and JARPA II is *prima facie* to be regarded as being in conformity with the Convention and the revised Schedule, including its subparagraph 10 (*e*).

Thus the whole question of the legality of the whaling activities of Japan under JARPA, and JARPA II as its continuation, has come to hinge upon the question of whether these activities of the Respondent could fall under the activities “for purposes of scientific research” within the meaning of Article VIII of the Convention.

IV. THE INTERPRETATION OF ARTICLE VIII

19. The essential character of the Convention as examined above lies in the fact that the Contracting Parties have created a self-contained regulatory régime for the regulation of whales and whaling. The prescription contained in Article VIII of the Convention in my view is one important component of this regulatory régime. It would be wrong in this sense to characterize the power recognized to a Contracting Party to grant to its nationals special permits “to kill, take and treat whales for purposes of scientific research” (Convention, Art. VIII, para. 1) as nothing else than an exception to the regulatory régime established by the Convention — namely as an exception recognized in deference to the traditional notion of sovereign right to engage in hunting whales under the freedom of high-sea fisheries. The Contracting Party which is granted this prerogative under Article VIII is in effect carrying out an important function within this regulatory régime by collecting scientific materials and data required for the promotion of the objectives and purposes of the Convention, such as the New Management Procedure (“NMP”) or the Revised Management Procedure (“RMP”) discussed in the IWC for the proper management of the whaling stocks. It is for this reason that the Contracting Party in question, endowed under the Convention with the discretion

to determine what types of scientific research it intends to conduct and how the research should be implemented, will be subjected to the subsequent process of review and critical comment by its executive organ, the IWC, and more specifically, its scientific subdivision, the Scientific Committee. These are the organs entrusted in this regulatory régime with the task of conducting the process of review and critical comment on these activities, from the viewpoint of achieving the object and purpose of the Convention on the basis of scientific assessment. It is to be noted that there is no provision, either in this Article or in any other part of the Convention, that empowers the IWC or the Scientific Committee legally to restrict the exercise of this prerogative of a Contracting Party to grant special permits in any specific way, except that the granting of special permits has to be “for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit” (Convention, Art. VIII, para. 1). In other words, under this regulatory régime of the Convention the power to determine such questions as what should be the components of the scientific research, or how the scientific research should be designed and implemented in a given situation, is primarily left to the discretionary decision of the granting Government. The Contracting Government is obligated to exercise this discretionary power only for purposes of scientific research in good faith and to be eventually accountable for its activities of scientific research before the executive organs of the Convention, the IWC and the Scientific Committee. These organs have the responsibility to ensure that this will be the case by reviewing and raising critical comments from a scientific point of view.

20. As I stated earlier, this does not mean that the Court, as the judicial institution entrusted with the task of interpreting and applying the provisions of the Convention, has no role to play in this whole process, while paying full respect to the internal autonomy of the Convention. The function of the Court as a court of law gives it the power to interpret and apply the provisions of the Convention from a legal point of view. Given the nature and the specific characteristics of the regulatory framework created by the Convention, however, this power of the Court has to be exercised with a certain degree of restraint, to the extent that what is involved is (*a*) related to the application of the regulatory framework of the Convention, and (*b*) concerned with the techno-scientific task of assessing the merits of scientific research assigned by the Convention to the Scientific Committee.

21. On the first aspect of the problem relating to the application of the regulatory framework of the Convention ((*a*) above, paragraph 20 of this opinion), good faith on the part of the Contracting State, acting as an agent within the framework of this regulatory régime, has necessarily to be presumed. The function of the Court in this respect is to see to it that the State in question is pursuing its activities in good faith and in accor-

dance with the requirements of the regulatory régime for the purposes of scientific research that is conducive to scientific outcomes which would help promote the object and purpose of the Convention. The concrete modalities of the activities for scientific research to be conducted by the State, including the programme's design and implementation, however, should by its nature not be the proper subject of review by the Court. Article VIII expressly grants to the Contracting Government the primary power to decide on this, by providing that

“[n]otwithstanding anything contained in this Convention any Contracting Government may grant . . . a special permit . . . subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit” (Convention, Art. VIII, para. 1).

It clearly grants the State in question the power *prima facie* to determine concrete modalities of research activities to be undertaken under Article VIII, although under this regulatory régime, these modalities, to be determined by the State in question, would be subjected to assessment by the IWC and the Scientific Committee through the review process.

22. Allegations made by the Applicant that the activities were designed and implemented for purposes other than scientific research under the cover of scientific research thus cannot be presumed, and will have to be established by hard conclusive evidence that could point to the existence of bad faith attributable to the State in question. Such serious charges of bad faith, either explicit or implicit, against a sovereign State can never be presumed and should not be accepted by this Court unless the Applicant can establish them by conclusive and indisputable evidence. This is an established principle of international law (see, e.g., *Lac Lanoux Arbitration (France v. Spain)*, *Reports of International Arbitral Awards (RIAA)*, Vol. XII, p. 281). Ulterior motives harboured by some individuals involved in the action, whatever their position may be, if any, should not be treated as relevant in principle, unless it is established by convincing evidence that such motives played the decisive role in formulating and embarking on the programme, constituting the real legal source (*fons et origo*) of the activities undertaken.

23. On the second aspect of the problem relating to the determination of what constitutes activities “for purposes of scientific research” (point *(b)* above, paragraph 20 of this opinion), I do not agree with the approach pursued by the Judgment to distinguish between “scientific research” as such and “[activities] for purposes of scientific research” (Judgment, paras. 70-71). It is true that the Judgment, after spending so many paragraphs (*ibid.*, paras. 73-86) attempting to define what constitutes “scientific research”, seems to have abandoned this effort in the end, rejecting

the criteria advanced by the Applicant on the basis of its expert's testimony. The Judgment nevertheless seems to dwell upon this distinction between "scientific research" and activities "for purposes of scientific research" with a view to establishing that an activity that may contain elements of "scientific research" cannot always be accepted as an activity "for purposes of scientific research". To me such a distinction is so artificial that it loses any sense of reality when applied to a concrete situation. The Court should focus purely and simply on the issue of the scope of what constitutes activities "for purposes of scientific research" according to the plain and ordinary meaning of the phrase.

24. On the question of what constitutes activities "for purposes of scientific research", it must first of all be said in all frankness that this Court, as a court of law, is not professionally qualified to give a scientifically meaningful answer, and should not try to pretend that it can, even though there may be certain elements in the concept that the Court may legitimately and usefully offer as salient from the viewpoint of legal analysis.

25. What is "scientific research" is a question on which qualified scientists often have a divergence of opinion and are not able to come to a consensus view. The four criteria advanced by one of the experts who testified before the Court and relied upon by the Applicant have not been accepted by the present Judgment as a useful framework to determine whether the activities of the Respondent in JARPA/JARPA II are for purposes of scientific research. Nonetheless the Judgment, in applying the test of objective reasonableness as its standard of review, *does* get into the "scientific assessment" of the Court itself on various substantive aspects of JARPA/JARPA II activities, in order to come to its final conclusion that these activities under the programme of JARPA II, especially focusing on the issue of the lethal taking of whales, cannot qualify as activities conducted "for purposes of scientific research", because they cannot be regarded as objectively reasonable according to the scientific assessment of the Court on its own. As the Judgment itself makes clear, the Judgment engages in a substantive assessment of its own on these activities in the name of objectively examining their "reasonableness". The question which immediately arises, however, is "in what context is this reasonableness to be judged?" Is it the legal context or is it the scientific context that the Court claims to be engaged in? If we are speaking of the legal context, the answer is clear. We have the answer in the Convention itself. The Convention leaves this point, at any rate at the level of the law, primarily to the good faith appreciation of the party which undertakes the research in question. If we are speaking of the scientific context, it would be impossible for the Court to establish that certain activities are objectively reasonable or not, from a scientific point of view, without getting into a techno-scientific examination and assessment of the design and implementation of JARPA/JARPA II, a task which this Court could not and should not attempt to do. This is the second reason why the Court should not engage in this exercise. I shall elaborate this point in the following section in connection with the issue of the scope and the standard of review.

V. THE SCOPE OF REVIEW BY THE COURT

26. According to the structure of the Convention as interpreted in light of its object and purpose, the Contracting Parties expressly recognize the need and the importance of scientific research for the purpose of supporting the “system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks” (Preamble, para. 7) as established by the Convention, which “provide[s] for the proper conservation of whale stocks and thus make[s] possible the orderly development of the whaling industry” (*ibid.*, para. 8). It is for this reason that the Conference which was convened for the conclusion of the Convention in 1946 stressed the critical importance of scientific research by scientific organizations engaged in research on whales. In this regard, the statement of its Chair, which makes the following points, is highly relevant:

“it is not our [i.e., the Contracting Parties’] intention or our belief that this commission [IWC] would usurp any of the previous prerogatives . . . of these various scientific organizations that have been engaged in research on whales . . . [W]e are in the main dependent on the factual information and on the work of their staff . . . [T]he Conference should bear in mind the great debt we owe to these research organizations . . .” (Minutes of the Third Session, IWC/20, p. 11, para. 117.)

While Article VIII, paragraph 1, was taken from the language of Article X of the International Agreement for the Regulation of Whaling of 1937, the Chair pointed out that “the two sentences reading, ‘each contracting Government shall report to the Commission all such authorizations which it has been (*sic*) granted’ are new” and that “[t]he remainder of Article VIII stresses the importance of scientific research and encourages dissemination of the resultant information” (Minutes of the Seventh Session, IWC/32 p. 23, paras. 322-323).

27. It becomes evident from what is quoted above that the intention of the Contracting Parties, in agreeing on the language of Article VIII of the Convention, was to provide for the right of a Contracting Government to grant to its nationals special permits to take whales for purposes of scientific research. This is a prerogative given to the Contracting Government by Article VIII of the Convention, and the Contracting Government may take this action without prior consultations with, or approval of, the IWC or its Scientific Committee. This is amply illustrated by the comments of one of the delegates during the drafting process, who suggested a contrary proposal “to require a contracting government to [issue permits for scientific research] *after* consultation with the commission, and not independently of it” (Minutes of the Third Session, IWC/20, p. 11, para. 115; emphasis added). This proposal was not adopted.

28. This of course is not to say that a Contracting Government has unlimited discretion in granting a special permit as an exercise of its sovereign freedom of action. The prerogative recognized under Article VIII is prescribed as part of the Convention, and more specifically as part of the regulatory régime established by the Convention. While in my view the assessment of scientific merits of research activities such as the JARPA/JARPA II programme, including the scientific assessment of their design and implementation, for achieving the purposes of the Convention is a matter assigned specifically to the organs of the Convention, especially the IWC and its Scientific Committee, there are certain aspects of this process of assessment which are to be subjected to the legal scrutiny of the Court in its exercise of its power of review for the interpretation and application of the Convention.

Within this delimited context, it is the role of the Court to examine from a legal point of view whether the procedures expressly prescribed by the regulatory régime of the Convention (i.e., the procedural requirements for the Contracting Party under Article VIII) are scrupulously observed. Without getting into the task of techno-scientific analysis of what should constitute in substance scientific research and without making the concrete assessment of each aspect of the activities involved — a task assigned to the Scientific Committee — the Court can also review whether the activities in question can be regarded as meeting the generally accepted notion of “scientific research” (the substantive requirement for the Contracting Party under Article VIII). This process involves the determination of the standard of review to be applied by the Court.

VI. THE STANDARD OF REVIEW BY THE COURT

29. In determining the standard of review, the Judgment sums up the positions of the Parties in the following manner. First, for the position of the Applicant, the Court states the following:

“According to Australia, the Court’s power of review should not be limited to scrutiny for good faith, with a strong presumption in favour of the authorizing State, as this would render the multilateral régime for the collective management of a common resource established by the ICRW ineffective. Australia urges the Court to have regard to objective elements in evaluating whether a special permit has been granted for purposes of scientific research, referring in particular to the ‘design and implementation of the whaling programme, as well as any results obtained’.” (Judgment, para. 63.)

30. Second, the Judgment juxtaposes this position of the Applicant with the following quotation from the statement of the Respondent in the oral proceedings as representing the position of the Respondent:

“Japan agrees with Australia and New Zealand in regarding the test as being whether a State’s decision is objectively reasonable, or ‘supported by coherent reasoning and respectable scientific evidence and . . . , in this sense, objectively justifiable’.” (Judgment, para. 66.)

31. Based on these two statements of the Parties, the Judgment concludes as its own position on the issue of the standard of review, as follows:

“When reviewing the grant of a special permit authorizing the killing, taking and treating of whales, the Court will assess, first, whether the programme under which these activities occur involves scientific research. Secondly, the Court will consider if the killing, taking and treating of whales is ‘for purposes of’ scientific research by examining whether, in the use of lethal methods, the programme’s design and implementation are reasonable in relation to achieving its stated objectives. This standard of review is an objective one.” (*Ibid.*, para. 67.)

32. With regard to this conclusion of the Judgment on the question of the standard of review, it has to be pointed out that there is a jump in logic in the reasoning between what is summarized as the respective positions of the Parties in paragraphs 63 and 66, and what is stated in this last quoted paragraph 67 as the conclusion of the Court which the Judgment claims to have been drawn from the respective positions of the Parties. In other words, the Judgment, ignoring the differences between the Parties on the question of the scope and the standard of review and without further explanation, would seem to endorse the position of one of the Parties, namely that of the Applicant. In paragraph 67 it declares, almost abruptly and *ex cathedra*, as it were, that the Court will assess “whether, in the use of lethal methods, the programme’s design and implementation are reasonable”, thus employing the formula advanced by the Applicant on the scope of the review and linking it with the standard of review seemingly conceded by the Respondent, as if to suggest that the application of this standard of objective reasonableness had been accepted as the common ground among the Parties in relation to the overall scope of the review, whereas, in reality, there was a wide difference of position between the Parties, especially in relation to the scope of the review. It has to be said that this conclusion as formulated by the Judgment is clearly a gross misrepresentation of what each of the Parties was prepared to accept as a common ground for the scope and the standard of review to be applied in the present context.

In the course of deciding that the Judgment, for whatever reason that has not been explained, is going to apply the yardstick that the programme must be objectively reasonable as the standard of review, the Judgment brings in to this process an entirely new element of “design and implementation” of the whaling programme (*ibid.*, para. 67), which relates to the scope of the review. This is an element which the Applicant

has been insisting on introducing in support of its contention. The Judgment provides no explanation as to why it is legitimate or appropriate for the Court to expand the scope of the review by engaging in the examination of these substantive aspects of the JARPA II programme.

33. A careful examination of the arguments of the Parties as developed through the written and oral proceedings in the present case reveals that the genesis of this standard of review would appear to derive its origin from the jurisprudence of the Appellate Body of the World Trade Organization (WTO), which has had to face a number of cases which involve the issue of judicial review of sovereign decisions of member States over scientifically controversial issues, as one of the Parties noted in its pleadings.

34. When one examines more closely the quoted jurisprudence of the WTO Appellate Body in its context, it becomes clear that this general proposition in favour of the test of objective reasonableness, has its basis in the Appellate Body's carefully reasoned argument for the demarcation line to be drawn between science and law in the context of the judicial review of a situation where there is no clear-cut consensual or even majority view of scientists on which jurists can rely. The rationale of the decision in question, which came before the WTO Appellate Body at the final phase of the *Continued Suspension of Obligations in the EC-Hormones Dispute* (United States) case (hereinafter "*EC-Hormones*"), illustrates this point. It is my view that the present Judgment takes this magic formula of objective reasonableness out of the context in which this standard was employed and applies it somewhat mechanically for our purposes, without giving proper consideration to the context in which this standard of review was applied.

35. The Respondent tried to clarify its position on the issue of the standard of review by explaining how this standard of objective reasonableness could be relevant to the present case, in the following words:

“Yes: the Court can ask, could a reasonable State regard this as a properly-framed scientific inquiry? But it can no more impose a line separating science from non-science than it could decide what is and what is not ‘Art’. In Japan’s view, *the correct question is, could a State reasonably regard this as scientific research?*”

That is why Japan agrees with Australia and New Zealand in regarding the test as being whether a State’s *decision is objectively reasonable, or ‘supported by coherent reasoning and respectable scientific evidence and... in this sense, objectively justifiable’.*” (CR 2013/22, p. 60, paras. 20-21 (Lowe); emphasis added.)

What this part of the argument of the Respondent is relying on is the quotation, word-for-word, from the decision of the WTO Appellate Body in the final phase of the *EC-Hormones* case. It is for this reason important to examine the precise context in which this quoted passage appears.

36. The decision of the WTO Appellate Body contained in its final Report of 16 October 2008, reviewing and setting aside the earlier decision of its Dispute Settlement Panel, states as follows:

“[S]o far as fact-finding by [the WTO] panels is concerned, the applicable standard is ‘neither *de novo* review as such, nor ‘total deference’, but rather the ‘objective assessment of facts’ . . .

It is the WTO Member’s task to perform the risk assessment. The panel’s task is to review that risk assessment. Where a panel goes beyond this limited mandate and *acts as a risk assessor*, it would be substituting its own scientific judgment for that of the risk assessor and making a *de novo* review and, consequently, would exceed its functions under Article 11 of the [Dispute Settlement Understanding of the WTO]. Therefore, *the review power of a panel is not to determine whether the risk assessment undertaken by a WTO Member is correct, but rather to determine whether that risk assessment is supported by coherent reasoning and respectable scientific evidence* and is, in this sense, objectively justifiable.” (WT/DS320/AB/R, p. 246, paras. 589-590; emphasis added.)

Here we find a well-defined exposé of the essential rationale for the standard of review developed in the jurisprudence that the Respondent quotes in agreeing to the test of objective reasonableness. The Appellate Body decision is very specific in clarifying that “a panel may not rely on the experts to go beyond its limited mandate of review” and that

“[t]he panel may seek the experts’ assistance in order to identify the scientific basis of the . . . measure [taken] and to verify that this scientific basis comes from a qualified and respected source, irrespective of whether it represents minority or majority scientific views” (*ibid.*, p. 247, para. 592).

37. Despite the difference that these two cases — one being before the Appellate Body of the WTO, the other being before the ICJ — represent in terms of the law applicable, in the nature of the issue involved and in the context in which the dispute arose, as well as the obvious fact that the WTO decision cannot in any sense constitute a precedent for our purposes, there is nevertheless one common element to which this Court could pay regard. It is the point that when a court of law or a judicial body is engaged in the legal assessment of a scientific matter where scientists hold divergent views, the judicial institution is under an intrinsic limitation on its power and must not exceed its competence as the administrator of the law, by straying into an area which lies beyond its delimited function. Thus under the system in which the judicial body’s task is to review the risk assessment conducted by a member State endowed with

that power and, to use the expression employed in the WTO jurisprudence,

“[w]here [that body] goes beyond this limited mandate and acts as a risk assessor, it would be substituting its own scientific judgement for that of the risk assessor and making a *de novo* review and, consequently, would exceed its functions” (WT/DS320/AB/R, p. 246, para. 590).

It is my view that it was in this sense and in this context that the jurisprudence of the WTO decision can be a useful point of reference for this Court in the present case, where the function of the Court “is not to determine whether the . . . assessment undertaken by a WTO Member is correct, but rather to determine whether that . . . assessment is supported by coherent reasoning and respectable scientific evidence and is, in this sense, objectively justifiable” (*ibid.*).

38. In my view, the Judgment has erred in its approach by taking this standard of objective reasonableness out of its context, and by mechanically applying it for the opposite purpose, that is, for the purpose of engaging the Court in making a *de novo* assessment of the activities of the Respondent, when that State is given the primary power under the Convention to determine what should be the modalities of activities for pursuing scientific research and to grant special permits for purposes of scientific research. This discretion given to the State issuing the permit is subject to the process of review and critical comment by the Scientific Committee and by the IWC in accordance with the regulatory framework of the Convention.

39. The concept of “reasonableness” appears from time to time in the jurisprudence of this Court in some of its past decisions. In my view, however, it is not possible nor useful to try to apply this concept of “reasonableness” in a general way as the standard of substantive assessment. No one would dispute the validity of this concept as such, which like the concept of “fairness”, is one of the basic principles of international law, or for that matter of law in general, but its concrete interpretation and application as a standard of review will depend entirely upon the context in which the term is to be applied. It is not a standard for substantive assessment, but a yardstick for ascertaining whether a decision or an action is or is not “arbitrary” or patently “out of bounds”.

In the case concerning *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, the Court referred to the contention of the Applicant (Costa Rica) which argued that the way the Respondent (Nicaragua) restricted Costa Rica’s navigational rights on the San Juan River was “not reasonable”. The Court clarified the character of this concept in the following way:

“The Court notes that Costa Rica, in support of its claim of unlawful action, advances points of fact about unreasonableness by referring to the allegedly disproportionate impact of the regulations. The Court recalls that in terms of well established general principle it is

for Costa Rica to establish those points (cf. *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 86, para. 68, and cases cited there). Further, a court examining the reasonableness of a regulation must recognize that *the regulator, in this case the State with sovereignty over the river, has the primary responsibility for assessing the need for regulation and for choosing, on the basis of its knowledge of the situation, the measure that it deems most appropriate to meet that need. It will not be enough in a challenge to a regulation simply to assert in a general way that it is unreasonable. Concrete and specific facts will be required to persuade a court to come to that conclusion.*" (*I.C.J. Reports 2009*, p. 253, para. 101; emphasis added.)

40. The position of the Respondent in the present case is analogous in law to that of the respondent under the 1858 Treaty of Limits in the case concerning *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*. The dictum of this Court in the latter case should be applicable to the situation in the present case.

VII. APPLICATION OF THE STANDARD OF REVIEW IN THE PRESENT CASE

41. Having thus clarified the scope and the standard of review to be applied by the Court in reviewing the JARPA II activities under Article VIII, I shall refrain from engaging myself in the exercise of refuting the conclusions of the Judgment resulting from its substantive assessment of each of the concrete aspects of the design and implementation of the JARPA II programme, in order to ascertain whether they can be regarded as objectively reasonable, as the Judgment has tried to do in Section II, subsection 3.B (Judgment, paras. 127-227). I do so refrain, because in my view to engage oneself in this exercise would be doing precisely what the Court should not have done under the Convention in light of the essential character of the Convention so clearly manifested in its object and purpose, and in particular in light of the legal structure of the regulatory régime created under the Convention, as well as, most importantly, in view of the intrinsic limitation inherent in the power of the Court as a legal institution empowered with review in the present context.

42. Nevertheless, I wish to draw the attention of the Court to one point of law which relates to a question of principle involved throughout the substantive assessment of the programme of JARPA II by the Judgment in its subsection 3.B. My critical comments relate to the methodology that the Judgment employs in applying the standard of objective reasonableness in assessing the concrete activities of JARPA II conducted under Article VIII of the Convention. In my view, the ordinary and plain meaning of Article VIII makes it clear that the Contracting Government

has the primary power to grant special permits authorizing to kill, take and treat whales for purposes of scientific research. There is a presumption — a strong, though rebuttable, presumption — that the granting Government, in granting the permits, has made this determination not only in good faith, but also in light of a careful consideration that the activities are carried out for purposes of scientific research. As I have repeatedly emphasized, the function of the Court, engaged in the judicial review of the exercise of power by the Contracting Government, is to assess whether this determination of the Contracting Government in question is objectively reasonable, in the sense that the programme of research is based upon a coherent reasoning and supported by respectable opinions within the scientific community of specialists on whales, even if the programme of research may not necessarily command the support of a majority view within the scientific community involved.

43. In particular, with regard to the issue of lethal taking of whales, which forms the central theme in the assessment in the Judgment of whether the programme in its design and implementation can be regarded as objectively reasonable, the Judgment appears to be applying the standard of objective reasonableness in such a way that it is the granting party that bears the burden of establishing that the scale and the size of the lethal take envisaged under the programme is reasonable in order for the programme to be qualified as a genuine programme “for purposes of scientific research”.

44. To place the onus of meeting such a stringent requirement upon the party granting the special permits in accordance with the provisions of the Convention cannot be in consonance with the plain and ordinary meaning of Article VIII, which provides for an unqualified right of the Contracting Party to “grant . . . special permit[s] authorizing . . . to kill, take and treat whales for purposes of scientific research” as part of the regulatory régime created under the Convention.

45. In the context of the present dispute, and applying the standard of objective reasonableness used by the Judgment as the yardstick for determining whether the activities were “for purposes of scientific research”, it should be the Applicant, rather than the Respondent, who has to establish by credible evidence that the activities of the Respondent under JARPA II cannot be regarded as “reasonable” scientific research activities for the purposes of Article VIII of the Convention. Under the Convention, the Respondent is given the presumptive power to grant permits for activities for purposes of scientific research. In my view, the Applicant has failed to establish that the activities carried out pursuant to JARPA II are not “reasonable” scientific activities.

46. It is my belief that, in fact, the activities carried out pursuant to JARPA II can be characterized as “reasonable” activities for purposes of scientific research. It may well be that JARPA II is far from a perfect programme, but the evidence presented to the Court has clearly shown that it provides some useful scientific information with respect to minke

whales that has been of substantial value to the Scientific Committee. By way of demonstrating the scientific value of JARPA/JARPA II activities, the Chair of the Scientific Committee stated in 2007 that “[t]he Japanese input into cetacean research in Antarctica is significant, and I would say crucial for the Scientific Committee” (Counter-Memorial of Japan, Ann. 207, Vol. IV, p. 387). It should be pointed out that a major review of JARPA II by the IWC is expected to take place this year (2014) and therefore a fully-fledged evaluation of the programme is premature (which is another reason for the Court not to pass hasty judgment). Although a specific assessment on the contribution of the scientific research conducted by the programme is not yet available for JARPA II itself, the Report of the IWC Intersessional Workshop to Review Data and Results from JARPA, which is in many respects substantively similar to JARPA II, expressed the positive appreciation of the JARPA programme in the following words:

“The results from the JARPA programme, while not required for management under the RMP, have the potential to improve management of minke whales in the Southern Hemisphere in [two] ways . . . The results of analyses of JARPA data could be used . . . perhaps to increase the allowed catch of minke whales in the Southern Hemisphere, without increasing depletion risk above the level indicated by the existing *Implementation Simulation Trials* of the RMP for these minke whales.” (Report of the Intersessional Workshop to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic, Tokyo, 4-8 December 2006; Counter-Memorial of Japan, Ann. 113, Vol. III, p. 201; emphasis in the original.)

In other words, this IWC Intersessional Workshop Report expressed the view that the JARPA programme can provide valuable statistical data which could result in a reconsideration of the allowed catch of minke whales under the RMP.

47. What is referred to in this Report is precisely the type of data that was envisioned as useful by the Convention. Article VIII of the Convention “[r]ecogniz[es] that continuous collection and analysis of biological data in connection with the operations of factory ships and land stations are indispensable to sound and constructive management of the whale fisheries” and states that “the Contracting Governments will take all practicable measures to obtain such data” (Art. VIII, para. 4). Article V of the Convention further states that amendments to the Schedule “shall be based on scientific findings” (Art. V, para. 2), and the text of the moratorium itself notes, as stated earlier, that it “will be kept under review, based upon the best scientific advice” (Schedule, para. 10 (*e*)).

48. In light of this evidence given with the authority of the findings of the Scientific Committee that the JARPA activities provided some of the

very data that the drafters of the Convention found to be “indispensable to sound and constructive management of the whale fisheries” (Art. VIII, para. 4), it is difficult to see how the activities of JARPA and its successor, JARPA II, could be considered “unreasonable.”

VIII. CONCLUSION

49. By way of conclusion, it should be emphasized that the sole and crucial issue at the centre of the present dispute is whether the activities under the programme of JARPA II are “for purposes of scientific research”. The issue is not whether the programme of JARPA II has attained a level of excellence as a project for scientific research for achieving the object and purpose of the Convention, which is a matter to be considered and examined by the Scientific Committee. It may also be true that the JARPA II programme is far from being perfect for attaining such an objective and may need improvements to achieve that purpose. Such criticism of JARPA II could appropriately be valuable in the review process, with a view to remodelling or redesigning these activities in accordance with what the regulatory framework of the Convention prescribes, but this cannot be the ground for the Court to declare that the activities of the programme are unreasonable for purposes of scientific research. Even if JARPA II contained some defects as a programme for purposes of scientific research, that fact in itself would not turn these activities into activities for commercial whaling. It certainly could not be the reason for this Court to rule that “Japan shall revoke any extant authorization, permit or licence granted in relation to JARPA II” (Judgment, operative part 7, para. 247).

(Signed) Hisashi OWADA.

DISSENTING OPINION
OF JUDGE ABRAHAM

[Traduction]

Agreement with Judgment's operative paragraph in its dismissal of Japan's objection to jurisdiction — Disagreement with Court's reasoning dismissing second limb of Australian reservation — Agreement with statement that Article VIII of the Convention must be interpreted neither restrictively nor expansively — Definition of "scientific research" given by Australia's expert rightly rejected — Disagreement with Court's objective standard, since the phrase "for purposes of" necessarily requires examination of aims pursued — Wrongful underlying unfavourable presumption against Japan — No manifest mismatch in this case between JARPA II's stated aims and means used — Similarly, sample size not manifestly excessive — Disagreement with finding in point 2 of operative paragraph that special permits granted by Japan in connection with JARPA II do not fall within the provisions of Article VIII, paragraph 1, of the Convention — Consequent disagreement with points 3, 4, 5 and 7 of operative paragraph.

1. I voted in favour of point 1 of the operative paragraph, in which the Court decides that it has jurisdiction to entertain the Application filed by Australia against Japan. But I voted against points 2 to 5, where the Court states that Japan has been in breach of various substantive obligations under the 1946 Convention for the Regulation of Whaling (hereinafter "the Convention"), in consequence of the fact that, according to the Judgment, the whaling programme known as "JARPA II", carried out by Japan in the Antarctic from 2005, was not genuinely conducted — notwithstanding the Respondent's assertions — "for purposes of scientific research" within the meaning of Article VIII of the Convention. As a result, I have also been unable to approve the measures which Japan is required to take under point 7 of the operative paragraph in order to make good the breaches found by the Court.

2. While I share the Judgment's conclusion on the issue of jurisdiction, I am not convinced by the reasoning followed in order to reach it. On this point, I would certainly describe my disagreement as minor. I will, however, explain the reasons for it below (I). On the merits, on the other hand, I regret to have to say that I am in profound disagreement with the overall approach adopted by the Court, and with the basic scheme of its reasoning: I believe that its approach is misconceived. I shall explain why (II).

I. JURISDICTION

3. Australia seized the Court on the basis of the declarations of acceptance of the latter's compulsory jurisdiction made by Australia and Japan on, respectively, 22 March 2002 and 9 July 2007. Japan has challenged the Court's jurisdiction in reliance on one of the reservations to Australia's declaration of acceptance, namely reservation (*b*).

4. There was no discussion between the Parties — and there could not seriously have been one — regarding the well-established rule that the respondent in a case is entitled to rely on a reservation by the applicant in the instrument whereby the latter accepted the Court's jurisdiction, invoking that reservation against its author with a view to having the Court decline jurisdiction.

5. It was over the scope, in other words the interpretation, of the Australian reservation that the debate took place. The Court found that the reservation was not applicable in the present case. I agree. However, the Court reached its decision on the basis of an interpretation of the reservation which I find highly questionable.

6. In truth, the reservation is not a model of clarity. It has two limbs, linked by the conjunction “or”. The first is relatively clear, seeking to exclude the Court's jurisdiction in respect of “any dispute concerning or relating to the delimitation of maritime zones including the territorial sea, the exclusive economic zone and the continental shelf” — which I would translate into French (only the English text is authentic) by: “tout différend concernant, ou se rapportant à, la délimitation de zones maritimes, y compris la mer territoriale, la zone économique exclusive et le plateau continental”. The Parties agree: the dispute submitted to the Court did not concern, or relate to, the delimitation of maritime zones — meaning that such a delimitation did not constitute the actual subject-matter of the dispute, and no such delimitation was being requested of the Court. That is perfectly clear.

7. The second limb of the reservation is a lot less clear, and it is on this one that Japan relied.

It excludes from the Court's jurisdiction any maritime dispute “arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation”, which could give in French: “[différend] découlant de, concernant, ou se rapportant à l'exploitation de tout espace disputé relevant d'une telle zone maritime ou adjacente à une telle zone dans l'attente de la délimitation de celle-ci”.

8. Japan has sought to persuade the Court to apply this second limb of the reservation in a strictly literal way.

It argues that the dispute between the Parties arises out of the implementation of a whaling programme, and hence of the “exploitation” of a specific maritime area — that where the activities authorized under JARPA II are being conducted. The word “exploitation” is said to be

peculiarly appropriate, given the view of the case taken by Australia (which maintains that these are activities carried out for commercial ends) — as opposed to the position taken by Japan, for whom this is indeed a scientific research programme.

Furthermore, at least part of the maritime areas in which JARPA II is being conducted is claimed by Australia as its exclusive economic zone, generated by the portion of Antarctic territory that it also claims. That claim is still pending, and no delimitation has been effected — nor can it be effected, thanks to the 1959 Antarctic Treaty, which freezes for an indefinite period all territorial claims over the Antarctic. The precise extent of Australia's maritime claims was not established during the debate, but Australia has never denied the existence of those claims, nor the fact that they encompass maritime areas which coincide, at least in part, with those where whaling activities under JARPA II are conducted.

In short, Japan claims that the dispute before the Court arises out of the exploitation of maritime zones which are the subject of a dispute as to whether they form part of Australia's exclusive economic zone, which has not yet been delimited in that area, and that the Australian reservation, taken literally, is accordingly applicable.

9. In order to reject that literal interpretation, in which, in my view, it was correct, the Court has relied on two grounds, one of which is presented as essential, while the other appears to be redundant.

As main ground, the Judgment finds that there are no overlapping claims by Australia and Japan in respect of the maritime areas covered by JARPA II. However, according to the Court, “[t]he existence of a dispute concerning maritime delimitation between the parties is required according to both parts of the reservation” (paragraph 37 of the Judgment). In other words, a necessary condition for the application of the second limb of the reservation, on which Japan relies, is that the Parties to the proceedings have overlapping claims on the maritime areas in which the “exploitation” underlying the dispute is taking place — and that condition is absent here.

Redundantly, the Judgment further finds that “[t]he nature and extent of the maritime zones are . . . immaterial to the present dispute” (para. 40), which means that, in order to decide the case, it is unnecessary for the Court to rule on the question of which State — if any — has sovereign rights over the maritime areas in question.

10. In my view the Court would have been better advised to rely solely on the second of these grounds, which is necessary and sufficient in this case to justify its jurisdiction.

11. The first ground relied on by the Court, and which is clearly presented as the main one, rests, in my view, on a highly questionable and unnecessarily restrictive interpretation of the Australian reservation.

That reservation, as we have seen, contains two distinct limbs, although these are to some extent interlinked.

12. The first limb, which relates to disputes concerning the delimitation of maritime zones, undoubtedly presupposes, in order to be applicable, the existence of overlapping claims by the parties in question over the same areas; the Court is denied jurisdiction to entertain a maritime delimitation dispute between Australia and another State.

13. On the other hand, nothing in the language of the second limb, or in its underlying logic, justifies the conclusion that it can only apply where there are overlapping claims in respect of the same maritime areas by two States parties to the proceedings.

This second limb may reasonably be understood as intended (also) to exclude from the jurisdiction of the Court disputes which, without being directly related to maritime delimitation, would require the Court to take a position — incidentally — on the nature and extent of Australia's maritime zones, since the subject-matter of such disputes would be the exploitation of a maritime area in respect of which there was a pending dispute as to whether it formed part of such a zone. In short, Australia does not wish the Court to rule either directly (first limb of the reservation) or indirectly (second limb), on the limits of its maritime zones.

However, unlike the first limb, there is no reason — either in the text or in terms of logic — that the second limb of the reservation could apply only if both Parties to the case had overlapping claims to the maritime areas concerned. Indeed, one can perfectly well conceive of a situation where settlement of a dispute between Australia and another State relating to the exploitation of a maritime zone claimed by Australia would incidentally lead the Court to determine whether the Australian claim was well-founded. In such a case, the second limb of the reservation would, in my view, be applicable.

14. I accordingly take the view that, while it is true that the two limbs of the reservation, which constitute a unity, must be read in conjunction with one another — the reason that the Court correctly rejected the strictly literal interpretation proposed by Japan — the Judgment pushes that unity too far when it holds that the second limb can, like the first, apply only in a case of overlapping maritime claims.

That is a restrictive interpretation which is all the more regrettable in that the Court could have avoided it by basing itself solely on its second ground, which is incontrovertible and sufficient for purposes of the present case, while leaving any other issue open — always assuming that the Court wished to remain cautious in its approach.

* * *

II. THE MERITS

15. On the merits, my disagreement with the Judgment is a great deal more fundamental.

16. The case presented itself to the Court in relatively simple terms.

The Court had to answer a basic question, which, to all intents and purposes, governed the solution of the case: were the special whaling permits granted by Japan from 2005 under the JARPA II programme issued “for purposes of scientific research” within the meaning Article VIII of the 1946 Convention?

If so — which, in my view, is the answer that the Court should have given — that would necessarily have resulted in the dismissal of virtually all of Australia’s claims.

If not — which was the response that the Court felt was correct — then, on the contrary, the only result could be broad acceptance of the Australian claims.

17. The heart of this case thus hinged on the interpretation of the words “for purposes of scientific research”, and it is primarily on this point that I part company with the majority of my colleagues.

18. However, it is not Article VIII of the Convention which lays down the rules that Japan was accused by Australia of having broken. In itself, Article VIII imposes no obligation on States parties (with the exception of the procedural obligations to inform the Commission and the body designated by it of the permits granted, and of the results of the scientific research conducted under those permits). The purpose of Article VIII is not to impose additional obligations on States but to exempt them, in respect of authorized whaling activities falling within its terms, from obligations under the other provisions of the Convention (including the Schedule annexed thereto). The substantive obligations which Australia alleges to have been breached by Japan are to be found in paragraph 10 (*e*) of the Schedule annexed to the Convention (which establishes a moratorium on “commercial” whaling), in paragraph 10 (*d*) of that same Schedule (which establishes a moratorium on the use of factory ships), and in paragraph 7 (*b*) (which prohibits commercial whaling within the Southern Ocean Sanctuary).

19. The reason why paragraph 1 of Article VIII plays such a decisive role in this case is that, if whaling permits granted by Japan under JARPA II are not for the purposes of scientific research, as Japan has repeatedly claimed that they are, then it follows inevitably that the activities conducted thereunder violate the three provisions (or prohibitions) cited above. It has indeed been established that whaling under JARPA II is conducted, *inter alia*, with factory ships, so that — if it is not covered by the general exemption in Article VIII — it breaches the prohibition in paragraph 10 (*d*) of the Schedule in respect of certain species of whale taken by Japanese whalers. Moreover, neither Australia nor Japan has argued that whaling authorized under JARPA II could be for a purpose which is neither of a scientific nor of a commercial nature; it follows that, if such activities are not genuinely conducted “for purposes of scientific

research” — as Australia has maintained — then they constitute a breach both of paragraph 10 (*e*) and of paragraph 7 (*b*).

20. In paragraph 229 of the Judgment the Court accepts this postulate — which Japan itself has not disputed — and states, in paragraphs 231, 232 and 233, that “all whaling that does not fit within Article VIII of the Convention (other than aboriginal subsistence whaling) is subject to” paragraphs 10 (*e*), 10 (*d*) and 7 (*b*) of the Schedule. I agree with this statement — if not in the general terms in which the Judgment expresses it, on the basis of a somewhat questionable interpretation of the Convention — at least in the circumstances of the present case, and thus, certainly, for purposes of resolving the dispute before the Court.

21. My view is that Australia has failed to show that Japan is not genuinely pursuing, under JARPA II, the scientific aims that it claims to be pursuing (from Australia’s standpoint, one might even say: “that it pretends to be pursuing”).

22. I will begin by setting out the points on which I am not in disagreement with the position taken by the Judgment, before going on to explain where I essentially disagree.

23. First, my position is not based on the existence of a purported “discretionary power” of the State granting special permits to determine whether the authorized activities are indeed “for purposes of scientific research”. It is true that the actual language of paragraph 1 of Article VIII does appear to give the State in question a measure of discretion: it is never required to grant a permit, and is free (in any event from the standpoint of international law) to refuse any request from an individual or a body, irrespective of the interest of the research envisaged; if it does grant a permit, it may make it subject to such conditions as it thinks fit; it may “at any time” revoke a permit granted, and enjoys discretionary power in that regard — again from the standpoint of international law, for domestic law may place certain restraints upon it.

On the other hand, in terms of characterizing a whaling programme as being “for purposes of scientific research” within the meaning of Article VIII — the essential condition to which that provision subjects the grant of special permits — one cannot speak of a discretionary power of the State. It is true that, when deciding on a request for a special permit, the State must necessarily make a determination as to the scientific value of the project for the implementation of which the permit is requested. But that power of determination is not a sovereign one: it is made subject not only to supervision by the bodies set up by the Convention, but also, if a dispute on the issue is brought before a judicial body having the relevant jurisdiction, to judicial oversight.

In that regard, I have no objection to what the Court states in paragraphs 59 to 61 of the present Judgment.

24. Nor does my disagreement relate to the cautious way in which the Court has addressed the notion of “scientific research” in the sense of Article VIII.

In my view the Court was correct in avoiding laying down a general, abstract definition of that notion. More particularly, it was correct in refusing to accept the four criteria proposed by Australia on the basis of the report by one of the experts retained by it, Professor Mangel: scientific research must have defined objectives based *inter alia* on verifiable hypotheses; it may only, in the context of the Convention, include the use of lethal methods if its objectives cannot be achieved by any other means; it must be periodically subject to peer review, and if necessary be modified in light of that review; it should endeavour to avoid adverse effects on the stocks studied.

As paragraph 86 of the Judgment quite correctly states, “[t]hese criteria appear largely to reflect what one expert regards as well-conceived scientific research, rather than serving as an interpretation of the term as used in the Convention”.

25. Furthermore, I essentially approve of the way in which the Court has analysed the objective and purpose of the Convention, in the light of which Article VIII must be interpreted, and the conclusion which it draws, namely that “neither a restrictive nor an expansive interpretation of Article VIII is justified”, since the aim of the Convention is both to ensure the conservation of whale stocks and to make possible the orderly development of the whaling industry (paras. 56 to 58).

26. Finally, I agree with the Judgment when it points out that “a State often seeks to accomplish more than one goal when it pursues a particular policy”, and that, “[a]ccordingly . . . whether particular government officials may have motivations that go beyond scientific research does not preclude a conclusion that a programme is for purposes of scientific research within the meaning of Article VIII” (para. 97). In other words, it is possible that Japan, in designing JARPA II, was also sensitive to the possible positive fall-out of the programme for industrial and commercial activities: that does not suffice to disqualify it under Article VIII as a scientific research programme. On the other hand, if the scale of the programme was manifestly unreasonable, that would tend to show that — in part at least — it is not pursuing exclusively scientific objectives, and — to that extent in any event — is not covered by Article VIII (I will return later to this latter point).

27. I now come to the statement of the reasons why I cannot subscribe to the essential elements of the reasoning followed by the Court and, hence, to its final conclusion.

28. First of all, I believe that, in a case like the present one, the Respondent should enjoy a quite strong presumption in its favour.

I am not, as a rule, in favour of excessively rigid rules in relation to the burden of proof, and I have never taken the view that the burden of proof should, in principle, be borne exclusively by the applicant. But there are instances where the Court is entitled to take a particularly demanding stance in relation to a party putting forward certain allegations. That is particularly so where one of the parties claims that the other is acting in bad faith, since there is a generally accepted presumption of good faith. However, in the present case, it is clear that the accusations levelled by Australia at Japan are fundamentally based on the notion that, in designing and implementing JARPA II, Japan acted in bad faith, in that it concealed the pursuit of commercial interests behind the outward appearances of a scientific research programme.

It is true that the Judgment refrains from ruling on the issue of good faith, and even states that this is an issue that it need not address, like all “other arguments invoked by Australia” on an alternative basis (para. 243).

However, while bad faith is expressly pleaded in Australia’s alternative arguments, it is also present, implicitly but necessarily, in the argument developed by it as principal claim.

I do not see how one can conclude that a whaling programme presented as being of a scientific nature, proposing scientific objectives and implemented with scientific methods, and which has duly been communicated as such to the Scientific Committee set up by the International Whaling Commission, and whose results have been published, has not been implemented “for purposes of scientific research”, but “for commercial purposes”, which is the Australian thesis as endorsed by the Court, without at least casting doubt — if only implicitly — on the good faith of the Respondents. When the Court states that it need not address Australia’s charge of bad faith against Japan, it seems to me that this is more a matter of formal presentation than of the reality.

29. Admittedly, since the presumption of good faith is not irrebuttable, what I have just said is not sufficient to show that the Court is wrong in its conclusion that special permits granted by Japan under JARPA II were not issued “for purposes of scientific research”.

However, in order seriously to support such a finding, the Court would, in my view, have needed particularly solid evidence, which was not apparent from the debate, and it was by contrast on the basis of weak arguments, and sometimes mere doubts, suppositions or approximations, that the Court felt able to accept Australia’s claims.

30. The truth is that the Court’s final conclusion was favoured by two aspects of its approach which strike me as particularly open to criticism.

31. First, far from placing the burden of proof on Australia, the Court consistently showed itself particularly demanding towards Japan, as if it was the Respondent that had to prove that it was in the right. From start to finish, the Judgment gives the impression that it is from Japan that explanations, proofs and justifications are expected.

Thus, for example, on the essential issue of sample size, the Judgment states that the task of the Court is

“to examine *whether Japan*, in light of JARPA II’s stated research objectives, *has demonstrated* a reasonable basis for annual sample sizes pertaining to particular research items, leading to the overall sample size of 850 (plus or minus 10 per cent) for minke whales” (para. 185; emphasis added),

before going on to conclude (para. 198) that the evidence — meaning, of course, that put forward by Japan — “provides scant analysis and justification for the underlying decisions that generate the overall sample size”, which “raises further concerns about whether the design of JARPA II can be said to demonstrate on an objectively reasonable basis that it is a project for purposes of scientific research”. In other words, it is Japan that is expected to show that the sample size (the authorized whale take) is proportionate to the stated objectives, and any doubt in this regard is held against it.

32. Secondly, and still more fundamentally, the Court has adopted a methodology which, to say the least, is unconvincing.

Explaining the method which it intends to follow in order to determine whether or not a programme is “for purposes of scientific research” within the meaning of paragraph 1 of Article VIII, the Court indicates that the main issue in this case relates to the expression “for purposes of”. It is not sufficient that a programme includes elements of scientific research; it must also be designed and implemented “for purposes of” such research. So far, I can follow, and find nothing to object to. But the Judgment then goes on to give this phrase (“for purposes of”) a meaning and scope which seem to me to depart from the ordinary sense of the words.

In my view, “for purposes of” relates to the intention, the ends sought, the aims really pursued (which may be different from those stated). Not according to the Judgment. The Court insists, on the contrary, that its standard is an “objective” one (para. 67), in other words that it is not setting out to discover Japan’s real intentions, to ascertain the reality of the aims pursued behind the outward appearances. And it explains — in paragraph 88, which is an essential link in its reasoning — that a programme can only be regarded as “for purposes of” scientific research if “the elements of [its] design and implementation are reasonable in relation to its stated scientific objectives”; it adds that, in order to determine whether these are reasonable, several elements need to be taken into account, including the scale of lethal sampling, the methodology used to select sample size, a comparison of target sample sizes and actual take, the time frame, and the programme’s scientific output, as well as the extent of co-ordination with related search projects.

33. At this point, I really have difficulty in following.

The extent to which the methods used match the aims pursued is certainly of assistance in assessing the quality of a scientific research programme. In this regard, all of the elements mentioned in paragraph 88 are doubtless relevant. But I do not see how one could conclude, from the fact that a programme might be criticized in terms of the appropriateness of the methods specified in light of its stated objectives, that such a programme is not conducted “for purposes of” scientific research — particularly if one has been at pains to make it clear that it is not the subjective intentions of the State in question that it is being sought to ascertain, and that a strictly “objective” approach is being applied. Even though the Court states that it is confining its examination to what is “reasonable”, it is launching itself, at this stage of its reasoning, on a path which leads it to depart from its role and to assess the scientific value of JARPA II, rather than seeking to ascertain the latter’s nature — and the rest of the Judgment amply confirms this.

34. In my view, the Court should have adopted an altogether different approach.

JARPA II is presented as a scientific research programme approved by Japan. It has objectives, which are set out by the Judgment in paragraphs 109 ff., and whose value is nowhere challenged by the Court; it involves the implementation of methods which are of a scientific nature — as the Judgment recognizes, when it states that “the JARPA II activities involving the lethal sampling of whales can broadly be characterized as ‘scientific research’” (para. 127); it was properly submitted for examination to the Scientific Committee before the issue of the first permit, as the Court recognizes in that part of the Judgment in which it rejects Australia’s request for a finding that Japan failed to comply with its obligations under paragraph 30 of the Schedule (see paragraph 238).

Accordingly, I believe that the permits granted under JARPA II should have been presumed to have been issued “for purposes of scientific research” — for a State’s word cannot lightly be challenged, and its good faith must be presumed until proof of the contrary — and only very strong evidence could have justified a finding unfavourable to the Respondent.

35. I consider that the Judgment does not demonstrate the existence of such evidence.

In my view, there are only two scenarios which could justify a finding that a programme, officially presented as being “for purposes of scientific research”, and which has at least every appearance of such a programme, does not fall within the terms of Article VIII. The first scenario is where it is apparent that there is clearly no reasonable relationship between the stated objectives and the means used, such that those means are manifestly unsuitable for achieving those objectives — from which it may be concluded that the programme is not genuinely seeking to achieve its stated objectives. The second scenario is where the sample size set by the programme is manifestly excessive in light of research needs, having regard to the programme’s stated objectives, from which it may be

concluded that, in respect of at least a proportion thereof, the authorized whale take was set for reasons, or for purposes, that are non-scientific (and thus, in all probability, commercial ones).

36. In my view the Court has failed to show that either of these scenarios is present here.

It is clear that the Court has taken a particularly demanding line towards the Respondent, since it appears to have raised a negative presumption against it, deriving from what might be termed “suspicion”, and has relied on grounds which in my view are too weak, and has at times expressed itself more as a scientific committee would, rather than as a judicial body should have done.

37. Between paragraphs 128 and 222, the Court sets out a number of reasons which lead it to conclude, in paragraph 227, that “the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II” are not issued “for purposes of scientific research” pursuant to Article VIII, paragraph 1, of the Convention”.

None of these reasons is truly convincing in itself, and, while, cumulatively, they may give an impression of weight, that is ultimately not convincing either.

38. Japan is criticized (paras. 141 and 144) for not having carried out studies of the feasibility of non-lethal methods, which might — to some extent — have replaced lethal methods under JARPA II, or rather for not having proved to the Court that it had done so. That is possibly so, but, in the first place, in paragraph 83 the Court rejects Australia’s contention that a scientific research programme requires a State systematically to give preference to non-lethal methods, and to have recourse to lethal methods only when other methods are not available; and furthermore, I cannot see how the fact that, when designing a scientific research programme, a State may have failed to carry out a study of a particular issue (even if that issue were relevant) would deprive that programme of its scientific character. At most, such a failure would justify an observation by the Scientific Committee. But it is not the function of the Court to decide whether JARPA II was designed as well as it might have been (that is a matter for the Scientific Committee to look into), but only to decide if this is indeed a programme pursuing scientific aims. As to the duty of States parties to “give due regard to recommendations” of the International Whaling Commission, which called upon States “to take into account whether research objectives can . . . be achieved by using non-lethal research methods” (para. 83), it cannot have the effect — which would be to confuse legal categories — of transforming those recommendations into binding decisions.

39. The Judgment further criticizes Japan for having set the sample size at a level higher than that necessary for the requirements of scientific research, in order to secure additional financial resources to finance that

research, an approach which, according to the Court, does not fall within the terms of Article VIII. That is a weak argument. First, it is based on a very questionable restrictive interpretation of the Convention; secondly, and in any event, it has not been shown that Japan did adopt such an approach. In reality, the Judgment relies solely on a document produced by Japan the language of which is ambiguous, but in which, in any event, no clear admission can be found that the sample size was increased for financial reasons (para. 143). If Japan is reproached with having, to a certain extent, favoured lethal methods because they are less expensive — *inter alia* because they enable some of the whale catch to be sold — such criticism may well be justified in factual terms, but certainly not in law: there is no rule — and the Judgment itself fails to identify one — which prevents a State from having regard to a consideration of this kind in designing a research programme.

40. The Judgment then goes on to examine the general question of the setting of sample sizes under JARPA II.

However, the Court was unable to reach a finding that the size of the sample was manifestly excessive in light of research needs, since there was no support for such a conclusion in the evidence before it. It is rather on the basis of its doubt as to the justification for the choices made by Japan and the methods adopted by it that the Judgment addresses the matter. However, even if a certain doubt is permissible, that cannot suffice to show that the aims pursued by JARPA II are unscientific, whether wholly or even in part.

41. In this regard, the Judgment queries the significant difference between the catch totals set under JARPA, the programme preceding that in issue here, and the sample sizes set under JARPA II. For minke whales in particular, the difference is substantial, increasing from an annual take of 400 to 850. The Court expresses its scepticism on the explanations given by Japan, namely that JARPA II had more ambitious aims than its predecessor. However, according to the Court, there is “considerable overlap . . . rather than dissimilarity” between the two programmes (para. 151). An additional reason cited “to question whether the increased minke whale sample size . . . is accounted for by differences between the two programmes” is that Japan launched JARPA II without waiting for the results of the Scientific Committee’s final review of JARPA (para. 154). Here again we are dealing with queries, doubts, suppositions. Nothing truly solid.

42. The Court then goes on to discuss at some length ways of calculating the sample size necessary to achieve the research targets. It conducts a series of particularly complex calculations, which it presents, *inter alia*, in the form of a table and a graphic (see paragraphs 165 and 182).

But however sophisticated, such calculations do not suffice to enable the Court to reach the clear conclusion that the sample size was set at a

manifestly excessive level. All they can do is to raise doubts, uncertainties and suspicions. It is true that the explanations provided by Japan lack clarity and transparency, and that a certain vagueness remains as to how the sample size was fixed. The expert called by Japan, Professor Walløe from Norway, himself admitted to the Court that “the Japanese [had] not always given completely transparent and clear explanations of how sample sizes were calculated or determined”. However, he then indicated that, on the basis of his own calculations, the minke whale sample size (that being by far the largest) was “of the right magnitude”.

As for the Court, the only finding that it was able to reach (in paragraph 198), after a lengthy discussion of the matter, was that “the evidence relating to . . . sample size . . . provides scant analysis and justification for the underlying decisions that generate the overall sample size”, and that this “raises further concerns” about “whether the design of JARPA II can be said to demonstrate on an objectively reasonable basis that it is a project for purposes of scientific research”. Further concerns, deriving from a finding of certain flaws or weaknesses, but nothing to provide solid support for the conclusion that JARPA II is not genuinely pursuing its purported research aims.

43. The Judgment then highlights the discrepancy between the targets set under JARPA II and the actual number of whales taken, which is far below the target totals. Strangely, the Court regards this as a further reason to find that JARPA II is not a programme conducted “for purposes of scientific research”.

The reasons for this discrepancy are known, and the Judgment refers to them (para. 206). Japan agreed to give up catching humpback whales following a request by the Chair of the International Whaling Commission, as a mark of goodwill. As regards the other two species, the discrepancy between target and actual catches can be largely attributed to the choice of vessels, which were unsuitable for taking minke whales, and to acts of organized sabotage by certain groups opposed to whaling, which prevented the target take for minke whales from being achieved.

44. It is difficult to see, however, how the fact that, in recent years, Japan has failed to achieve the target takes under JARPA II can justify the finding that the programme has ceased to be a scientific one, and still less that it has never been a scientific programme.

The Court’s reasoning (in paragraphs 209-211) is, in substance, as follows. First, because JARPA II has continued despite actual catches being far smaller than the original targets, that tends to show that those targets had been fixed at an excessively high level and not in accordance with the requirements of need and proportionality, which “adds force to Australia’s contention that the target sample size for minke whales was set for non-scientific reasons”. Secondly, the zero or negligible take for two of

the three species concerned casts doubt on Japan's argument that the significant increase in the target take for the third species of whale (minke whales) under JARPA II can be explained by the introduction into that programme of research on inter-species competition, which was absent from the preceding one.

The Court summarizes its position as follows:

“Japan's continued reliance on the first two JARPA II objectives to justify the target sample sizes, despite the discrepancy between the actual take and those targets, coupled with its statement that JARPA II can obtain meaningful scientific results based on the far more limited actual take, cast further doubt on the characterization of JARPA II as a programme for purposes of scientific research.” (Para. 212.)

Once again, doubt. But is a doubt, or even an accumulation of doubts, sufficient to constitute proof? In my view, in any event in the present instance, that is very far from being the case. What is more, it seems to me hardly disputable that the fact that a research programme has been only partially achieved does not deprive it of the ability to produce scientifically significant results, and I can see nothing here that could provide support for such grave suspicions.

45. It is true that the Court completes its demonstration with three concluding arguments, under the head of “additional aspects”, but which I have to say that I do not find any stronger than the preceding ones: JARPA II has an open-ended time frame — but I cannot see where anyone might get the idea that a research programme can only be “scientific” if it is for a fixed period; publication of research results from JARPA II in scientific journals has been extremely limited — but that does not suffice to justify a finding that the programme is not being conducted for purposes of scientific research, at most it could be an indication of weaknesses or flaws in its design; Japan has given few examples of co-operation between the institution responsible for JARPA II and other research institutions, which, according to the Court, “could have been expected” — but we are still dealing here with criticism of the way the research has been conducted, rather than a convincing challenge to its scientific character.

46. Even taken together, the Court's criticisms of Japan are very far, in my view, from justifying a finding that JARPA II was not designed and implemented “for purposes of scientific research”, which is the conclusion that the Court reaches in paragraph 227.

And I believe this to be the case for two basic reasons: doubts are not proof; methodological flaws in the design of a scientific programme do not deprive it of its scientific character, nor do they stamp it with a commercial purpose.

47. I particularly regret the stance that the Court has chosen to adopt, inasmuch as, in so doing, it has ignored the contribution — in my view, a remarkable one — from the expert called by Japan, the internationally renowned Norwegian professor, Lars Walløe. Professor Walløe demonstrated his independence in openly criticizing certain aspects — albeit minor ones — of the JARPA II programme; and indeed the Judgment has cited these several times in support of its argument against the Respondent. That, in my view, only serves to enhance the overall credibility of his evidence. Professor Walløe stated that “both JARPA and JARPA II have given valuable information for the possible implementation of the current version of RMP [the Revised Management Procedure, the stock management tool used by the International Whaling Commission] and for possible future improvements of RMP”, and that “the programmes are giving critical information about the ongoing changes in the Antarctic ecosystem”.

As regards sample size, Professor Walløe stated at the hearings that he did not really know how the Japanese scientists had calculated them, but that, on the basis of his own calculations to determine, *inter alia*, the necessary sample size to assess changes in age and sexual maturity — which were parameters of particular interest — over a period of six years, he found that “to get any detectable you would need in the order of magnitude [of] 900 whales”.

48. I am well aware that, since Professor Walløe was an expert called by one of the Parties, the Court could not simply accept the truth, without further enquiry, of everything he said, when other experts, called by the opposing Party, expressed differing views.

However, I believe that the fact that a scientist of this renown unequivocally expresses his positive view of the scientific value of the research carried out under JARPA II, and of the reasonableness of the sample sizes set (with the exception, as he stated, of fin whales, for which the sample size was too small to give significant results) ought to have carried substantial weight in the Court’s assessment of the true nature of JARPA II.

That would certainly have been the case if the Court, instead of attempting to function as a sort of scientific committee, seeking to enquire in detail into what aspects of JARPA II could be regarded as design or implementation flaws or deficiencies, had confined itself simply to answering the question of whether the activities concerned were conducted for purposes of scientific research — regardless of whether they were brilliantly or poorly designed. And if the Court had not applied an underlying negative preconception in its treatment of the Respondent.

(Signed) Ronny ABRAHAM.

DECLARATION OF JUDGE KEITH

1. As my votes indicate, I agree with the conclusions the Court has reached. I also agree generally with the reasons it has given in reaching those conclusions. My purpose in this declaration is to address three matters in support of those reasons:

- (a) the broader context in which the case is to be seen;
- (b) the extent of the power of a Contracting Government to grant a special permit under Article VIII of the Convention and the related issue of the standard of review to be applied by the Court in the event of a dispute about the grant of particular permits;
- (c) the application of that standard of review to the facts of the present case.

A. THE BROADER CONTEXT

2. In the 65 years the International Convention for the Regulation of Whaling (hereinafter “the Convention”) has been in force, there have been massive changes both in the operation of the whaling industry and in attitudes and policies towards whaling. Under the Schedule, as in effect at the outset, the total allowable annual catch in the waters south of 40 degrees south latitude was 16,000 blue whales, or 32,000 fin whales or 40,000 humpback whales. (No provision was originally made in respect of minke whales.) By 1965 the taking of blue whales had been prohibited, and by 1972 the limit for Antarctic minke whales had been set at 5,000. These limits are two of the many manifestations of the exercise by the International Whaling Commission of its powers of regulation. Such binding action could be taken, if the necessary majority was available, subject to the power of a Contracting Government to object, with the consequence that it would not be bound by the new regulation.

3. In 1972, the year the 5,000 limit on the take of minke whales was introduced, the United Nations Conference on the Human Environment, held in Stockholm, recommended a ten-year moratorium on commercial whaling. As some of the nine original members of the Commission, which were all whaling nations at the outset, abandoned whaling and new mem-

bers, with extensive NGO support, joined the Commission, the votes favouring a moratorium grew. As the Judgment recounts, the moratorium was adopted in 1982. Many factors, commercial, scientific, technological, environmental, political and others, no doubt lay behind that decision. Those factors are also manifested in the very many zero catch limits now to be found in the tables in the Schedule. Today's Schedule is in very sharp contrast to that which operated 65 years ago. It is hard to imagine that those who in 1946 proposed and adopted the new "effective administrative machinery" anticipated it being used in such dramatic ways. They might think it strange that a power established to regulate an ongoing industry had been used virtually to prohibit it; compare, e.g., *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (Judgment, *I.C.J. Reports 2009*, p. 249, para. 87 (1)).

4. Those Contracting Governments which engaged in whaling and took that view had a number of options open to them. They could withdraw from the Convention by giving notice under its terms, as some did. They could exercise their right to object to the measures, as, again, a number of States, including Japan, did. They could seek to amend the Convention, but that possibility has not been pursued. Or they could challenge the lawfulness of a particular measure, again a course not taken.

5. Over the last 30 years, the membership of the Commission has again changed, with an increase of those Contracting Governments which support whaling, as well as of those which are opposed. It has been possible for those on each side of the argument about whaling to complain that the Commission has become over politicized. One consequence has been that the Commission has become deadlocked and has recently decided to meet only every second year.

6. I conclude this introductory passage by putting the current dispute, brought before the Court for decision in accordance with international law, in the broader context of methods of peaceful settlement of international disputes. From 2007 until 2010 there were extensive attempts through *The Future of the IWC Process* to resolve through negotiations a range of matters, including the dispute which is now before the Court. That process however failed. It ended just days after Australia filed its Application in this case. The Chair of the Support Group, when reviewing the process, particularly paid tribute to the United States of America for its energy and leadership during the negotiating process, and to Japan for its huge commitment and its willingness for compromise. Japan

referred to this assessment several times during the written and oral pleadings. Australia said nothing at all about it.

B. THE EXTENT OF THE POWER TO GRANT A SPECIAL PERMIT
AND THE STANDARD OF REVIEW

7. I see the extent of the power of the Contracting Government to grant a special permit and the extent of the power of the Court to review the grant as being essentially interrelated. The wider the power of the Contracting Government the more limited the power of the Court to review. For me, three features of the power conferred on Contracting Governments by Article VIII (I) of the Convention are significant. The first is that the wording of the provision at its core is not subjective. It does not say that a Contracting Government may grant a special permit for “what it considers to be” scientific research. The non-appearance of those words is emphasized by the subjective wording appearing at the end of that sentence — “as the Contracting Government thinks fit”. Such wording was, for instance, in issue in the *Certain Questions of Mutual Assistance in Criminal Matters* case, where the Court nevertheless considered that it had some power of review ((*Djibouti v. France*), *Judgment*, *I.C.J. Reports 2008*, p. 229, para. 145). That case is helpful in a second and more important way since the assessment there by the relevant State authority was based on that State’s own assessment of prejudice to its “essential interests”. The assessment here, by contrast, relates to a much more concrete matter — a programme for the purposes of scientific research relating to whales and associated matters. A third feature is the common interest of all the Contracting Governments in the operation of the Convention with the related roles of the IWC and its Scientific Committee. Those features all indicate for me real limits on the power of the Contracting Government to grant a special permit. A fourth significant matter bearing directly on the Court’s exercise of its power of review in this case is the extensive body of information in the record before it about the process which led to the range of decisions to establish the JARPA II programme and about its implementation.

8. As the Judgment indicates, the positions of the Parties and the Intervener on the standard of review have evolved over the course of the proceedings (paras. 62-69). While in general I agree with the test stated by

the Court, I formulate it in this way: Is the Contracting Government's decision to award a special permit objectively justifiable in the sense that the decision is supported by coherent scientific reasoning? The test does not require that the programme be "justified", rather, that on the record it is justifiable. Nor is it for the Court to decide on the scientific merit of the programme's objectives nor whether its design and implementation are the best possible means of achieving those objectives. But it does have the role of assessing, in the light of the features of the power mentioned in the previous paragraph, the evidence to see whether it demonstrates coherent scientific reasoning supporting central features of the programme. Such tests, like that stated by the Court, become clearer as they are applied to the facts in issue.

C. THE APPLICATION OF THE STANDARD OF REVIEW TO THE FACTS

9. Subject to one matter of emphasis, I have nothing to add to the reasons given in support of the conclusions reached by the Court relating to the decisions taken by the Japanese authorities regarding the use of lethal methods as opposed to non-lethal ones (paras. 128-144) and the determination of the sample sizes (paras. 147-198); and relating to the comparison of the sample size to the actual take (paras. 199-212). The matter of emphasis is that for me the evidence demonstrates a failure by the Japanese authorities even to address central matters involved in the initial design and ongoing implementation of the programme.

10. In respect of the decisions regarding the use of lethal methods and non-lethal ones, I see as critical the failure of Japan to provide any evidence of any studies which it undertook of the use of non-lethal methods through the long period running from the planning of the programme to the present day (see in particular paragraphs 136-141). The Court did, by contrast, receive evidence from the two experts called by Australia about the enhancement and wider use over that time of non-lethal methods which were capable of being used for at least some of the objectives of the programme.

11. So far as the determination of the sample sizes is concerned, the lack of any clear explanation in the record for the choices of a 12-year research period for two of the species and of six years for the other means, as I see the matter, that those aspects of the decision which are critical for the sizes of the samples of the different species are not supported by coherent scientific reasoning. Among the objectives of the programme are inter-species competition and ecosystem research (paras. 176-178). A similar lack of explanation appears in respect of the choice of annual sample sizes of 50 for each of the humpback and fin species when the Research

Plan for the programme called for a take of at least 131 of each species for the purpose of one of the objectives (para. 179).

12. I next see as significant the essential failure of Japan to explain in a persuasive manner the big increase in the target for minke whales from JARPA to JARPA II. On the one hand, it said that the new objectives were a major reason, when they do not appear to be clearly distinct from the objectives of JARPA as they existed in the last part of that programme; but, on the other, it emphasized the need for continuity in moving from the first to the second programme (paras. 147-156). It does not appear to me to be scientifically credible to maintain both of those arguments at one and the same time.

13. Finally, I consider the difference between the sample size and the actual take. I see it as significant that, while Japan has continued to issue special permits for the taking of the same numbers of the three species throughout the programme, except for 2005 and 2006 in respect of fin and humpback whales, it has never reported to the IWC and in particular to the Scientific Committee on the consequences of the much reduced takes of minke whales and fin whales and the nil take of humpback whales for the design and implementation of the programme (paras. 209-212). The Annexes to Japan's Counter-Memorial in the part concerned with documents which it issued (Anns. 133-159) include only three possibly relevant documents submitted to the IWC or its Scientific Committee (Anns. 152, 153 and 156) and none on its face addresses those changes and the possible consequences for the research. Only one of them dates from the time of the full-scale operation of JARPA II and does no more than list publications arising from JARPA II as well as from JARPA. That failure is to be seen in the context of the requirements of paragraph 30 of the Schedule and the duty of co-operation with the IWC and its Scientific Committee which, as the Court notes, both Parties and the intervening State recognize (paras. 83 and 240).

14. To summarize, the evidence before the Court, as I read it, does not show that the Japanese authorities in planning and implementing the programme have given any real consideration or indeed any consideration at all to the central elements of the programme discussed above. Accordingly, and for the reasons also given by the Court, I conclude that the programme does not fall within the scope of Article VIII (1) and that, as a consequence, the actions of Japan, taken in terms of the programme, for the killing, taking and treating of whales under it, breach paragraph 10 (*e*), paragraph 10 (*d*) and paragraph 7 (*b*) of the Schedule.

(Signed) Kenneth KEITH.

DISSENTING OPINION OF JUDGE BENNOUNA

[English Original Text]

Interpretation of the Convention — Discretionary power of State party — Reasonableness of a whaling programme “for purposes of scientific research” — Aim of a whaling programme “for purposes of scientific research” — Choice between lethal and non-lethal methods — Determination of sample sizes — Bases for the Court’s findings — Need to decide whether JARPA II is of a “commercial” nature — JARPA II not of a “commercial” nature — Court substituting itself for Convention bodies — Co-operation between States parties to the Convention.

To my great regret, I have had to vote against points 2, 3, 4, 5 and 7 of the Judgment’s operative paragraph, since I do not agree with the majority’s interpretation of the relevant provisions of the International Convention for the Regulation of Whaling of 2 December 1946 (hereinafter the “Convention”) and of the Schedule annexed thereto (hereinafter the “Schedule”).

I regret, in particular, that the majority has failed to adhere to the methods of interpretation envisaged by the Vienna Convention on the Law of Treaties (Arts. 31 and 32), which have the status of customary law, and has consequently failed to confine itself to a strictly legal analysis of the Parties’ obligations. I know that the issue of whaling is one that carries a heavy emotional and cultural charge, nourished over the centuries by literature, mythology and religious writings. This background was indeed evoked before the Court, but the judges, while they cannot ignore it, are bound, by virtue of their function, to ensure that it does not impinge in any way on their strictly legal analysis. The best way for the Court to contribute to the promotion of co-operation between the States concerned is to do justice by applying international law, in accordance with its Statute.

Unfortunately, the approach adopted by the majority remains somewhat “impressionistic”, inasmuch as it rests essentially on queries, doubts and suspicions, based on a selection of indicators from among the mass of reports and scientific studies.

The Convention was adopted in 1946, in a context very different from that in which the Court is called upon to interpret and apply it today. The consumption of whale meat has fallen dramatically, so as to have become negligible, and the whaling industry has declined accordingly. The fact nonetheless remains that, when interpreting a provision of the Convention, the Court is bound to take account of the objectives set out in its Preamble, in particular the conservation and sustainable development of whale stocks. The Court cannot content itself with stating that “neither a restrictive nor an expansive interpretation of Article VIII is justified”, and

that programmes for purposes of scientific research “may pursue an aim other than either conservation or sustainable exploitation of whale stocks” (Judgment, para. 58). But we are not concerned here with the issue of whether the interpretation should be “restrictive” or “expansive”, but rather with determining “the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” (Vienna Convention, Art. 31, para. 1).

What the Court has to do is to confront Article VIII, as an integral part of the Convention, with the latter’s object and purpose, and to ask itself whether, in light of its ordinary meaning, the research programme, in this case JARPA II, is fully covered by this provision.

Furthermore, Article VIII must be analysed in the context of the other provisions of the Convention and of its Schedule, as amended since its adoption. Under that Article, any State party may “grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research”, subject to such conditions as it “thinks fit”. In so doing, the State in question is not required to comply with the other provisions of the Convention, in particular those relating to commercial whaling. At the time when the Convention was adopted, the only concern was to regulate and not to prohibit this category of whaling. And it was for that reason that the power given to a State party to grant permits “for scientific research” was a very wide one, since commercial whaling was regulated by the Convention and subject to compliance with the latter’s objectives. As long as it remained within the framework of scientific research, the Government concerned was free to decide on the use to be made of the proceeds from the sale of killed and processed whales. It is implicit that any proceeds from the sale of such whales must be allocated to the objective of scientific research, which lies at the heart of Article VIII, and which justifies the exemption of the State party concerned from all of the other obligations relating to the regulation of commercial whaling.

I accept, as the Court points out (Judgment, para. 61), that a State party’s discretionary power under Article VIII of the Convention does not mean that the killing, taking and treating of whales depends “simply on that State’s perception”.

I am likewise of the view that a State party, in exercising this power, must satisfy itself that “the programme’s design and implementation are reasonable in relation to achieving its stated objectives”, and that “[t]his standard of review is an objective one” (*ibid.*, para. 67).

The wide normative power which Article VIII nevertheless gives to States parties in issuing permits is offset by the supervision exercised by the central body established by the Convention, namely the International Whaling Commission (Convention, Art. III) (hereinafter the “Commission”), assisted by the Scientific Committee. Thus, under the terms of paragraph 3 of Article VIII, the State concerned

“shall transmit to such body as may be designated by the Commission, in so far as practicable, and at intervals of not more than one year,

scientific information available to that Government with respect to whales and whaling, including the results of research conducted pursuant to paragraph 1 of this Article and to Article IV”.

The Judgment recognizes that Japan has complied with its procedural obligations in relation to the Commission and to the Scientific Committee, in particular by submitting proposals of special permits prior to their granting, as required under paragraph 30 of the Schedule.

Clearly, the Commission’s adoption in 1982 of the moratorium on commercial whaling (Schedule, para. 10 (*e*), the number of whales to be taken for commercial purposes being set at zero), which entered into force during the 1985-1986 season, would have an impact on the meaning and structure of the provisions of the Convention and its Schedule. Japan, having initially opposed the moratorium, withdrew its objection in 1987. However, we should not lose sight of the fact that the moratorium was, by definition, only a provisional decision, pending an evaluation, envisaged for 1990, which ultimately never took place.

In parallel with its acceptance of the moratorium, Japan launched its JARPA research programme. However, there is nothing to lead one to suppose, *a priori*, as was suggested by Australia (Judgment, para. 101), that this was a way of continuing commercial whaling under a different legal guise. In reality, there was nothing surprising in itself about the launch of JARPA, since the moratorium on commercial whaling now prevented access to certain kinds of information about whales, which were needed for scientific research. It has, however, been established that research on whale stocks, and in particular on their diet, had an important role to play as a source of knowledge of the marine ecosystem and its resources. Moreover, in 2006 the Commission did not dispute JARPA’s contribution in this regard. In any event, as the Judgment correctly points out, the operation and legality of JARPA are not at issue here (*ibid.*, para. 99). What is in fact at issue here is JARPA II, which succeeded JARPA with effect from the 2005-2006 season.

The legality of this second programme has been challenged before the Court by Australia, which claims that it is not “a programme for purposes of scientific research within the meaning of Article VIII of the Convention”, and that, in authorizing and implementing it, Japan has been in breach of paragraph 10 (*e*) of the Schedule on the moratorium on commercial whaling, of paragraph 7 (*b*) on the Southern Ocean Sanctuary, and of paragraph 10 (*d*) on the moratorium on factory ships.

The position adopted by the majority is thus a surprising one, since it amounts to devoting the essence of the reasoning to showing that JARPA II is not a programme “for purposes of scientific research”, while ultimately avoiding the issue of what the true aim of such a programme is.

The Court begins by declining to establish a definition of the notion of “scientific research”, of which there is not one in the Convention. As regards the definition proposed by the experts, the Court considers that it

is not applicable in the present case (Judgment, para. 86). However, immediately afterwards, the Court undertakes an analysis of the meaning of the phrase “for purposes of scientific research” (*ibid.*, para. 87), which might be regarded as something of a paradox. In effect, the Court seeks to determine the purpose of a given activity without having first clarified what that activity consists of. This is a perilous exercise, all the more so since what it turns out to consist in is a discussion of whether the design and implementation of the programme “are reasonable in relation to its stated scientific objectives” (*ibid.*, para. 88).

It becomes apparent, reading the Court’s subsequent reasoning, that in reality it fails to apply the test of correspondence between the programme’s objectives, on the one hand, and its design and implementation on the other. Thus the Judgment (in paragraphs 135 to 156) essentially undertakes a comparison between JARPA and JARPA II, in order to conclude that the latter has not been conducted “for purposes of scientific research”. And this is said to be because the programme has utilized lethal methods, when it could have had greater recourse to non-lethal methods. However, nowhere does the majority demonstrate the existence of a requirement on the State concerned to give priority to non-lethal methods in the conduct of scientific research.

The Court seeks to remedy the lack of such an obligation by invoking (Judgment, para. 144) the inadequacy of Japan’s analysis of non-lethal methods, and its failure to give due regard to IWC resolutions and Guidelines, despite the fact that, by their nature, these are not binding upon that State. We may well ask ourselves how a legal obligation can derive from the inadequacy of an analysis, or from a failure to have regard to acts of international bodies which carry no normative force in relation to those to whom they are addressed.

In my view, a State is perfectly entitled, for purposes of scientific research, to eschew the use of non-lethal methods if it considers them too costly and, if need be, to fund the costs of research out of the proceeds from the sale of the whales taken and processed.

But the Court does not stop there in its comparison between JARPA and JARPA II. It queries the latter’s scale, again by reference to the former (*ibid.*, paras. 145 to 156). It concludes this comparison by noting “weaknesses in Japan’s explanation” (*ibid.*, para. 156), relying largely on these to justify the assumption made about Japan’s intention:

“These weaknesses also give weight to the contrary theory advanced by Australia — that Japan’s priority was to maintain whaling operations without any pause, just as it had done previously by commencing JARPA in the first year after the commercial whaling moratorium had come into effect for it.” (*Ibid.*)

Despite having proceeded on the premise that it would not define scientific research, the majority then, however, engages in a detailed analysis of

sample sizes for each species, identifying five stages in this process, illustrated by statistical studies (Judgment, paras. 157 to 202).

At the close of this whole arduous and complex discussion, the Court concludes that “this raises further concerns about whether the design of JARPA II is reasonable in relation to achieving its stated objectives” (*ibid.*, para. 198). These concerns are based on a very elaborate structure of statistics and studies, but a series of concerns cannot result in certainty, namely that there has been a legal breach of an international obligation.

Is it possible, nonetheless, to exclude all reasonable doubt by comparing sample sizes and actual catches?

Having undertaken such an exercise (*ibid.*, paras. 199 to 211), the Court again asserts that the discrepancy noted between sample sizes and the actual take of whales “cast[s] further doubt on the characterization of JARPA II as a programme for purposes of scientific research” (*ibid.*, para. 212). Thus, the Judgment, having again noted this discrepancy in the case of minke whales, goes on to state that “[t]his adds force to Australia’s contention that the target sample size for minke whales was set for non-scientific reasons” (*ibid.*, para. 209). In other words, if Japan had taken all the whales provided for in the sample, that would have sufficed to make the programme a credible one “for purposes of scientific research”. Such a finding would, moreover, contradict the previous emphasis on the priority of non-lethal methods over lethal methods.

In its final conclusion on the issue of whether JARPA II has been conducted for purposes of scientific research (*ibid.*, paras. 223 to 227), the Court finds that “the use of lethal sampling per se is not unreasonable in relation to the research objectives of JARPA II” (*ibid.*, para. 224), but it is only by comparing the latter with JARPA that it finds that the size of the samples for minke whales has been significantly increased, even though, in absolute terms, the proportion of whales actually taken was limited. Thus, in relation to the minke whale population, which numbers between 338,000 and 1,486,000 individuals (Memorial of Australia, Vol. I, para. 2.116), the actual total take of minke whales for the entire JARPA II programme did not exceed 3,264 individuals (*ibid.*, Fig. 6, and Counter-Memorial of Japan, pp. 178 and 181).

Are all of these concerns and queries sufficient for the Court to conclude that JARPA II was not designed and implemented “for purposes of scientific research” (Judgment, para. 227)?

The Court then addresses (*ibid.*, para. 228) Australia’s contentions regarding Japan’s breaches of the Schedule, namely the moratorium on commercial whaling (para. 10 (*e*)), the factory ship moratorium (para. 10 (*d*)), and the prohibition on commercial whaling in the Southern Ocean Sanctuary (para. 7 (*b*)). One might have expected, at this stage in the reasoning, that the Court would ask itself whether JARPA II was designed and implemented for commercial purposes. Indeed, the Conven-

tion envisages only three categories of whaling (commercial whaling, whaling “for purposes of scientific research”, and aboriginal subsistence whaling). Leaving aside the latter category, which is not at issue in this case, the sole remaining choice lies between the first two categories. Indeed, both Parties and the intervening State do not dispute this, as the Court points out (Judgment, para. 229). Furthermore, it was on the allegation that JARPA II was of a commercial nature that Australia based its claim that the above provisions of the Schedule had been breached.

Why, then, does the Court refuse “to evaluate the evidence in support of the Parties’ competing contentions about whether or not JARPA II has attributes of commercial whaling” (*ibid.*, para. 230)?

The Court begins by noting that the moratorium on factory ships (para. 10 (*d*) of the Schedule) makes no explicit reference to commercial whaling, unlike those imposing the moratorium on commercial whaling and establishing the Southern Ocean Sanctuary. Yet the Court nonetheless interprets paragraphs 10 (*e*) and 7 (*b*) of the Schedule, which concern these two latter matters, as not relating exclusively to commercial whaling. According to the Court, any contrary interpretation “would leave certain undefined categories of whaling activity beyond the scope of the Convention” (Judgment, para. 229). I must confess that I cannot see what is the basis for this expansive interpretation of clear texts which prohibit commercial whaling; nor can I work out which, from among the methods of interpretation envisaged by the Vienna Convention, is that relied on here.

I now return to the Court’s finding concerning paragraph 10 (*d*) of the Schedule in relation to the moratorium on factory ships. It is true that this provision makes no explicit reference to commercial whaling. However, examination of the *travaux préparatoires* in this regard explains why, unlike the other two subparagraphs of the Schedule with which we are concerned, it contains no such reference.

Paragraph 10 (*d*) of the Schedule originated in a proposal by the United States for a moratorium on commercial whaling. This proposal was taken up by Panama, which proposed that it be divided into two parts, with, on the one hand, a moratorium on factory ships and, on the other, one on land station operations (see Chairman’s Report of the Thirty-First Annual Meeting, *Report of the International Whaling Commission*, Vol. 30, 1980, p. 26, Counter-Memorial of Japan, Vol. II, Ann. 46; see also P. W. Birnie, *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale Watching*, Vol. 1, Oceana Publs., 1985, p. 505). Only the first part of the proposal was adopted by the Commission, and became the current paragraph 10 (*d*) of the Schedule. The moratorium on factory ships was thus drafted on the basis of a proposal for a moratorium on commercial whaling, and it was clear at the time of its adoption that it only concerned

commercial whaling. It follows that paragraphs 10 (*d*), 10 (*e*) and 7 (*b*) of the Schedule thus apply solely to commercial whaling.

I therefore believe that the majority was not entitled to dispense with an examination of the question whether JARPA II was of a commercial nature. Clearly, it could not have so found, since any commercial activity must be conducted with a view to profit, even if that is not achieved. However, this is simply not the case for JARPA II, or for the special permits issued thereunder, since the proceeds from the sale of whales taken and processed are given to a non-profit whale research institute.

I would add that the position taken by the majority is not only unfounded in law, but has failed to take account of the spirit of the Convention, which aims at strengthening co-operation between States parties for the purposes of managing a shared resource. The Commission and the Scientific Committee play a key role in this regard. In particular, they are required to conduct periodic examinations of the special permits granted by States parties and to comment thereon, including on aspects which might be improved. Moreover, they performed this task in relation to JARPA, as is shown by the list of resolutions adopted by the Commission. As things stand at present, JARPA II underwent a prior examination in 2005, and its periodic examination is currently under way. The results are due to be published shortly. In other words, neither the Commission nor the Scientific Committee has yet had the opportunity to pass judgment on the implementation of JARPA II. In engaging in an evaluation of the programme, the Court has, in a sense, substituted itself for these two bodies.

In order to strengthen the object and purpose of the Convention, it is clearly desirable that States parties should act within the institutional framework established by the latter. That would probably be the best way of strengthening multilateral co-operation between States parties in defence of their common interest — as the Preamble to the Convention emphasizes — and of enabling them to arrive at an authentic interpretation of the Convention.

(Signed) Mohamed BENNOUNA.

SEPARATE OPINION
OF JUDGE CANÇADO TRINDADE

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1. I have accompanied the Court's majority, in voting in favour of the adoption of the present Judgment in the case *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*. Yet, I would have wished certain points to be further developed by the Court. I feel thus obliged to leave on the records, in the present separate opinion, the foundations of my personal position thereon. To this effect, I shall address the following points: (a) the object and purpose of the International Convention on the Regulation of Whaling (the teleological approach); (b) collective guarantee and collective regulation; (c) the limited scope of Article VIII (1) of the ICRW; (d) the evolving law relating to conservation: interactions between systems; (e) the ICRW as a "living instrument": the evolving *opinio juris communis*; (f) inter-generational equity; (g) conservation of living species (marine mammals); (h) principle of prevention and the precautionary principle; (i) remaining uncertainties around "scientific research" (under the JARPA II programme). The way will then be paved for my concluding observations, on the JARPA II programme and the requirements of the ICRW and its Schedule.

I. THE OBJECT AND PURPOSE OF THE ICRW

2. I find it necessary, to start with, to dwell upon *the object and purpose* of the International Convention on Regulation of Whaling (hereinafter the "ICRW"), so as to set the context for the consideration of the interpretation of Article VIII of the ICRW, and of the question whether Japan complied with its obligations under the ICRW and its Schedule (cf. *infra*). Both contending Parties, Australia and Japan, and the intervenor, New Zealand, have in fact dedicated some attention to the object and purpose of the ICRW. The adoption of a Convention like the ICRW, endowed with a supervisory organ of its own, evidences that the goal of conservation integrates its object and purpose, certainly not limited to the development of the whaling industry.

3. To try to reduce the object and purpose of the ICRW to the protection or development of the whaling industry would be at odds with the rationale and structure of the ICRW as a whole. If the main goal of the ICRW were only to protect and develop the whaling industry, the entire framework of the ICRW would have been structured differently. Moreover, the fact that the ICRW is a multilateral treaty, encompassing member States that do not practice whaling, also speaks to the understanding that the ICRW's object and purpose cannot be limited to the development of the whaling industry. Furthermore, in the same line of reasoning, the adoption of a moratorium on commercial whaling within the framework of the ICRW also seems to indicate that the conservation of whale

stocks is an important component of the object and purpose of the ICRW.

1. The Teleological Approach

4. May I turn briefly to the Preamble of the ICRW, which contains indications as to the object and purpose of the Convention. First, the Preamble recognizes “the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks”; this seems, in my view, to be in line with the purpose of conserving and protecting whales. Secondly, other preambular paragraphs mention “regulation” of whaling to ensure conservation and development of whale stocks. Then, the Preamble also posits that the States parties “decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry”.

5. It appears that the primary object and purpose of the ICRW can be found in the conservation and recovery of whale populations. The ICRW provides for a mechanism to ensure its own evolution in face of changing conditions and new challenges. The International Whaling Commission (IWC) has a specific role (under Article VI) to make recommendations to States parties, in the form of resolutions, to which they are to give consideration in good faith. The practice of the IWC, conformed by its successive resolutions, seems to indicate that conservation of whale stocks is an important objective of the ICRW: for example, in a number of resolutions, the IWC has focused on non-lethal methods of research concerning whales, disclosing a concern with the conservation of whale stocks¹. Thus, in my perception, the use of whales cannot take place to the detriment of the conservation of whale stocks.

6. The Schedule of regulations annexed to the ICRW is an integral part of it, with equal legal force; amendments have regularly been made to the Schedule, so as to cope with international environmental developments. States parties thus count on a scheme to act together in the common interest, setting a proper balance between conservation and the use of whale resources. The ICRW, adopted in 1946 to stop the overexploitation of whales, presented thus two novelties in comparison with the first treaties on whaling: the creation of the IWC (under Article III), and the inclusion of the Schedule, controlling whaling so as to achieve conserva-

¹ E.g., resolution 2007-3 (Resolution on the Non-Lethal Use of Cetaceans); resolution 2007-1 (Resolution on JARPA).

tion and recovery of whale stocks. It became a multilateral scheme, seeking to avoid unilateral action so as to foster conservation.

7. The object and purpose of the ICRW are to be construed in light of its text, its supervisory mechanism, and its nature as a multilateral treaty encompassing both whaling and non-whaling States. The object and purpose of the Convention point to, as a guiding principle, the conservation and recovery of whale stocks; not to be seen on an equal footing with the sustainable development of the whaling industry or the protection of commercial whaling. A State party — Japan or any other — cannot act unilaterally to decide whether its programme is fulfilling the object and purpose of the ICRW, or the objective of conservation.

2. *Response of New Zealand to Questions from the Bench*

8. In this connection, in the course of the oral pleadings before the Court (on 8 July 2013), I deemed it fit to put the following questions to the intervenor, New Zealand:

“1. In your view, does the fact that the International Convention for the Regulation of Whaling is a multilateral treaty, with a supervisory organ of its own, have an impact on the interpretation of its object and purpose?”

2. You have stated in your written observations (of 4 April 2013) that the object and purpose of the International Convention for the Regulation of Whaling is: ‘to replace unregulated, unilateral whaling by States with collective regulation as a mechanism to provide for the interests of the parties in the proper conservation and management of whales’ (p. 16, para. 33). In your view, is this a widely accepted interpretation nowadays of the object and purpose of the International Convention for the Regulation of Whaling?”²

9. As to these questions, New Zealand at first recalled that, distinctly from the 1937 International Agreement for the Regulation of Whaling, the 1946 ICRW counts on a permanent Commission (the IWC) endowed with a supervisory role, evidencing a “collective enterprise”, and acknowledging that whale conservation “must be an international endeavour”. In sum, in New Zealand’s view, the object and purpose of the ICRW ought to be approached in the light of the *collective interest* of States parties in

² CR 2013/17, of 8 July 2013, pp. 49-50.

the conservation and management of whale stocks³. Secondly, New Zealand argued that the IWC had recognizedly become the appropriate organ for the conservation and management of whales. Such role of collective regulation of the IWC — New Zealand added — was in the line of the United Nations Convention on the Law of the Sea, which requires States (Art. 65) to co-operate with a view to the conservation of marine mammals and to work through the appropriate international organs. Such endeavours of conservation have become a “collective responsibility”, and the IWC — New Zealand added — would “work co-operatively to improve the conservation and management of whale populations and stocks on a scientific basis and through agreed policy measures”⁴.

II. COLLECTIVE GUARANTEE AND COLLECTIVE REGULATION

1. *Collective Decision-Making under the ICRW*

10. The collective system established by the ICRW is crucial to the understanding and proper handling of the present case of *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*. In my view, the system created by the Convention aims at replacing a system of unilateral unregulated whaling, with a system of collective guarantee and regulation so as to provide for the interests of the States parties in the proper conservation and management of whales. To my mind, the structure of the Convention evidences that one of its aims is to achieve collective guarantee through collective regulation, in relation to all activities associated with whaling. This collective regulation is achieved through a process of collective decision-making by the IWC, which adopts regulations and resolutions (*supra*).

11. In addition, it may be recalled that the IWC may also adopt recommendations addressed to any or all of the States parties on any matters which relate to whales or whaling and to the objective and purpose of the Convention. These recommendations and resolutions, in my understanding, express the collective views of the parties under the Convention concerning the protection of their interests in the proper conservation and management of whales. Furthermore, membership of the IWC has grown along the years, with many members having no whaling industry or history of whaling activities; their common interest would arguably be the conservation and management of whales themselves, rather than solely the preservation of the whaling industry.

³ Written Responses of New Zealand to the Questions Put by Judge Cançado Trindade at the End of the Public Sitting Held on 8 July 2013 at 10 a.m., of 12 July 2013, pp. 6-7, paras. 1-3.

⁴ *Ibid.*, pp. 8-9, paras. 1-4.

12. Thus, the nature and structure of the ICRW, the fact that it is a multilateral Convention (comprising both whaling and non-whaling States) with a supervisory organ of its own, which adopts resolutions and recommendations, highlights the collective decision-making process under the Convention and the collective guarantee provided thereunder. In the light of the object and purpose of the ICRW, clearly a system of collective guarantee and collective regulation operates thereunder.

2. *Review of Proposed Special Permits
under the Schedule*

13. In fact, in numerous resolutions, the IWC has provided guidance to the Scientific Committee for its review of special permits under paragraph 30 of the Schedule. This is aimed at amending proposed special permit programmes that do not meet the conditions. The expectation ensues therefrom that, e.g., non-lethal methods will be used whenever possible, on the basis of successive resolutions of the IWC stressing the relevance of obtaining scientific information without needing to kill whales for “scientific research”. In accordance with the IWC resolutions, the Scientific Committee has, for its part, elaborated a series of Guidelines to enable it to undertake its function of review of special permits (under paragraph 30 of the Schedule).

14. In the present proceedings before the ICJ, this practice has been brought to the attention of the Court, in particular by New Zealand⁵, who has further pointed out that over 25 resolutions of the IWC, issued after the Scientific Committee’s review of proposed special permits (under Article VIII of the ICRW), have been consistently requesting the States parties concerned “not to proceed where the Scientific Committee had determined that the proposed activity did not satisfy the Scientific Committee’s criteria”⁶. Such is the case of IWC resolutions 1987-1, 1987-2, 1987-3, 1987-4, 1989-1, 1989-2, 1989-3, 1990-1, 1990-2, 1991-2, 1991-3, 1993-7, 1993-8, 1994-9, 1994-10, 1994-11, 1995-9, 1996-7, 1997-5, 1997-6, 2000-4, 2000-5, 2001-7, 2001-8, 2003-2, 2003-3, 2005-1, and 2007-1⁷. Hence, it is clear that one counts nowadays on a system of collective guarantee and collective regulation under the ICRW (cf. also *infra*).

15. Bearing the IWC resolutions in mind, the Scientific Committee’s Guidelines have endeavoured to assist it in undertaking adequately its function of review of special permit proposals and of research results from existing and completed special permits. In its most recent Guidelines, adopted in 2008 (Annex P), the Scientific Committee’s review pro-

⁵ Both in its written observations, of 4 April 2013, and in its oral arguments; cf. written observations of New Zealand, of 4 April 2013, pp. 30-33, paras. 55-60; and CR 2013/17, of 8 July 2013, pp. 30-31 and 39, paras. 50-54 and 14.

⁶ Written observations of New Zealand, of 4 April 2013, p. 56, para. 98.

⁷ *Ibid.*, p. 56, para. 98, note 195.

cess focuses on, *inter alia*, the possibility of using non-lethal research methods, the aims and the methodology and the sample size, the point whether the catches will have an adverse effect on the stocks (paras. 2-3). Moreover, the proposed activity is to be subject to periodic and final reviews. It is clear that there is here not much room for State unilateral action and free will.

16. It clearly appears, from paragraph 30 of the Schedule⁸, that a State party issuing a special permit is under the obligation to provide the IWC Secretary with proposed scientific permits *before* they are issued, and in sufficient time so as to allow the Scientific Committee to review and comment on them. Paragraph 30 of the Schedule thus plays an important role in the overall structure of the ICRW and in the pursuit of the fulfilment of its object and purpose. It establishes a review procedure that must be followed in relation to the granting of special permits, and that serves as a mechanism through which the granting of special permits may be monitored by the IWC. Accordingly, States granting special permits do not have an unfettered freedom to issue such permits.

17. It follows therefrom that, even if the recommendations of the Scientific Committee and the IWC are not *per se* legally binding on States, States willing to issue special permits should consider the comments of the IWC and the recommendations of the Scientific Committee in good faith (principle of *bona fide*). The terms of paragraph 30 make it clear that the particular duty to provide proposed special permits in advance to the IWC is set forth so as to enable the Scientific Committee to “review and comment” on them. It seems that, if States were to decide, at their free will, whether or not to take into account the comments and recommendations of the IWC and the Scientific Committee, that provision would be rendered meaningless, dead letter; the review procedure would then become a sort of unacceptable “rubber stamp” mechanism, whereby States issuing permits would be able to disregard completely the comments and recommendations whenever they wished.

⁸ Paragraph 30 of the Schedule states that a State party shall provide the IWC Secretary with proposed scientific permits

“before they are issued and in sufficient time to allow the Scientific Committee to review and comment on them. The proposed permits should specify: (a) objectives of the research; (b) number, sex, size and stock of the animals to be taken; (c) opportunities for participation in the research by scientists of other nations; and (d) possible effect on conservation of stock.”

Paragraph 30 adds that proposed permits

“shall be reviewed and commented on by the Scientific Committee at Annual Meetings when possible. When permits would be granted prior to the next Annual Meeting, the Secretary shall send the proposed permits to members of the Scientific Committee by mail for their comment and review. Preliminary results of any research resulting from the permits should be made available at the next Annual Meeting of the Scientific Committee.”

18. Paragraph 30 thus creates a *positive* (procedural) obligation⁹ of the State willing to issue a special permit to co-operate with the IWC and the Scientific Committee. It would seem inconsistent with the purpose of paragraph 30 if a State party would feel entitled to issue a special permit without having co-operated with the IWC and the Scientific Committee, or without having given any consideration whatsoever to the views of other States parties expressed through the comments of the IWC and the recommendations of the Scientific Committee.

19. In its 2006 Report (p. 50), the Scientific Committee was of the view that the JARPA II proposed programme provided the specifications required by paragraph 30 of the Schedule. One has here, as already indicated, a system of collective guarantee and collective regulation under the ICRW. In the framework of this latter, the Court has determined, on distinct points, that the respondent State has not acted in conformity with paragraph 10 (*d*) and (*e*), and paragraph 7 (*b*), of the Schedule¹⁰ to the ICRW (resolatory points 3-5).

III. THE LIMITED SCOPE OF ARTICLE VIII (1) OF THE ICRW

20. Keeping the review system in mind, and given the arguments of the contending Parties and of the intervenor as to the scope of Article VIII¹¹ within the ICRW as a whole, a point to be addressed is that of the requirements for a whaling programme to be considered “for purposes of scientific research”. The key point seems to be whether a whaling programme carried out under a special permit must be exclusively for scientific

⁹ On the conceptualization of positive obligations in a distinct context, cf., e.g., D. Xenos, *The Positive Obligations of the State under the European Convention of Human Rights*, London/N.Y., Routledge, 2012, pp. 57-141.

¹⁰ Paragraph 10 (*d*) of the Schedule establishes a moratorium on the taking, killing or treating of (sperm, killer and baleen) whales, except minke whales, by factory ships or whale catchers attached to factory ships. And paragraph 10 (*e*) provides in addition for a “comprehensive assessment” of the effects of catches on whale stocks and the establishment of new catch limits. And paragraph 7 (*b*) of the Schedule prohibits commercial whaling in the Southern Ocean Sanctuary (a prohibition to be reviewed every ten years).

¹¹ Article VIII (1) of the ICRW reads as follows:

“Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.”

research and not for any other purpose. In other words, the question is whether the same programme may be carried out under a special permit for the purpose of “scientific research” and, e.g., for purpose of selling the whale meat.

21. In my understanding, Article VIII (1) of the ICRW is not to be interpreted broadly, so as to go against the object and purpose of the normative framework of the Convention as a whole. Article VIII (1) appears as an *exception* to the normative framework of the ICRW, to be thus interpreted restrictively. The purpose, in particular, of granting special permits, is, to my mind, to allow for scientific research to be undertaken; other purposes do not seem to be allowed under Article VIII, and should not fall under the exception of Article VIII (1), which, in my understanding, applies solely and specifically to scientific research programmes. If a programme with multiple purposes (including a “scientific research” purpose) could be qualified for a special permit under Article VIII (1), the provision would not have been drafted in the way it was. Article VIII (1) is phrased in terms (“for purposes of”) which seem to make it clear that the sole purpose for which a special permit shall be granted is the conduct of scientific research. Otherwise, it could be expected that the expression “or other purposes” would also have been included.

22. The Court has determined that the special permits granted by Japan in connection with JARPA II “do not fall within the provisions of Article VIII (1)” of the ICRW (resolatory point 2). As to whether a State issuing a special permit under Article VIII (1) has the discretion to determine whether a whaling programme is “for purposes of scientific research”, such a question can only be properly considered within the whole framework of the ICRW as a multilateral treaty, nowadays endowed with a supervisory mechanism of its own. Accordingly, a State issuing a permit does not have *carte blanche* to dictate that a given programme is “for purposes of scientific research”. It is not sufficient for a State party to describe its whaling programme as “for purposes of scientific research”, without demonstrating it.

23. In my view, such an unfettered discretion would not be in line with the object and purpose of the ICRW, nor with the idea of multilateral regulation. The State issuing a special permit should take into consideration the resolutions of the IWC which provide the views of other States parties as to what constitutes “scientific research”. There is no point in seeking to define “scientific research” for all purposes. When deciding whether a programme is “for purposes of scientific research” so as to issue a special permit under Article VIII (1), the State party concerned

has, in my understanding, a duty to abide by the principle of prevention and the precautionary principle (cf. *infra*).

24. In my perception, Article VIII, part and parcel of the ICRW as a whole, is to be interpreted taking into account its object and purpose. This discards any pretence of devising in it a so-called “self-contained” regime or system, which would go unduly against the ICRW’s object and purpose. In sum, in my understanding, in line with the object and purpose of the ICRW (*supra*), a State party does not have an unfettered discretion to decide the meaning of “scientific research” and whether a given whaling programme is “for purposes of scientific research”. The interpretation and application of the ICRW in recent decades bear witness of a gradual move away from unilateralism and towards multilateral conservation of living marine resources, thus clarifying the limited scope of Article VIII (1) of the ICRW.

IV. THE EVOLVING LAW RELATING TO CONSERVATION: INTERACTIONS BETWEEN SYSTEMS

25. With the growth in recent decades of international instruments related to conservation, not a single one of them is approached in isolation from the others; not surprisingly, the co-existence of international treaties of the kind has called for a *systemic outlook*, which has been pursued in recent years. Reference can here be made to e.g., the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES Convention), the 1979 Convention on Migratory Species of Wild Animals, the 1980 Convention on the Conservation of Antarctic Marine Living Resources, the 1982 United Nations Convention on the Law of the Sea, the 1992 United Nations Convention on Biological Diversity (CBD Convention).

26. The systemic outlook seems to be flourishing in recent years. For example, at its fifth meeting, in 2000, the Conference of States parties to the CBD Convention referred to “the interactions between climate change and the conservation and sustainable use of biological diversity in a number of thematic and cross-cutting areas”, including, *inter alia*, marine and coastal biodiversity¹². As for the ICRW, the most complete academic work produced to date, on its legal regime, that of Patricia W. Birnie, supports the teleological interpretation of the ICRW, stressing the growing importance of *conservation* in the evolving interpretation and application of the ICRW; she further points out that related treaties (e.g., the CITES Convention) have helped to identify the wide range of matters of concern to the inter-

¹² CBD, *Scientific Assessments — Note by the Executive Secretary*, doc. UNEP/CBD/SBSTTA/10/7, of 5 November 2004, p. 8, para. 29.

national community as a whole, such as, e.g., *inter alia*, the protection of wild fauna and flora¹³.

V. THE ICRW AS A “LIVING INSTRUMENT”: THE EVOLVING *OPINIO JURIS COMMUNIS*

27. The interpretation and application of the aforementioned treaties, in the light of the systemic outlook, have been contributing to the gradual formation of an *opinio juris communis* in the present domain of contemporary international law. The present Judgment of the ICJ in the *Whaling in the Antarctic* case has recalled the establishment, in 1950, by the IWC, of the Scientific Committee to assist it in discharging its functions; as from the mid-1980s, the Scientific Committee has conducted its review of special permits on the basis of Guidelines, issued or endorsed by the IWC (para. 47). Moreover, the IWC is entitled to adopt *recommendations* (under Article VI of the ICRW), which may be relevant (when adopted by consensus or unanimity) for the interpretation of the Convention or its Schedule (para. 46). As the ICJ itself has put it, the functions conferred upon the IWC “have made the Convention an evolving instrument” (para. 45).

28. The present Judgment of the ICJ proceeds to assert that States parties to the ICRW “have a duty to co-operate with the IWC and the Scientific Committee” and to “give due regard to recommendations calling for an assessment of the feasibility of non-lethal” research methods (para. 83). In this respect, it further recalls, *inter alia*, that “the two experts called by Australia referred to significant advances in a wide range of non-lethal research techniques over the past 20 years” (para. 137). The Judgment the Court has just adopted today, 31 March 2014, is likely to be of importance to the future of the IWC, and to secure the survival of the ICRW itself, as a “living instrument” capable of keeping on responding to needs of the international community and new challenges that it faces in the present domain.

29. This is not the first time that the Court acknowledges that international treaties and conventions are “living instruments”. In its *célèbre* Advisory Opinion (of 21 June 1971) on *Namibia*, for example, the ICJ referring to the mandates system of the League of Nations era, stated that

¹³ P. W. Birnie, *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale Watching*, Vol. II, N.Y./London/Rome, Oceana Publs., 1985, pp. 583 and 635. She further singles out the continuing work of the IWC, with several resolutions addressing “a wide variety of new issues”, such as, *inter alia*, criteria for aboriginal subsistence whaling, small cetaceans, creation of sanctuary areas, preservation of habitats, “humane killing”, discouragement of whaling, among others; cf. *ibid.*, Vol. II, p. 641.

“the concepts embodied in Article 22 of the Covenant (. . .) were not static, but were by definition evolutionary (. . .). [V]iewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations or by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of its interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. (. . .) In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.” (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, *I.C.J. Reports 1971*, pp. 31-32, para. 53.)

30. Subsequently, in its Judgment (of 25 September 1997) in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the ICJ pondered that “newly developed norms of environmental law are relevant for the implementation of the [1977] Treaty” in force between Hungary and Slovakia, that was the object of the dispute. The Court proceeded that the contending Parties are required, “in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration”. Accordingly, the Court added, the 1977 Treaty “is not static, and is open to adapt to emerging norms of international law” (*I.C.J. Reports 1997*, pp. 67-68, para. 112).

31. Other contemporary international tribunals have pursued the same evolutionary interpretation. For example, the European Court of Human Rights, in its judgment (of 25 April 1978) in the *Tyrer v. The United Kingdom* case, asserted that the European Convention on Human Rights “is a living instrument”, to be “interpreted in the light of present-day conditions” (para. 31). Subsequently, the European Court reiterated, *expressis verbis*, this *obiter dictum*, in its judgment (on preliminary objections, of 23 March 1995) in the case of *Loizidou v. Turkey*, wherein it added that, accordingly, the provisions of the European Convention, as a “living instrument”,

“cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago. (. . .) In addition, the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.” (Application No. 5856/72, paras. 71-72.)

32. Likewise, the Inter-American Court of Human Rights, in its Judgment (of 31 August 2001) in the case of the *Mayagna (Sumo) Awas*

Tingni Community v. Nicaragua, stated that “human rights treaties are living instruments, the interpretation of which ought to adapt to the evolution of times, and, in particular, to current living conditions” (para. 146). In the same line of thinking, in its earlier Advisory Opinion (of 1 October 1999) on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, the Inter-American Court observed that the International Law of Human Rights

“has made great headway thanks to an evolutive interpretation of international instruments of protection. That evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention. (. . .) [H]uman rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions.” (Para. 114.)

33. The experience of supervisory organs of various international treaties and conventions points to this direction as well. Not seldom they have been faced with new challenges, requiring new responses from them, which could never have been anticipated, not even imagined, by the draftsmen of the respective treaties and conventions. In sum, international treaties and conventions are a product of their time, being also *living instruments*. They evolve with time; otherwise, they fall into *desuetude*. The ICRW is no exception to that. Those treaties endowed with supervisory organs of their own (like the ICRW) disclose more aptitude to face changing circumstances.

34. Moreover, in distinct domains of international law, treaties endowed with a supervisory mechanism of their own have pursued a hermeneutics of their own¹⁴, facing the corresponding treaties and conventions as *living instruments*. International treaties and conventions are products of their time, and their interpretation and application *in time*, with a temporal dimension, bears witness that they are indeed living instruments. This happens not only in the present domain of conservation and management of living marine resources, but likewise in other areas of international law¹⁵.

35. By the time of the adoption of the 1946 ICRW, in the mid-twentieth century, there did not yet exist an awareness that the living marine resources were not inexhaustible. Three and a half decades later, the adoption of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) — a major international law achievement in the nine-

¹⁴ Cf., for example, in the domain of the international protection of the rights of the human person, A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. II, Porto Alegre/Brazil, S. A. Fabris Ed., 1999, Chap. XI, pp. 23-200.

¹⁵ Cf. A. A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, 2nd rev. ed., Leiden/The Hague, Nijhoff, 2013, Chap. II (“Time and Law Revisited: International Law and the Temporal Dimension”), pp. 31-51.

teenth century — contributed to the public order of the oceans, and to the growing awareness that their living resources were not inexhaustible. Unilateralism gradually yielded to collective regulation towards conservation. An example to this effect is provided, under the 1946 ICRW, by the 1982 general moratorium on commercial whaling.

36. Another example can be found in the establishment by the IWC of whale sanctuaries (under Article V (1) of the ICRW) (*infra*). The IWC has so far adopted three whale sanctuaries: first, the Southern Ocean Sanctuary (1948-1955); secondly, the Indian Ocean Sanctuary (1979, renewed in 1989, and indefinitely as from 1992); thirdly, the new Southern Ocean Sanctuary (from 1994 onwards). Moreover, in its meetings of 2001-2004, the IWC was lodged with a proposal (revised in 2005) of a new sanctuary, the South Atlantic Sanctuary¹⁶, so as to reassert the need of conservation of whales.

37. Over the last three decades, the IWC has repeatedly made clear that lethal research methods are not in line with the aforementioned moratorium. In its resolution 2003-2, for example, the IWC calls for a limitation of “scientific research” to “non-lethal methods only”, and expresses its opposition to commercial whaling, “contrary to the spirit of the moratorium”, and presents an annotated compilation of its “Conservation Work”, with a systematization of resolutions to this effect (Anns. I-II). It is nowadays reckoned that States parties to the ICRW that wish to issue special permits are bound to co-operate with the IWC and the Scientific Committee, and to give consideration to the views of other States parties expressed through the comments of the IWC and the recommendations of the Scientific Committee.

38. Parallel to this, multilateral conventions (such as UNCLOS and CBD) have established a framework for the conservation and management of living marine resources. The UNCLOS Convention contains a series of provisions to that effect¹⁷. As to the CBD Convention, the Conference of the parties held in Jakarta in 1995, for example, adopted the Jakarta Mandate on Coastal and Marine Biodiversity, reasserting the relevance of conservation and ecologically sustainable use of coastal and marine biodiversity, and, in particular, linking conservation, sustainable use of biodiversity and fishing activities.

39. Furthermore, in its meeting of 2002, the States parties to the Convention on Migratory Species (CMS) pointed out the need to give greater protection to six species of whales (including the Antarctic minke whales)

¹⁶ Propounded mainly by Brazil, Argentina, South Africa and Uruguay in the ambit of the IWC. On the proposal, cf. “Chair’s Report of the 57th Annual Meeting of the International Whaling Commission”, pp. 33-34.

¹⁷ Such as Articles 61, 64-67, 192, 194 and 204 (2).

and their habitats, breeding grounds and migratory routes. These are clear illustrations of the evolving *opinio juris communis* on the matter. In its 2010 meeting, held in Agadir, Morocco, the “Buenos Aires Group”¹⁸ reiterated support for the creation of a new South Atlantic Sanctuary for whales, and positioned itself in favour of conservation and non-lethal use of whales¹⁹, and against so-called “scientific whaling” (in particular in the cases of endangered or severely depleted species).

40. The “Buenos Aires Group” stressed the needed implementation of the moratorium, and recalled the achievements of the IWC since the early 1980s. It further called for a reform of Articles V (whaling under objection) and VIII (scientific whaling) of the ICRW, so that their interpretation and application do not go against the principle of conservation of whales underlying the Convention. More recently, on 4 February 2013, the same “Buenos Aires Group” expressed its “strongest rejection” of the ongoing whale hunting (including species classified as endangered) in the Southern Ocean Sanctuary (para. 1), with catches pointing to “an operation of a commercial nature which lacks any scientific justification” (para. 2). After calling for non-lethal methods and “the maintenance of the commercial moratorium in place since 1986”, the “Buenos Aires Group” stated that the ongoing whale hunting was in breach of “the spirit and the text” of the 1946 ICRW, and failed to respect “the integrity of the whale sanctuaries recognized by the IWC” (paras. 3-4).

VI. INTER-GENERATIONAL EQUITY

41. The 1946 ICRW was indeed pioneering, in acknowledging, in its Preamble, “the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks”. At that time, shortly after World War II, its draftsmen could hardly have anticipated that this concern would achieve the dimension it did, in the international agenda and in international law-making (in particular in the domain of international environmental law) in the decades that followed. The long-term temporal dimension, underlying the inter-generational equity, was properly acknowledged. And the conceptual construction of *inter-generational equity* (in the process of which I

¹⁸ Formed by Argentina, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Mexico, Panama, Peru and Uruguay.

¹⁹ Cf. Chair’s Report of the 62nd Annual Meeting of the International Whaling Commission, pp. 7-8.

had the privilege to take part) was to take place, in international legal doctrine, four decades later, from the mid-1980s onwards.

42. Within this Court, I had in fact the occasion to address the long-term temporal dimension, in relation to *inter-generational equity*, in my separate opinion in the case of the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (*Judgment, I.C.J. Reports 2010 (I)*, p. 14). I pondered therein that

“The long-term temporal dimension marks its presence, in a notorious way, in the domain of environmental protection. The concern for the prevalence of the element of *conservation* (over the simple exploitation of natural resources) reflects a cultural manifestation of the integration of the human being with nature and the world wherein he or she lives. Such understanding is, in my view, projected both in space and in time, as human beings relate themselves, in space, with the natural system of which they form part (and ought to treat with diligence and care), and, in time, with other generations (past and future)²⁰, in respect of which they have obligations. (. . .)

In fact, concern with future generations underlies some environmental law conventions²¹. In addition, in the same line of reasoning, the 1997 UNESCO Declaration on the Responsibilities of Present Generations Towards Future Generations, after invoking, *inter alia*, the 1948 Universal Declaration of Human Rights and the two 1966 United Nations Covenants on Human Rights, recalls the responsibilities of present generations to ensure that ‘the needs and interests of present and future generations are fully safeguarded’ (Article 1 and Preamble). The 1997 Declaration added, *inter alia*, that ‘the present generations should strive to ensure the maintenance and perpetuation

²⁰ Future generations promptly began to attract the attention of the contemporary doctrine of international law: cf., e.g., A.-Ch. Kiss, “La notion de patrimoine commun de l’humanité”, 175 *Recueil des cours de l’Académie de droit international de La Haye (RCADI)* (1982), pp. 109-253; E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, Tokyo/Dobbs Ferry N.Y., United Nations University/Transnational Publs., 1989, pp. 1-351; A.-Ch. Kiss, “The Rights and Interests of Future Generations and the Precautionary Principle”, *The Precautionary Principle and International Law — The Challenge of Implementation* (eds. D. Freestone and E. Hey), The Hague, Kluwer, 1996, pp. 19-28; [Various Authors], *Future Generations and International Law* (eds. E. Agius and S. Busuttill *et al.*), London, Earthscan, 1998, pp. 3-197; [Various Authors], *Human Rights: New Dimensions and Challenges* (J. Symonides, ed.), Paris/Aldershot, UNESCO/Dartmouth, 1998, pp. 1-153; [Various Authors], *Handbook of Intergenerational Justice* (J. C. Tremmel, ed.), Cheltenham, E. Elgar Publ., 2006, pp. 23-332.

²¹ E.g., the 1992 United Nations Framework Convention on Climate Change, the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change, the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, among others.

of humankind with due respect for the dignity of the human person' (Art. 3). Almost two decades earlier, the United Nations General Assembly adopted, on 30 October 1980, its resolution proclaiming 'the historical responsibility of States for the preservation of nature for present and future generations' (para. 1); it further called upon States, in 'the interests of present and future generations', to take 'measures (. . .) necessary for preserving nature' (para. 3). (. . .)

May I recall that the subject at issue was originally taken up by the Advisory Committee to the United Nations University (UNU) on a project on the matter, in early 1988, so as to provide an innovative response to rising and growing concerns over the depletion of natural resources and the degradation of environmental quality and the recognition of the need to conserve the natural and cultural heritage (at all levels, national, regional and international; and governmental as well as non-governmental). The Advisory Committee, composed of professors from distinct continents²², met in Goa, India²³, and issued, on 15 February 1988, a final document titled 'Goa Guidelines on Intergenerational Equity'²⁴, which stated:

'Th[e] temporal dimension is articulated through the formulation of the theory of 'intergenerational equity'; all members of each generation of human beings, as a species, inherit a natural and cultural patrimony from past generations, both as beneficiaries and as custodians under the duty to pass on this heritage to future generations. As a central point of this theory the right of each generation to benefit from this natural and cultural heritage is inseparably coupled with the obligation to use this heritage in such a manner that it can be passed on to future generations in no worse condition than it was received from past generations. This requires conservation and, as appropriate, enhancement of the quality and of the diversity of this heritage. The conservation of cultural diversity is as important as the conservation of environmental diversity to ensure options for future generations.

²² Namely, Professors E. Brown Weiss, A. A. Cançado Trindade, A.-Ch. Kiss, R. S. Pathak, Lai Peng Cheng and E. W. Ploman.

²³ In the meeting held in Goa, India, convened by the United Nations University (UNU), the members of the UNU Advisory Committee acted in their own personal capacity.

²⁴ These Guidelines, adopted on 15 February 1988, were the outcome of prolonged discussions, which formed part of a major study sponsored by the UNU. It is not my intention to recall, in the present separate opinion, the points raised in those discussions, annotated in the unpublished UNU dossiers and working documents, on file with me since February 1988.

Specifically, the principle of intergenerational equity requires conserving the diversity and the quality of biological resources. (. . .)

The principles of equity governing the relationship between generations (. . .) pertain to valued interests of past, present and future generations, covering natural and cultural resources. (. . .) There is a complementarity between recognized human rights and the proposed intergenerational rights. (. . .)²⁵

And the aforementioned UNU document moved on to propose strategies to implement inter-generational rights and obligations. From then onwards, the first studies on this specific topic of inter-generational equity, in the framework of the conceptual universe of International Environmental Law, began to flourish²⁶. From the late 1980s onwards, inter-generational equity has been articulated amidst the growing awareness of the vulnerability of the environment, of the threat and gravity of sudden and global changes, and, ultimately, of one's own mortality."²⁷

43. Inter-generational equity comes again to the fore in the present case of *Whaling in the Antarctic*. The factual context of the *cas d'espèce* is of course quite distinct from that of the *Pulp Mills* case; yet, significantly, in one and the other, *inter-generational equity* (with its long-term temporal dimension) marks its presence. It does so in distinct international instruments of international environmental law, and in its domain as a whole. And this cannot pass unnoticed here.

44. In this respect, the 1973 CITES Convention, e.g., states in its Preamble that wild fauna and flora "must be protected for this and the generations to come", and adds that "peoples and States are and should be the best protectors of their own wild fauna and flora". The CITES Convention provides for control of trade, and prevention or restriction of exploitation of species (Art. II). The 1979 Convention on the Conservation of Migratory Species of Wild Animals asserts in its Preamble the awareness that each generation "holds the resources of the earth for future generations and has an obligation to ensure that this legacy is conserved and, where utilized, is used wisely". Furthermore, it recognizes in

²⁵ The full text of the "Goa Guidelines on Intergenerational Equity" is reproduced in Annexes to the two following books, whose authors participated in the elaboration of the document: E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, *op. cit. supra* note 20, Appendix A, pp. 293-295; A. A. Cançado Trindade, *Direitos Humanos e Meio Ambiente: Paralelo dos Sistemas de Proteção Internacional*, Porto Alegre/Brazil, S. A. Fabris Ed., 1993, Ann. IX, pp. 296-298.

²⁶ Cf., *inter alia*, *supra* note 20.

²⁷ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), pp. 177-180, paras. 114, 118, 120 and 121 of my aforementioned separate opinion.

the Preamble that “wild animals in their innumerable forms are an irreplaceable part of the earth’s natural system which must be conserved for the good of mankind”.

45. The 1992 CBD Convention expresses, in its Preamble, the determination “to conserve and sustainably use biological diversity for the benefit of present and future generations”. It further asserts in its Preamble that “the conservation of biological diversity is a common concern of humankind”, and calls for “the conservation of biological diversity and the sustainable use of its components”, also to “contribute to peace for humankind”. In its operative part, the CBD Convention then proceeds, in detail, to provide for conservation of biological diversity and its sustainable use (Arts. 1, 6-10, 11-13, and 17-18).

46. In the course of a meeting of a UNEP Group of Legal Experts — of which I keep a good memory — which took place in Malta before the holding of the 1992 UNCED Conference in Rio de Janeiro in the period of the *travaux préparatoires* of the CBD Convention — the need was stressed of relating “preventive with corrective measures, with preventive measures seeming “to lend themselves more easily to an inter-generational perspective”²⁸. The Group of Legal Experts then identified “the constitutive elements” of common concern of humankind, namely:

“involvement of all countries, all societies, and all classes of people within countries and societies; long-term temporal dimension, encompassing present as well as future generations; and some sort of sharing of burdens of environmental protection”²⁹.

47. In effect, inter-generational equity marks presence nowadays in a wide range of instruments of international environmental law, and indeed of contemporary public international law. It goes beyond the scope of the present separate opinion to dwell extensively upon them. Suffice it here to refer to yet another illustration. The 2001 UNESCO Universal Declaration on Cultural Diversity, e.g., after expressing, in its Preamble, the aspiration to “greater solidarity” on the basis of “recognition of cultural diversity, of awareness of the unity of humankind, and of the development of intercultural exchanges”, adds, in Article 1, that “cultural diversity is as necessary for humankind as biodiversity is for nature”; in this

²⁸ UNEP, “Report on the Proceedings of the Meeting Prepared by the Co-Rapporteurs, Profs. A. A. Cançado Trindade and D. J. Attard”, *The Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues* (D. J. Attard, ed. — Malta, University of Malta, 13-15 December 1990), Nairobi, UNEP, 1991, p. 22, para. 6.

²⁹ *Ibid.*, p. 21, para. 4.

sense, “it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations”.

VII. CONSERVATION OF LIVING SPECIES (MARINE MAMMALS)

1. The Tension between Conservation and Exploitation: Arguments of the Parties

48. In the course of the proceedings (written phase) of the present case *Whaling in the Antarctic*, both Australia and Japan referred, in distinct terms to the conservation of marine mammals. To start with, Australia’s Memorial devoted some attention to the development, from the mid-1970s onwards, of a treaty-based regime for the conservation of marine mammals. It observed that, from then onwards, “the international community has adopted an increasingly conservation-oriented approach in the development of treaty regimes, including those covering marine mammals” (para. 4.84). This, in its view, has led to “significant developments in the law relating to conservation” (para. 4.85).

49. In Australia’s view, those international instruments recognize “the intrinsic value” of all living species, and “the importance of conservation of migratory species and biological diversity as common concerns of mankind”. They are directly relevant to the conservation and management of whales, and support an interpretation of Article VIII of the ICRW that “contributes to, rather than undermines, the conservation of whales” (para. 4.86). Australia then advances “a restrictive interpretation of the Article VIII exception, and a stringent limitation on the use of lethal methods of scientific research if non-lethal means are available” (para. 4.86). Australia further refers to the recognition of the “precautionary approach” in several “international environmental agreements, concerning both broader environmental matters, and, more particularly, the conservation and protection of marine mammals” (para. 4.89).

50. For its part, Japan, in its Counter-Memorial, argued that, in its view, there is “no contradiction” between the conservation and the exploitation of whales, not even under the ICRW (para. 6.15). In the same line of thinking — Japan added — the United Nations Convention on Biological Diversity (CBD) “permits the use of biological resources” in a manner that avoids or minimizes “adverse impacts” on biological diversity (para. 6.17). In Japan’s view, the term “use” includes “both commercial exploitation and use for the purposes of scientific research” (para. 6.18). Japan then recalled that the concept of “sustainable use” has been further developed by the Conference of the States parties to the

CBD, which, in 2004, adopted the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity, recognizing that:

“Sustainable use is a valuable tool to promote conservation of biological diversity, since in many instances it provides incentives for conservation and restoration because of social, cultural and economic benefits that people derive from that use. In turn, sustainable use cannot be achieved without effective conservation measures. In this context, and as recognized in the Plan of Implementation of the World Summit on Sustainable Development, sustainable use is an effective tool to combat poverty, and consequently, to achieve sustainable development.” (Memorial of Australia, para. 6.19.)

51. Japan further argued that the policy of “combination of conservation and sustainable use” under the CBD has been a “matter of practical necessity”, and “what types and levels of utilization are sustainable will depend on the status of the species and the demands upon it at any particular time” (*ibid.*, para. 6.20). As the “level of exploitation” would depend on “the conservation status of the species in question” — Japan added — it followed that “the measures adopted to promote sustainable use of biological resources should be adjusted according to the information available about a species, bearing in mind the precautionary approach” (*ibid.*, para. 6.22).

2. *Whale Stocks — Conservation and Development:
Responses of the Parties and the Intervenor
to Questions from the Bench*

52. There has been growing awareness in recent years that the ICRW does not allow the use of whales to take place to the detriment of the conservation of whale stocks. The general membership of the ICRW (encompassing both whaling and non-whaling States) has been attentive to the growing emphasis on conservation, with more protective measures (by the IWC), and the gradual crystallization of the precautionary principle (cf. *infra*). In the present case of *Whaling in the Antarctic*, in the course of the oral pleadings before the Court (on 8 July 2013), I deemed it fit to put the following questions to Japan, Australia and New Zealand together:

- “[1.] How do you interpret the terms ‘conservation and development’ of whale stocks under the International Convention for the Regulation of Whaling?
[2.] In your view, can a programme that utilizes lethal methods be considered ‘scientific research’, in line with the object and purpose of the International Convention for the Regulation of Whaling?”³⁰

³⁰ CR 2013/17, of 8 July 2013, p. 49.

And then, I addressed the following additional questions only to Japan :

- “1. To what extent would the use of alternative non-lethal methods affect the objectives of the JARPA II programme?
2. What would happen to whale stocks if many, or even all States parties to the International Convention for the Regulation of Whaling, decide to undertake ‘scientific research’ using lethal methods, upon their own initiative, similarly to the *modus operandi* of JARPA II?”³¹

53. The questions I put to Australia, Japan and New Zealand together pertained to the interpretation of the terms “conservation and development” of whale stocks under the ICRW, and to the methods to be used in “scientific research” in the light of the object and purpose of the ICRW. In its answer, Australia drew attention to quotas for “aboriginal subsistence whaling”, and to measures for purposes other than consumption (e.g., whale watching)³². For its part, Japan referred to the co-existence between “conservationist measures” (e.g., moratorium and sanctuaries) and “scientific whaling” under Article VIII of the ICRW³³.

54. In its response, the intervenor, New Zealand, warned against the excesses of commercial whaling (also referring to the sustainable use of whale stocks), invoking the Preamble of the ICRW’s provision, to the effect that whale capture cannot endanger those “natural resources”. New Zealand further referred to the duty of co-operation and “the needs of conservation for the benefit of all”. Invoking the precautionary approach, New Zealand ascribed a limited role to Article VIII for the conduct of scientific research, adding that lethal methods could only be used when they created no risk of an adverse effect on the whales stock³⁴.

55. As to one of the questions I addressed to Japan, pertaining to the objectives of a programme (*supra*), the argument advanced by Japan was that the research objectives (of JARPA II) dictated the methods, and not vice versa. If certain data could only be collected by using lethal methods, in its view there would be no alternative non-lethal methods. Japan then added that there were limitations to the use of non-lethal methods of biopsy sampling and satellite tagging³⁵.

³¹ CR 2013/17, of 8 July 2013, p. 49.

³² CR 2013/19, of 10 July 2013, p. 54, para. 79.

³³ CR 2013/21, of 15 July 2013, pp. 40-41, paras. 20-21.

³⁴ Written Responses of New Zealand, *op. cit. supra* note 3, pp. 4-5, paras. 1-4.

³⁵ CR 2013/22, of 15 July 2013, p. 48, para. 20.

56. Australia retorted that the objectives of JARPA II were, in its view, rather vague and general, and seemed to have been adopted and applied so as to allow the killing of whales; thus, the methods (of JARPA II) dictated the objectives, and not vice versa. After criticizing the stated objectives of JARPA II, Australia advocated the use of non-lethal methods under that programme. And it added that, if many of the States parties to the ICRW felt entirely free — as Japan does — to decide for itself to issue special permits under Article VIII for the taking of any number of whales, this would certainly have adverse effects on the fin, humpback and other whale stocks³⁶. Australia expressed its concern that, as the situation stands at present, “an unknown and indefinite number of whales will be taken under JARPA II”³⁷.

3. General Assessment

57. It has been made clear, in recent decades, that the international community has adopted a conservation-oriented approach in treaty regimes, including treaties covering marine mammals. The ICRW is to be properly interpreted in this context; it does not stand alone as a single international Convention aimed at conservation and management of marine mammals. The ICRW is part of a plethora of international instruments adopted in recent years, aiming at conservation with a precautionary approach. Amongst these instruments stands the United Nations Convention on Biological Diversity (CBD), adopted at the United Nations Conference on Environment and Development (UNCED), in Rio de Janeiro, on 5 June 1992, which can here be recalled as an international instrument aiming at conservation of living species.

58. The CBD is directly pertinent to conservation and management of whales. For example, in its Preamble, it asserts *inter alia* its determination “to conserve and sustainably use biological diversity for the benefit of present and future generations”. In this respect, the ICRW should be read in the light of other international instruments that follow a conservation-oriented approach and the precautionary principle. The existence of the ICRW in relation to Conventions aimed at conservation of living resources supports a narrow interpretation of Article VIII of the ICRW.

59. Accordingly, Article VIII (1), as already pointed out, cannot be broadly interpreted, and cannot at all be taken as a so-called “self-contained” regime or system. It is not a free-standing platform, not a *carte blanche* given to States to do as they freely wish. It is part and parcel of a system of collective guarantee and collective regulation oriented

³⁶ Written Comments of Australia on Japan’s Responses to Questions Put by Judges during the Oral Proceedings, of 19 July 2013, pp. 8-13.

³⁷ CR 2013/20, of 10 July 2013, p. 16, para. 37.

towards the conservation of living species. Thus, Article VIII (1) can only be interpreted in a restrictive way; all States parties to the ICRW have recognized a common interest in the conservation and in the long-term future of whale stocks.

VIII. PRINCIPLE OF PREVENTION AND THE PRECAUTIONARY PRINCIPLE:
ARGUMENTS OF THE PARTIES AND THE INTERVENOR

60. Although the Court does not dwell upon the precautionary principle or approach in the present Judgment in the case of *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, I deem it fit to recall and point out herein that, in the course of the proceedings in the present case, the two contending Parties as well as New Zealand addressed the principle of prevention and the precautionary principle as related to the *cas d'espèce*. In its oral arguments, Australia stressed *conservation* under contemporary international environmental law, invoking its “three main legal pillars”, namely, “intergenerational equity, the principle of prevention and the precautionary approach”, principles that are to “govern the interpretation and the application of the 1946 Convention régime, as they make it possible for its object and purpose to be achieved”³⁸.

61. In the same line of thinking, in its Memorial Australia upheld the precautionary principle, asserting that, for example, “[t]he establishment of sanctuaries reflects also the increasing importance of the precautionary approach in the IWC’s management and conservation of whales” (p. 42, para. 2.80). It has then added that

“[t]he IWC now pursues conservation of whales as an end itself. In so doing, it places greater reliance on a precautionary approach to conservation and management combined with a focus on non-consumptive use” (p. 52, para. 2.99).

62. Australia, in sum, identified an “increasingly conservation-oriented approach” (p. 172, para. 4.83). This is so in view of the growing pursuance of the precautionary approach. In Australia’s perception,

“This development, which has been recognized by the IWC, must be taken into account in interpreting the Article VIII exception. In practical terms, and in the face of uncertainty as to the status of whale stocks and the effect of any lethal take, precaution directs an interpretation of Article VIII that limits the killing of whales.

The precautionary approach specifically is intended to provide guidance in the development and application of international environ-

³⁸ CR 2013/7, of 26 June 2013, pp. 56-58, paras. 50, 55 and 57-58.

mental law where there is scientific uncertainty. The core of this approach is reflected in Principle 15 of the Rio Declaration (. . .). The approach requires caution and vigilance in decision-making in the face of such uncertainty.

The precautionary approach has been recognized in a number of international policy documents and international environmental agreements, concerning both broader environmental matters and, more particularly, the conservation and protection of marine mammals. (. . .)

The Contracting Governments to the ICRW have agreed to the adoption of a precautionary approach in a wide range of matters. As applied to Article VIII, this means that the uncertainty regarding the status of whale stocks requires Contracting Governments to act with prudence and caution by strictly limiting the grant of special permits under Article VIII.” (Memorial of Australia, pp. 173-176, paras. 4.87-4.91.)³⁹

63. In sum, in Australia’s understanding, developments in international law confirm that “Article VIII is to be interpreted as an exception that is only available in limited circumstances”; Article VIII “is not self-judging”, and its application is to be “determined by reference to objective criteria, consistent with those adopted by the Commission established under the ICRW”. Such an approach — Australia added — is consistent with “the broader international legal framework in which the ICRW now rests”, which promotes a “conservation-oriented focus” that is consistent with the precautionary approach (*ibid.*, pp. 173-176, paras. 4.87-4.91). Australia concluded on this point that “the Article VIII exception” had a “strictly limited application”, in particular where there is “uncertainty regarding the status of the relevant whale stocks” (*ibid.*, p. 187, paras. 4.118). Also in its oral arguments, Australia insisted that “the aim of the precautionary approach is conservation (. . .)”, and this latter applies in particular “where there is scientific uncertainty”⁴⁰.

64. For its part, in its arguments (in the written and oral phases) Japan did not elaborate on the principle of prevention. Furthermore, in its Counter-Memorial, it somehow minimized the precautionary approach⁴¹, but it conceded that such an approach entailed “the conduct of further special permit whaling for scientific purposes as a means of improving

³⁹ Australia recalled, still in its Memorial, not only the incorporation of the precautionary approach (as propounded in Principle 15 of the Rio Declaration on Environment and Development) in “a growing number of international treaties”, but also the contemporary case law on the subject, of the International Court of Justice (case of the *Pulp Mills on the River Uruguay*), as well as of the International Tribunal for the Law of the Sea (ITLOS) (the *Southern Bluefin Tuna* cases, and the Advisory Opinion of its Sea-Bed Disputes Chamber, on the *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*) (pp. 173-176, paras. 4.87-4.91).

⁴⁰ CR 2013/7, of 26 June 2013, p. 47, paras. 53-54.

⁴¹ Counter-Memorial of Japan, p. 132, para. 3.92.

understanding of marine ecosystems and the sustainability of whale stocks”; it was on that basis, Japan added, “that JARPA and JARPA II have been designed and carried out”, in a “prudent and cautious” way, posing “no risk to the survival of abundant minke whale stocks”⁴².

65. In its oral arguments, Japan further stated that it was conducting “scientific research” in such a way that “no harm to stocks” would occur “in full application of the precautionary approach”. It added that “[l]ittle is known of the ecosystem in the Antarctic Ocean”, and it was “precisely to supply the Scientific Committee with necessary scientific data that Japan is pursuing research whaling”, and, together with “other nations’ contribution, conservation and management based on science under the IWC has been making progress”⁴³. In invoking the precautionary approach (as expressed in Principle 15 of the Rio Declaration on Environment and Development), Japan asserted that the JARPA II programme was “consistent” with its requirements; Japan then called for “a permissive interpretation and application of Article VIII of the ICRW, so as to render it effective”⁴⁴.

66. For its part, New Zealand, in its oral arguments, in addressing the *principle of prevention*, stated that “consultations and negotiations” — in pursuance of the duty of co-operation — are to be “meaningful”⁴⁵, also taking into account “the views and legitimate interests of others”⁴⁶. Turning to the precautionary principle or approach, New Zealand argued, in its written observations, that States parties to the ICRW do not have full discretion, in the form of a “blank cheque”, to “determine the number of whales to be killed under special permit under Article VIII”; they have to proceed reasonably, so as to achieve the object and purpose of the Convention as a whole⁴⁷.

67. That number of whales, New Zealand proceeded in its written observations, ought to be “necessary and proportionate to the objectives of the scientific research”, pursuant to the precautionary approach as related to “the conservation and management of living marine resources”.

⁴² Japan added that “possible effects of JARPA II catches on whale stocks were analysed and submitted to the IWC Scientific Committee in 2005”, and those analyses concluded that “there would be no adverse effects on the long-term status of any of the targeted whale species in the Antarctic”. Japan concluded that, if there was “scientific uncertainty about the conservation status and population dynamics of whale stocks”, then further research would become necessary, and it would keep on “acting prudently in continuing to conduct JARPA II” (Counter-Memorial of Japan, pp. 424-426, paras. 9.33-9.36).

⁴³ CR 2013/12, of 2 July 2013, pp. 15-16, para. 9.

⁴⁴ CR 2013/16, of 4 July 2013, pp. 29-35, para. 19, and cf. also paras. 11-12, 15-16, and 20-21.

⁴⁵ CR 2013/17, of 8 July 2013, p. 45, para. 30.

⁴⁶ *Ibid.*, p. 46, para. 33.

⁴⁷ *Ibid.*, pp. 25-27, paras. 34-38.

New Zealand added in its written observations, that States parties are required to act with “prudence and caution”, particularly when “information is uncertain, unreliable or inadequate”, so as to avoid “any harm” (CR 2013/17, of 8 July 2013, pp. 40-41, paras. 73-74). In issuing a special permit, a State party to the ICRW is to demonstrate that it “will avoid any adverse effect on the conservation of the stock” (*ibid.*, p. 41, para. 75).

68. Again in its oral arguments, New Zealand sustained that the issue here in contention is the number of whales to be killed, which, in its view, cannot be “entirely self-judging”, nor completely without review⁴⁸. In its view, the determination of that number should take into account certain factors, namely:

- “(a) first, the number of whales killed must be the lowest necessary for, and proportionate to, the purposes of scientific research;
- (b) as a consequence, there is an expectation that non-lethal methods of research will be used;
- (c) third, the number of whales to be killed must be set at a level which takes into account the precautionary approach; and
- (d) finally, the discretion to set the number of whales to be killed must be exercised reasonably and consistent with the object and purpose of the Convention”⁴⁹.

69. Insisting on the relevance of the precautionary approach, New Zealand added that States parties to the ICRW “should act with prudence and caution when applying provisions, such as Article VIII, which may have an effect on the conservation of natural resources”. Such “prudence and caution” are even more needed “when the information is uncertain, unreliable or inadequate” (*ibid.*, para. 15). A “prudent and cautious” approach would ensure that the number of whales to be taken “is necessary and proportionate”, and would “give preference to the conduct of non-lethal methods of research. (. . .) [U]ncertainty is the very reason for acting with caution.”⁵⁰

70. Even if the Court, in the present Judgment in the *Whaling in the Antarctic* case, has not seen it fit to pronounce on the principle of prevention and the precautionary principle, it is, in my view, significant that the contending Parties, Australia and Japan, and the intervenor, New Zealand, have cared to refer to these principles, in general, in their arguments as to whether or not Japan’s whaling practices under special permits conform to them. Such principles are to inform and conform any programmes under special permits within the limited scope of Article VIII of the ICRW. Furthermore, the principles of prevention and precaution appear inter-related in the present case of *Whaling in the Antarctic*.

⁴⁸ CR 2013/17, of 8 July 2013, p. 35, para. 3.

⁴⁹ *Ibid.*, pp. 35-36, para. 3.

⁵⁰ *Ibid.*, p. 40, para. 17.

71. May I add just one final remark in this respect. Despite the hesitation of the ICJ (and of other international tribunals in general) to pronounce and dwell upon the precautionary principle, expert writing increasingly examines it, drawing attention to its incidence when there is need to take protective measures in face of risks, even in the absence of corresponding scientific proof. The precautionary principle, in turn, draws attention to the time factor, the temporal dimension, which marks a noticeable presence in the interpretation and application of treaties and instruments of international environmental law⁵¹. In this domain in general, and in respect of the ICRW in particular, there has occurred, with the passing of time, a move towards conservation of living marine resources as a common interest, prevailing over State unilateral action in search of commercial profitability⁵². This move has taken place by the operation of the system of collective guarantee, collective decision-making and collective regulation under the ICRW (cf. item II, *supra*).

IX. RESPONSES FROM THE EXPERTS, AND REMAINING UNCERTAINTIES AROUND “SCIENTIFIC RESEARCH” (UNDER JARPA II)

72. During the public sittings of the Court, I deemed it fit to put several questions to the experts of Australia and Japan. In response to my five questions put to him, the expert of Australia (M. Mangel) addressed the availability of non-lethal research techniques to States parties to the 1946 ICRW in the context of conservation and management of whales, pointing out that their use (so as to replace lethal methods) would depend on “having a relevant question”, as there is “always a tension in the scientific community about the exact question”⁵³. Satellite tagging, e.g., has become a non-lethal tool, with the technological development as from the early 1990s, for the collection of information (e.g., on the movement of whales)⁵⁴.

73. In response to my three questions put to him, the expert of Japan (L. Walløe) compared biopsy sampling with lethal sampling. He admitted that he could not determine the total of whales to be killed to attain the objectives of “scientific research” (as under JARPA II), as that, in his view, would depend on the question one would be focusing on; but, “for the time being”, he added, and “for some years”, it would “be justified to

⁵¹ Cf., generally, e.g., Y. Tanaka, “Reflections on Time Elements in the International Law of the Environment”, 73 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2013), pp. 143-147, 150-156, 165-167 and 170-175.

⁵² Cf. M. Bowman, “‘Normalizing’ the International Convention for the Regulation of Whaling”, 29 *Michigan Journal of International Law* (2008), pp. 139, 163, 175-177 and 199.

⁵³ CR 2013/9, of 27 June 2013, pp. 64-66.

⁵⁴ *Ibid.*, pp. 66-67.

kill 850”⁵⁵. He submitted that, for certain purposes, “lethal research” (e.g., on the amount of stomach contents) continued to be necessary⁵⁶. Yet, despite these responses, there remained, in my perception, the impression of a lack of general criteria for the determination of the total whales to be killed, and for how long, for the purposes of so-called “scientific research”.

74. “Scientific research” is surrounded by uncertainties; it is undertaken on the basis of uncertainties. Suffice it here to recall the legacy of Karl Popper, who used to ponder wisely that scientific knowledge can only be uncertain or conjectural, while ignorance is infinite. Scientific research is a search for truth, amidst conjectures, and, given one’s fallibility, one has to learn with mistakes incurred into. One can hope to be coming closer to truth, but without knowing for sure whether one is distant from, or near it. Without the ineluctable refutations, science would fall into stagnation, losing its empirical character. Conjectures and refutations are needed, for science to keep on advancing in its empirical path⁵⁷. As for the *cas d’espèce*, would this mean that whales could keep on being killed, and increasingly so, for “scientific purposes” and amidst scientific uncertainty? I do not think so; there are also non-lethal methods, and, after all, living marine resources are not inexhaustible.

X. REITERATED CALLS UNDER THE ICRW FOR NON-LETHAL USE OF CETACEANS

75. The reiterated calls for non-lethal use of cetaceans, under the ICRW, cannot pass unnoticed here. In its resolution 1995-9, on whaling under special permit, the IWC recommended that “scientific research” intended to assist the comprehensive assessment of whale stocks should be undertaken by non-lethal means; furthermore, it recalled that the ICRW recognizes the common interest of all “the nations of the world” in safeguarding the “great natural resources” of whale stocks “for future generations”. Subsequently, in its resolution 2005-I, on JARPA II, the IWC began by recalling (second preambular paragraph) that

“since the moratorium on commercial whaling came into force in 1985-1986, the IWC has adopted over 30 resolutions on special

⁵⁵ CR 2013/14, of 3 July 2013, pp. 50-51.

⁵⁶ *Ibid.*, pp. 51-52.

⁵⁷ Cf. Karl R. Popper, *Conjecturas e Refutações — O Progresso do Conhecimento Científico* [*Conjectures and Refutations — The Growth of Scientific Knowledge*], 5th ed., Brasília, Editora Universidade de Brasília, 2008, pp. 255, 257, 260, 269 and 271.

permit whaling in which it has generally expressed its opinion that special permit whaling should: be terminated and scientific research limited to non-lethal methods only (2003-2); refrain from involving the killing of cetaceans in sanctuaries (1998-4); ensure that the recovery of populations is not impeded (1987); and take account of the comments of the Scientific Committee (1987)".

76. Resolution 2005-I of the IWC proceeded to express concern (sixth preambular paragraph) that "more than 6,800 Antarctic minke whales (*Balaenoptera bonaerensis*) have been killed in Antarctic waters under the 18 years of JARPA, compared with a total of 840 whales killed globally by Japan for scientific research in the 31-year period prior to the moratorium". It then noted (tenth preambular paragraph) that "some humpback whales which will be targeted by JARPA II belong to small, vulnerable breeding populations around small island States in the South Pacific", and "even small takes could have a detrimental effect on the recovery and survival of such populations". The IWC further expressed concern (eleventh preambular paragraph) that "JARPA II may have an adverse impact on established long-term whale research projects involving humpback whales". At last, the operative part of resolution 2005-I "strongly" urged Japan to withdraw its JARPA II proposal, or else to revise it to consider using non-lethal means.

77. Two years later, the IWC adopted two new resolutions on the non-lethal use of whale resources. In resolution 2007-1, the IWC recalled that paragraph 7 (*b*) of the Schedule establishes the Southern Ocean Sanctuary; it further recalled its repeated requests to States parties to refrain from issuing special permits for research involving the killing of whales within the Southern Ocean Sanctuary. It then expressed concern at continuing lethal "research" within the Southern Ocean Sanctuary. In relation to JARPA II in particular, the IWC noted that, thereunder, "the take of minke whales has been more than doubled, and fin whales and humpback whales have been added to the list of targeted species" (fourth preambular paragraph). Convinced that "the aims of JARPA II do not address critically important research needs" (six preambular paragraph), resolution 2007-I, in its operative part, called upon Japan 31 recommendations of the Scientific Committee and "to suspend indefinitely the lethal aspects of JARPA II conducted within the Southern Ocean Whale Sanctuary".

78. In addition, the IWC recalled, in resolution 2007-3 (on Non-Lethal Use of Cetaceans), the ICRW's aim to safeguard "the natural resources represented by whale stocks for the benefit of future generations" (first preambular paragraph). It noted that many coastal States adopted poli-

cies of non-lethal use of cetaceans in the waters under their jurisdiction, in the light of relevant provisions of the 1982 United Nations Convention on the Law of the Sea and the 1992 Rio Declaration on Environment and Development (second preambular paragraph). It pondered that “most whale species are highly migratory” and are “thus shared biodiversity resources” (third preambular paragraph). Calling for the non-lethal use of whales, it further noted that “the moratorium on commercial whaling has been in effect since 1986 and has contributed to the recovery of some cetacean populations essential for the promotion of non-lethal uses in many countries” (sixth preambular paragraph).

79. Next, in the same resolution 2007-3, the IWC expressed its concern that whales in the twenty-first century “face a wider range of threats than those envisaged when the ICRW was concluded in 1946” (seventh preambular paragraph). The IWC further notes that the Buenos Aires Declaration states that “high quality and well managed implementation of whale watching tourism promotes economic growth and social and cultural development of local communities, bringing educational and scientific benefits, whilst contributing to the protection of cetacean populations” (eighth preambular paragraph). Accordingly, in the operative part of resolution 2007-3, the IWC recognized, first, the valuable benefits to be derived from “the non-lethal uses of cetaceans as a resource, both in terms of socio-economic and scientific development”, and secondly, the non-lethal use as “a legitimate management strategy”. Thus, the IWC encouraged member States “to work constructively” towards “the incorporation” of the needs of non-lethal uses of whale resources in “any future decisions and agreements”.

XI. CONCLUDING OBSERVATIONS, ON THE JARPA II PROGRAMME AND THE REQUIREMENTS OF THE ICRW AND ITS SCHEDULE

80. Last but not least, as to the central question of the present case, that is, whether JARPA II is in conformity with the ICRW and its Schedule, — object of the main controversy between Australia and Japan — in my perception JARPA II does not meet the requirements of a programme “for purposes of scientific research” and does not fall under the exception contained in Article VIII of the ICRW. There are a few characteristics of JARPA II which do not allow it to qualify under the exception of Article VIII, to be restrictively interpreted; in effect, the programme at issue does not seem to be genuinely and *solely* motivated by the purpose of conducting scientific research.

81. This is so, keeping in mind the relation between JARPA II’s stated objectives and the methods used to achieve these objectives: lethal methods, which JARPA II widely applies in its operations, are, in my view,

only to be used, first, where it is unavoidable to achieve a crucial objective of the scientific research; secondly, where no other methods would be available; and thirdly, where the number of whales killed corresponds to those necessary to conduct the research. In practice, the use of lethal methods by JARPA II in relation to what seems to be a large number of whales does not appear justifiable as “scientific research”.

82. Furthermore, the fact that JARPA II runs for an indefinite duration also militates against its professed purpose of “scientific research”. To my mind, a scientific programme, when being devised, should have objectives which go along a specific time frame for their achievement. To prolong the killing of whales indefinitely does not seem to be in line with scientific research, nor justifiable. In addition, there subsists the concern with the possible adverse effects of JARPA II on whale stocks. As just indicated, JARPA II utilizes lethal methods and runs for an indefinite time. It is not entirely convincing that, under these parameters, whale stocks subject to the programme will not be adversely affected. This is exacerbated in the hypothesis that other States parties to the ICRW decide to follow the same approach and methodology of Japan, and start likewise killing whales allegedly for similar purposes of “scientific research”.

83. There could be an adverse impact on whale stocks if other States parties to the ICRW decided to kill as many whales as Japan, within an unlimited time frame, for purposes of “scientific research”. JARPA II, in the manner it is being currently conducted, can have adverse effects on whale stocks. Even if there is a minor scientific purpose in the JARPA II programme, it is clearly not the main purpose of the programme. In my view, given the methodologies used (widely employing lethal methods — cf. *supra*), the structure of the programme and its duration, “scientific research” is not the sole purpose of the programme, nor the main one.

84. As to the question whether commercial aspects are permissible under Article VIII (2) of the Convention⁵⁸, the text of this provision seems clear: it does not seem expressly to allow for commercial aspects of a whaling programme under special permit. Article VIII (2) is aimed, in my perception, solely to avoid waste. The commercialization of whale meat does not seem to be in line with the purpose of granting special permits and should not be validated under this provision. Permitting commercial aspects of a special permit whaling programme under this provision would go against Article VIII as a whole, and the object and purpose of the ICRW (cf. *supra*). Commercial whaling, pure and simple, is not permissible under Article VIII (2).

⁵⁸ Which reads as follows: “Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.”

85. As to the Schedule, paragraph 30 sets forth a *positive* procedural obligation of States parties to the ICRW, whereby Japan's co-operation with the IWC and the Scientific Committee is expected. The Court has found, in the present Judgment in the *Whaling in the Antarctic* case, that Japan has not acted in conformity with paragraph 10 (*d*) and (*e*) (whaling moratorium, and assessment of effects of whale catches on stocks), and paragraph 7 (*b*) (prohibition of commercial whaling in the Southern Ocean Sanctuary), of the Schedule (resolatory points 3-5). Japan does not appear to have fulfilled this obligation to take into account comments, resolutions and recommendations of the IWC and the Scientific Committee.

86. For example, I note that many resolutions⁵⁹ have been issued over the years concerning JARPA II and its use of lethal methods, which Japan does not seem to have fully taken into account, given its continued use of lethal methods. The Court itself has drawn attention, in the present Judgment (para. 144), to the paucity of analysis by Japan of the feasibility of non-lethal methods to achieve JARPA II objectives; and it has added that

“Given the expanded use of lethal methods in JARPA II, as compared to JARPA, this is difficult to reconcile with Japan's duty to give due regard to IWC resolutions and Guidelines and its statement that JARPA II uses lethal methods only to the extent necessary to meet its scientific objectives.” (Judgment, para. 144.)

⁵⁹ Cf., e.g., Resolution on Japanese Proposal for Special Permits, App. 4, Chairman's Report of the 39th Annual Meeting, *Report of the International Whaling Commission [Rep. Int. Whal. Commn]* 38, 1988, p. 29 (resolution 1987-4); Resolution on the Proposed Take by Japan of Whales in the Southern Hemisphere under Special Permit, App. 3, Chairman's Report of the 41st Annual Meeting, *Rep. Int. Whal. Commn* 40, 1990, p. 36 (resolution 1989-3); Resolution on Special Permit Catches by Japan in the Southern Hemisphere, App. 2, Chairman's Report of the 42nd Meeting, *Rep. Int. Whal. Commn* 41, 1991, pp. 47-48 (resolution 1990-2); Resolution on Special Permit Catches by Japan in the Southern Hemisphere, App. 2, Chairman's Report of the 43rd Meeting, *Rep. Int. Whal. Commn* 42, 1992, p. 46 (resolution 1991-2); Resolution on Special Permit Catches by Japan in the Southern Hemisphere, App. 5, Chairman's Report of the 44th Meeting, *Rep. Int. Whal. Commn* 43, 1993, 71 (resolution 1992-5); Resolution on Special Permit Catches by Japan in the Southern Hemisphere, App. 7, Chairman's Report of the 45th Annual Meeting, *Rep. Int. Whal. Commn* 44, 1994, p. 33 (resolution 1993-7); Resolution on Special Permit Catches by Japan in the North Pacific, Resolution 1994-9, App. 15, Chairman's Report of the 46th Annual Meeting, *Rep. Int. Whal. Commn* 45, 1995, p. 47 (resolution 1994-9); Resolution on Special Permit Catches by Japan in the Southern Hemisphere, resolution 1994-10, App. 15, Chairman's Report of the 46th Annual Meeting, *Rep. Int. Whal. Commn* 45, 1995, p. 47 (resolution 1994-10); Resolution on Special Permit Catches by Japan, resolution 1996-7, App. 7, Chairman's Report of the 48th Meeting, *Rep. Int. Whal. Commn* 47, 1997, pp. 51-52 (resolution 1996-7); cited in CR 2013/8, of 26 June 2013, pp. 34-35.

87. Moreover, it could hardly be claimed that the sole purpose of the JARPA II programme is “scientific research”, as it appears that some commercial aspects permeate the programme. The JARPA II programme does not seem to fall under the exception of Article VIII of the ICRW. In the present Judgment, the Court has found that the special permits granted by Japan in connection with JARPA II do not fall under Article VIII (1) of the ICRW (resolatory point 2). The present case has provided a unique occasion for the Court to pronounce upon a system of collective regulation of the environment for the benefit of future generations. The notion of *collective guarantee* has been developed, and put in practice, to date in distinct domains of contemporary international law. The Court’s present Judgment in the *Whaling in the Antarctic* case may have wider implications than solely the peaceful settlement of the present dispute between the contending Parties, to the benefit of all.

88. Last but not least, may I observe that international treaties and conventions are a product of their time; yet, they have an aptitude to face changing conditions, and their interpretation and application in time bears witness that they are *living* instruments. They evolve with time, otherwise they would fall into *desuetude*. The 1946 ICRW is no exception to that, and, endowed with a mechanism of supervision of its own, it has proven to be a *living* instrument. Moreover, in distinct domains of international law, treaties and conventions — especially those setting forth a mechanism of protection — have required the pursuance of a hermeneutics of their own, as *living* instruments. This happens not only in the present domain of conservation and sustainable use of living marine resources, but likewise in other areas of international law.

89. The present case on *Whaling in the Antarctic* has brought to the fore the evolving law on the conservation and sustainable use of living marine resources, which, in turn, has disclosed what I perceive as its contribution to the gradual formation of an *opinio juris communis* in the present domain of contemporary international law. *Opinio juris*, in my conception, becomes a key factor in the formation itself of international law (here, conservation and sustainable use of living marine resources); its incidence is no longer that of only one of the constitutive elements of one of its “formal” sources⁶⁰. The formation of international law in domains of public or common interest, such as that of conservation and sustainable use of living marine resources, is a much wider process than the formulation of its “formal sources”, above all in seeking the legitimacy of norms to govern international life⁶¹.

⁶⁰ These latter being only means or vehicles for the formation of international legal norms.

⁶¹ For the conceptualization of this outlook, cf. A. A. Cañado Trindade, *International Law for Humankind . . .*, *op. cit. supra* note 15, pp. 134-138, esp. p. 137.

90. *Opinio juris communis*, in this way, comes to assume a considerably broader dimension than that of the subjective element constitutive of custom, and to exert a key role in the emergence and gradual evolution of international legal norms. After all, juridical conscience of what is necessary (*jus necessarium*) stands above the “free will” of individual States (*jus voluntarium*), rendering possible the evolution of international law governing conservation and sustainable use of living marine resources. In this domain, State voluntarism yields to the *jus necessarium*, and notably so in the present era of international tribunals, amidst increasing endeavours to secure the long-awaited primacy of the *jus necessarium* over the *jus voluntarium*. Ultimately, this becomes of key importance to the realization of the pursued common good.

(Signed) Antônio Augusto CANÇADO TRINDADE.

DISSENTING OPINION OF JUDGE YUSUF

The Court misconstrued the applicable law — The parameters of review of Japan's conduct are Article VIII of the ICRW, paragraph 30 of the Schedule, and the Guidelines adopted, not extraneous standards such as "reasonableness" — The question before the Court is treaty interpretation — It is whether Japan's decision to authorize JARPA II was consistent with the applicable law — The Court should have assessed the effect of recent amendments on the object and purpose of the Convention — Article VIII should have been interpreted in light of that evolution — The Court's function is not to conduct a scientific review of the design and implementation of JARPA II — Whether or not a programme is for purposes of scientific research cannot be determined on the basis of the reasonableness of the scale of the use of lethal sampling — The distinction between "scientific research" and "for purposes of scientific research" adopted by the Judgment is unpersuasive — It is paradoxical to conclude that something constitutes scientific research but is not for purposes thereof — Paragraph 10 (e), paragraph 10 (d), and paragraph 7 (b) of the Schedule only apply to commercial whaling — The Court has not established that JARPA II was commercial whaling — The finding that Japan has breached the moratorium, the Southern Ocean Sanctuary and the ban on factory ships is thus unwarranted.

I. INTRODUCTION

1. I regret not to be able to join the majority that has voted in favour of most of the operative paragraphs of this Judgment. I regret it all the more since I am certainly no less sensitive than my colleagues to the taking and killing of the whales.

2. Many of us are disturbed by the killing of these iconic and intelligent animals and by the manner in which they are killed. However, these perfectly justified emotional reactions should not make us overlook that it is only by reference to the law that the issues before this Court can be resolved. The judicial settlement of disputes between States cannot be made on emotional or purely ethical grounds.

3. I have decided to dissent because I have serious doubts about the legal correctness of the Court's reasoning and its conclusions. First, the question before the Court is one of treaty interpretation and it is whether or not Japan's decisions are consistent with the relevant provisions of the ICRW. The parameters to determine the legality of Japan's special per-

mits for JARPA II, are to be found in the treaty itself, particularly Article VIII, paragraph 30, of the Schedule and the Guidelines adopted for the application of Article VIII (such as Annex P); and not in some extraneous and undefined standard of review. Resort to such a standard negates the relevance of the specific provisions of the treaty which constitute the law applicable to this dispute.

4. The dispute before the Court in the instant case is not about the fit between the aims of JARPA II and its design and implementation as a scientific research programme; nor is it the task of the ICJ to review and evaluate the design and implementation of a research plan for scientific whaling (para. 67). That is the function of the Scientific Committee of the International Whaling Commission (IWC).

5. Secondly, I think that the reasoning of the majority is seriously flawed in characterizing, on the one hand, JARPA II activities as “scientific research”, while concluding, on the other, that the special permits granted by Japan for JARPA II are not “for purposes of scientific research”. JARPA II is not implemented for commercial purposes and the Judgment recognizes as much. If it was not designed for purposes of scientific research, it could not have simply stumbled into scientific research activities, unless it is accepted that serendipity was at work here. In any case, it appears to me paradoxical that a programme that is broadly characterized as scientific research is considered by the majority not to be “for purposes of scientific research”, particularly without its qualification as commercial whaling under Article VIII, paragraph 4, of the ICRW and without a definition of the words “scientific research”.

6. Thirdly, both the obligation to respect zero catch limits of whales from all stocks (generally known as the moratorium) established in paragraph 10 (*e*) of the Schedule and the prohibition on whaling in the Southern Ocean Sanctuary (para. 10 (*d*) of the Schedule) apply only to commercial whaling, not to research whaling. Thus, there is, in my view, no legal basis to the conclusion that JARPA II is in breach of those provisions, or of the factory ship moratorium (para. 7 (*b*)), particularly in the absence of clear evidence which establishes that JARPA II is commercial whaling in disguise.

7. Finally, the Court should have assessed whether the evolving regulatory framework of the Convention — particularly the recent amendments to the Schedule setting zero catch limits and establishing whale sanctuar-

ies — should be taken into account in the interpretation of Article VIII and the discretionary power it grants to States parties for purposes of scientific research to shed light on the extent to which the conservationist approach now adopted in the Convention restricts the right to issue special permits.

8. I will further elaborate on these matters below.

II. THE DISPUTE BETWEEN THE PARTIES AND THE APPLICABLE LAW

A. The Dispute between the Parties

9. The dispute between the Parties concerns the interpretation and application of Article VIII of the ICRW and the discretionary power it grants any Contracting Government to issue special permits to its nationals “to kill, take and treat whales for purposes of scientific research”. This discretionary power is subject to “such restrictions as to number and . . . to such other conditions as the Contracting Government thinks fit” and to the other requirements and obligations arising from Article VIII itself and from other related provisions. More specifically, what is in issue is whether Japan has used that discretionary power for purposes other than scientific research in connection with the authorization granted to JARPA II.

10. According to Australia, Japan is not conducting whaling under the JARPA II programme for purposes of scientific research, but for commercial purposes, and is therefore in breach of its international obligations under the ICRW, and particularly those relating to commercial whaling included in the Schedule, which is an integral part of the Convention. Japan asserts the contrary and insists on its right to issue special permits under Article VIII, paragraph 1, of the Convention. At the heart of the dispute between the Parties is the lawful exercise of that right by Japan in issuing special permits for JARPA II and its compliance with the corresponding requirements under Article VIII and related instruments adopted by the IWC or by the Scientific Committee.

11. In determining whether a given programme is “for purposes of scientific research” under the ICRW, and may therefore be granted a special permit by a State party, the relevant legal criteria to be considered are those contained in Article VIII of the Convention, together with paragraph 30 of the Schedule and Annex P¹, the latter being the latest relevant

¹ The 2009 version of “Annex P” is Annex 116 to the Counter-Memorial of Japan. The 2012 revised version is available on the IWC website at: <http://iwc.int/index.php?cID=3100&cType=document&download=1>.

set of Guidelines for the application of Article VIII adopted by consensus at the IWC. It is on the basis of the interpretation and application of these provisions, which constitute the law applicable to the circumstances of the present dispute, together with the assessment of whether Japan has breached any other treaty obligations, that the Court should have tried to resolve the dispute before it, and not on the basis of an analysis of the fit between the design and implementation of a research programme and its stated objectives.

B. The Standard of Review Applied by the Court

12. The Court does not, however, use that applicable law to evaluate whether the special permits issued by Japan for JARPA II are for purposes of scientific research. Instead of using those parameters, the Court comes up with a standard of review that is extraneous to the Convention. The need to resort to such a standard is not explained, nor is it indicated that the applicable provisions of the Convention are somehow inadequate to the task. Moreover, the Court does not apply the standard it sets forth to the subject of the dispute between the Parties, namely the legality of Japan's conduct in issuing special permits to JARPA II, but rather to a review of the design and implementation of JARPA II. Thus, it is stated in the Judgment that:

“the Court will consider if the killing, taking and treating of whales is ‘for purposes of’ scientific research by examining whether, in the use of lethal methods, the programme’s design and implementation are reasonable in relation to achieving its stated objectives. This standard of review is an objective one.” (Para. 67.)

13. Consequently, for the Court the object of the review is “the design and implementation of JARPA II” rather than the legality of the conduct of Japan and whether or not Japan, by issuing special permits for JARPA II, has violated or is violating its obligations under the Convention.

14. It is true that Australia, in its oral pleadings, suggested that

“[I]n assessing the actual purpose of a Contracting Government in issuing a special permit it is instructive to have regard to the design and implementation of the whaling programme, as well as any results obtained.”²

However, it is one thing to use design and implementation as an “instructive” factor and another to treat it as the sole object of review to which regard should be had by the Court. Similarly, the suggestion by Japan to use the standard of “objective reasonableness”³ concerned the review of “a State’s decision” to issue special permits and not the “design and implementation” of JARPA II. Japan’s suggestion was also accompanied

² CR 2013/8, p. 53, para. 92 (Crawford).

³ CR 2013/22, p. 60 (Lowe).

by certain criteria for determining what the appropriate standard of review would consist of⁴. Even if the Court wanted to use the standard suggested by Japan, it should have defined the criteria underlying its application by the Court, or otherwise tried to define it.

15. In any case, I am not persuaded that the standard of “reasonableness of the design and implementation of JARPA II in relation to the stated objectives of the programme”, applied by the Court, is grounded in law or in the practice of this Court. The Court used the test of “objective and reasonable” grounds for a decision it was reviewing only once before, in the 2012 Advisory Opinion on the IFAD, where the standard was adopted concerning what was essentially an administrative matter⁵. There are of course some cases where the Court employed the more general concept of “reasonableness”, but rarely as a standard of review of discretionary acts. For example, in the *Barcelona Traction* case, the Court held that “in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably”⁶. But this, as other cases, concerned methods of interpretation⁷.

16. The only case where a standard of review of reasonableness was referred to is the *Elettronica Sicula* case, concerning “unreasonable requisitions” of foreign property. Here the Court had to determine whether under the treaty which the Court was interpreting the requisition of certain property by Italian authorities was “arbitrary”. On cue from United States counsel, the test of “reasonableness” was used by the Court as one which constituted the opposite of “arbitrariness”⁸. But this test arose from the terms of the treaty, and was not adopted by the Court on its own.

⁴ “Japan agrees with Australia and New Zealand in regarding the test as being whether a State’s decision is objectively reasonable, or supported by coherent reasoning and respectable scientific evidence and . . . in this sense, objectively justifiable.” (CR 2013/22, p. 60 (Lowe).)

⁵ *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012 (I)*, pp. 27 and 29.

⁶ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 48.

⁷ See, e.g., *Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Objections, Judgment, I.C.J. Reports 1961*, pp. 32-33:

“Moreover, the Court has held in the *Anglo-Iranian Oil Co.* case (*I.C.J. Reports 1952*, p. 104) that the principle of the ordinary meaning does not entail that words and phrases are always to be interpreted in a purely literal way; and the Permanent Court, in the case of the *Polish Postal Service in Danzig (P.C.I.J., Series B, No. 11, p. 39)*, held that this principle did not apply where it would lead to ‘something unreasonable or absurd’. The case of a contradiction would clearly come under that head.”

⁸ *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgment, I.C.J. Reports 1989*, pp. 76-77.

17. In the present case, the Court should have focused its analysis on the lawful use by Japan of its discretionary power under Article VIII, in light of the object and purpose of the Convention, in issuing a special permit for JARPA II and whether or not Japan has violated or is violating its obligations under the ICRW in authorizing and implementing JARPA II, instead of reviewing the design and implementation of a scientific research programme, which is the task of the Scientific Committee of the IWC. The reasonableness of the design and implementation of JARPA II in relation to achieving its stated objectives is a debatable matter the assessment of which may give rise to genuine differences of opinion among scientists who have to deal with the design and implementation of research plans. This is confirmed by the work of the Scientific Committee of the IWC, where the divergences of opinion on JARPA and JARPA II are often reflected in its reports. It is also confirmed by the views expressed by the experts presented by the Parties during the oral proceedings.

C. The Applicable Law

18. Article VIII of the ICRW, which is at the core of the dispute between the Parties, reads as follows:

“1. Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.

2. Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.

3. Each Contracting Government shall transmit to such body as may be designated by the Commission, in so far as practicable, and at intervals of not more than one year, scientific information available to that Government with respect to whales and whaling, including the results of research conducted pursuant to paragraph 1 of this Article and to Article IV.

4. Recognizing that continuous collection and analysis of biological data in connection with the operations of factory ships and land stations are indispensable to sound and constructive management of

the whale fisheries, the Contracting Governments will take all practicable measures to obtain such data.”

19. Article VIII constitutes an exception to the regulatory régime established by the Convention for commercial whaling, but it is not, as initially argued by Japan, “outside the scope of the ICRW”. It cannot be outside the scope of the ICRW, because it is an integral part of the Convention, and was included therein to deal with a distinct type of whaling, which may be referred to as “scientific whaling” or whaling for purposes of scientific research. It establishes a system of special permits for this type of whaling, a system that is “exempt from the operation of this Convention” in so far as the killing, taking and treating of whales is carried out “in accordance with the provisions” of Article VIII.

20. The opening words of paragraph 1, i.e., “Notwithstanding anything contained in this Convention any Contracting Government may grant a special permit”, have to be interpreted in the sense of a discretionary power granted under the Convention to States parties to issue a special permit for purposes of scientific research subject to such restrictions and conditions “as the Contracting Government thinks fit”. The discretionary power granted to States parties distinguishes this type of whaling from the commercial whaling regulated in other parts of the Convention for which the Commission has to fix the conditions and restrictions, such as stock status and commercial quotas, in accordance with the Schedule annexed to the Convention.

21. The fixing of the number of whales to be taken, the combination of non-lethal methods with the lethal ones permitted by Article VIII and any other conditions rest with the discretion of the Contracting Government issuing the permit. Nonetheless, the killing, taking and treating of whales for which special permits are issued have to be carried out “in accordance with the provisions” of Article VIII; i.e., for purposes of scientific research and in compliance with the requirements laid down in paragraphs 2 and 3 of that provision. Thus, there is a correlative obligation under Article VIII itself not to use such a right or discretionary power for reasons contrary to the purpose for which it was granted, or in an arbitrary or capricious manner.

22. Consequently, the discretionary power granted under Article VIII is far from being unrestricted. It is to be lawfully used only for the achievement of the purposes laid down in the Convention, namely scientific research, and in accordance with the provisions of Article VIII. Besides the primary requirement that such special permits can only be issued “for purposes of scientific research”, other limitations to the discretionary power of the issuing State under Article VIII include the duty to “report at once to the Commission all such authorizations which it has granted” (para. 1) and to

“transmit to such body as may be designated by the Commission, in so far as practicable, and at intervals of not more than one year,

scientific information available to that Government with respect to whales and whaling, including the results of research conducted pursuant to paragraph 1 of this Article and to Article IV"⁹ (para. 3).

23. In addition, the meat of any whales taken for scientific research has to be processed and disposed of in accordance with directions issued by the Government by which the permit was granted (para. 2). As indicated above, these requirements are further complemented by the obligations laid down in paragraph 30 of the Schedule which have been specifically elaborated to enable the Scientific Committee to review and comment on such special permits and by the Guidelines in Annex P both of which are examined in paragraphs 33-34 below.

24. The obligations and requirements limiting the discretionary power granted in Article VIII are not to be sought, as has been done in the Judgment, in an assessment of the reasonableness of the relationship between the design and implementation of JARPA II and its stated objectives as a research plan. They are to be found in Article VIII itself and in the related instruments developed by the ICW and by its Scientific Committee to review and ascertain the lawful use of such discretionary power by those States issuing the special permits. It is these provisions and instruments that should have been used by the Court to determine the legality of the conduct of Japan in issuing such permits for JARPA II, and not the extraneous standard of reasonableness of the design and implementation of the programme in relation to its stated objectives.

25. Moreover, the amendments made to the Schedule with respect to the regulatory framework for commercial whaling, and in particular the moratorium adopted in 1982, which is still in place, and the Schedule on the prohibition on commercial whaling in the Southern Ocean Sanctuary, cannot be considered to be devoid of influence on the interpretation and implementation of Article VIII of the Convention in so far as they reflect a shift in attitudes and societal values towards the use of lethal methods for whaling in general. Thus, the application of Article VIII in the context of JARPA II should have been interpreted through the prism of all these developments, and in light of their effect on the object and purpose of the Convention.

26. On account of the developments that have taken place both in the ICRW and in international environmental law in general, the Court should have assessed whether the continued conduct of JARPA II, as a programme that uses lethal methods for purposes of scientific research under Article VIII, constitutes an anomaly, which may frustrate the object and purpose of the Convention in light of the amendments introduced to it in recent years which have resulted in an evolution of the

⁹ Article IV deals with the collaboration of the Commission with independent agencies of the Contracting Governments to encourage, recommend or organize studies and investigations relating to whales and whaling.

regulatory framework of the Convention. Indeed, the balance between conservation and sustainable exploitation has clearly shifted in the Convention in favour of more conservation and less exploitation. Although JARPA II does not appear to have adverse effects on whale stocks at the moment, such an assessment could have perhaps shed light on whether a programme for purposes of scientific research, such as JARPA II, may still be considered to be consistent with the conservationist approach adopted in the Convention or whether this new approach restricts the right to issue permits for scientific research purposes.

27. Although the Judgment recognizes the centrality of the interpretation and application of these provisions in its paragraph 50¹⁰, it quickly skates over their analysis to embark in an extremely detailed assessment of “whether the design and implementation of JARPA II are reasonable in relation to achieving the programme’s stated research objectives” (see subtitle B, para. 127), which is adopted as the standard of review on whether or not JARPA II is for purposes of scientific research. It bears to be emphasized that neither the design and implementation of scientific research programmes nor their reasonableness in relation to achieving a programme’s stated objectives are mentioned in Article VIII of the ICRW or in the related instruments mentioned above. Nonetheless, they have surprisingly managed to occupy centre stage in the Judgment.

28. The Judgment also recognizes that:

“since Article VIII, paragraph 1, specifies that ‘the killing, taking and treating of whales in accordance with the provisions of this Article shall be exempted from the operation of this Convention’, whaling conducted under a special permit which meets the conditions of Article VIII is not subject to the obligations under the Schedule concerning the moratorium on the catching of whales for commercial purposes, the prohibition of commercial whaling in the Southern Ocean Sanctuary and the moratorium relating to factory ships” (para. 55).

However, instead of analysing whether the special permits issued by Japan meet the conditions of Article VIII, the Judgment takes up the examination and application of the extraneous standard of “reasonableness in relation to achieving the stated objectives of the programme” and derives its final conclusions from it. Thus, the law applicable to the subject of the dispute between the Parties, recognized by the Court itself in the Judgment, is set aside in favour of an obscure and debatable standard which cannot be found anywhere in the Convention while the effects of the conservationist approach adopted in the Convention in recent years

¹⁰ Paragraph 50 reads as follows: “The issues concerning the interpretation and application of Article VIII of the Convention are central to the present case . . .”

on the interpretation of the discretionary power granted under Article VIII are ignored.

D. The Assessment of the Legality of the Special Permits for JARPA II

29. Is the primary purpose of the special permit issued to JARPA II to undertake scientific research or to facilitate the supply of whale meat to a commercial market? Is there evidence to support that JARPA II was granted special permit for a purpose other than scientific research? What are the criteria for determining whether a programme is for purposes of scientific research under the ICRW? To answer these questions and others relating to the legality of the special permits issued by Japan in connection with JARPA II, recourse must be had to the applicable law outlined above.

30. An objective test of whether a programme for which a special permit has been issued is “for purposes of scientific research” and is carried out “in accordance with the provisions of Article VIII” is not, as stated in the Judgment, whether the use of lethal sampling is on a larger scale than is reasonable in relation to achieving the programme’s stated objectives, nor whether the sample sizes are reasonable with respect to those objectives. Those are matters on which scientists and the statistical calculations they use for that purpose can differ. They are not criteria established under Article VIII or in any other provisions of the Convention.

31. Likewise, whether or not a programme is for purposes of scientific research cannot be determined on the basis of the reasonableness of the scale of the use of lethal sampling. The killing or taking of even a single whale may be considered illegal today under the provisions of the ICRW unless it is done for purposes of scientific research. Thus, the fact that the sample size of minke whales taken under JARPA II is much larger than that of JARPA makes no difference unless it is established first that both programmes are for purposes of scientific research.

32. As indicated above, the assessment of the legality of the special permits issued for JARPA II should focus first and foremost on the procedural and substantive requirements of Article VIII itself and with those of paragraph 30 of the Schedule. It should also take into account the effect of recent developments in the regulatory framework of the Convention on the interpretation of Article VIII in light of its object and purpose. Did Japan transmit to the Scientific Committee of the IWC, and at intervals of not more than one year, scientific information available to it with respect to whales and whaling, including the results of research conducted, as required by paragraph 3 of Article VIII? Did it submit the proposed permits for review and comment by the Committee, in accordance with paragraph 30 of the Schedule, which was adopted in 1979? To

answer these questions, it is important to examine, in addition to the procedural requirements, whether Japan has breached its treaty obligations by the use of lethal methods in JARPA II, by the scale of the sampling size involved, by authorizing JARPA II to offer for sale the by-products of the whales killed or taken in the implementation of the programme.

33. To begin with the procedural requirements, paragraph 30 of the Schedule requires Contracting Governments to “provide the Secretary to the International Whaling Commission with proposed scientific permits before they are issued and in sufficient time to allow the Scientific Committee to review and comment on them”. It elaborates further on the requirement of paragraph 3 of Article VIII, identifies the four types of information to be specified in the proposals¹¹ and prescribes that “Proposed permits shall be reviewed and commented on by the Scientific Committee at Annual Meetings when possible . . .” With regard to these requirements, the Court finds that “[a]s regards the substantive requirements of paragraph 30 . . . the JARPA II Research Plan, which constitutes the proposal for the grant of special permits, sets forth the information specified by that provision” (para. 239). It then concludes that: “the Court is persuaded that Japan has met the requirements of paragraph 30 as far as JARPA II is concerned” (para. 242).

34. These findings of the Court contradict its other conclusions that the special permits granted by Japan in connection with JARPA II are not for purposes of scientific research pursuant to Article VIII, paragraph 1, of the Convention. Compliance with the requirements of paragraph 30 is by itself a significant distinguishing feature of a programme for purposes of scientific research. The JARPA II programme was duly reviewed and commented by the Scientific Committee of the IWC in 2005 in accordance with the Guidelines contained in Annex Y (now Annex P) with regard to its methodology, the effects of catches on the population concerned and the opportunities for participation in the research¹². In other instances, when the Scientific Committee took the view that a permit proposal submitted by a State did not meet its criteria, it specifically recommended that the permits sought should not be issued. Indeed, in 1987 the Scientific Committee explicitly recommended that the Commission request the Republic of Korea to refrain from issuing permits until it can show that such permits will not further deplete the stock and that it will materially contribute to the comprehensive assessment of this

¹¹ They are: (a) objectives of the research; (b) number, sex, size and stock of the animals to be taken; (c) opportunities for participation in the research by scientists of other nations; and (d) possible effect on conservation of stock.

¹² Report of the Scientific Committee (SC Report) 2005, *J. Cetacean Res. Manage* 8 (Suppl.), 2006, p. 49. All the reports of the Scientific Committee are available at: <http://iwc.int/scientific-committee-reports>.

stock¹³. Similarly, in 1990 with relation to a proposal by the USSR, the Committee explicitly noted that “the proposed investigations on the whales to be caught do not appear to be structured either to provide information essential for rational management of these stocks, or to contribute to the comprehensive assessment or other critically important research needs”¹⁴. This was not the case with regard to JARPA II despite the fact that 63 out of 195 members of the Scientific Committee declined to participate in the relevant meeting of the Scientific Committee (see paragraph 241 of the Judgment).

35. Moreover, as discussed below in paragraph 53, the Scientific Committee in its Report of 2012 specifically recommended the use of data arising, *inter alia*, from both JARPA and JARPA II for catch-at-age based analyses for the minke whale population dynamics model it is investigating; while in its 2013 Report it referred to non-lethal sampling of humpback whales occurring within the JARPA/JARPA II programmes as useful in the assessment of certain breeding stocks of humpback whales. If JARPA II were not a programme for purposes of scientific research, as the Judgment concludes, would the Scientific Committee of the IWC continue not only to review and comment on it, but also to recommend the use of its data for the advancement of its own work?

36. A second test for assessing whether JARPA II is for purposes of scientific research is whether it satisfies the criteria laid down in the Annex P Guidelines adopted by consensus by the States parties to the Convention in 2006 and revised in 2009. Annex P establishes clear criteria and conditions, which all special permit proposals should meet, and against which they are to be reviewed and commented by the Scientific Committee. Such proposals have to specify the objectives of the study¹⁵, the methods

¹³ *Rep. Int. Whal. Commn* 38, 1988, pp. 53-54, the Committee:

“reiterated its serious concern at the lack of the collection of even basic biological information from the previous year’s permit catch [proposed by Korea]. There is no reason to believe the new proposal will be any more useful in assisting the Committee’s work. The Committee, therefore, *requests* that the Commission strongly urges the Government of Korea to refrain from issuing a special scientific permit until it can fully show that the take of 80 whales per year will not further deplete the stock and that it will materially contribute to the comprehensive assessment of this stock.”

¹⁴ *Rep. Int. Whal. Commn* 41, 1991, pp. 74-75.

¹⁵ The objectives should:

- (a) be quantified to the extent possible;
- (b) be arranged into two or three categories, if appropriate: “Primary”, “Secondary” and “Ancillary”;
- (c) include a statement for each primary proposal as to whether it requires lethal sampling, non-lethal methods or a combination of both;

to address objectives¹⁶, the assessment of the potential effects of catches on the stocks involved¹⁷, and provide the results of a simulation study on the effects of the permit takes on the stock and a note of the provisions for co-operative research¹⁸. These Guidelines are given a curt treatment in the Judgment (para. 240), but their importance cannot be underesti-

(d) include a brief statement of the value of at least each primary objective in the context of the three following broad categories objectives:

- (i) improve the conservation and management of whale stocks,
- (ii) improve the conservation and management of other living marine resources or the ecosystem of which the whale stocks are an integral part and/or,
- (iii) test hypotheses not directly related to the management of living marine resources;

(e) include, in particular for (d) (i) and (d) (ii), at least for each primary objective, the contribution it makes to *inter alia*:

- (i) past recommendations of the Scientific Committee,
- (ii) completion of the comprehensive assessment or in-depth assessments in progress or expected to occur in the future,
- (iii) the carrying out of implementations or implementation reviews of the RMP or AWMP,
- (iv) improved understanding of other priority issues as identified in the Scientific Committee Rules of Procedure (IWC, 2006, p. 180),
- (v) recommendations of other intergovernmental organizations.

¹⁶ Methods to address objectives:

(a) field methods, including:

- (i) species, number (and see (c) below), time frame, area,
- (ii) sampling protocol for lethal aspects of the proposal, and
- (iii) an assessment of why non-lethal methods, methods associated with any ongoing commercial whaling, or analyses of past data have been considered to be insufficient;

(b) laboratory methods;

(c) analytical methods, including estimates of statistical power where appropriate;

(d) time frame with intermediary targets [emphasis added].

¹⁷ Assessment of potential effects of catches on the stocks involved:

- (a) a summary of what is known concerning stock structure in the area concerned;
- (b) the estimated abundance of the species or stocks, including methods used and an assessment of uncertainty, with a note as to whether the estimates have previously been considered by the Scientific Committee;
- (c) provision of the results of a simulation study on the effects of the permit takes on the stock that takes into account uncertainty and projects (1) for the expected life of the permit (i.e., n years); (2) for situations where the proposal is assumed to continue for (a) a further n years, (b) a further $2n$ years and (c) some longer period of years since the start of the proposal.

¹⁸ A note on the provisions for co-operative research:

- (a) field studies;
- (b) analytical studies.

mated since they were used by the Scientific Committee in the initial review and commentary on JARPA II and continue to be used by it to ensure its compliance with paragraph 30 of the Schedule to the Convention as well as Article VIII.

37. Japan submitted the JARPA II proposal in March 2005 and furnished the information required by paragraph 30 and Annex Y (now P). The Committee recognized that “[t]he proposal provides the information under paragraph 30 of the Schedule”¹⁹. The Committee does not have the power to disallow or authorize a permit, which rests in the discretion of the State party under Article VIII. However, its views and comments are of utmost significance. When the Committee reviews a proposal, the Government concerned must take serious account of the discussions which have taken place, and of the conclusions and recommendations of the Committee. Paragraph 30 also requires that “[p]reliminary results of any research resulting from the permits” should be made available.

38. The evidence before the Court indicates that Japan continues to submit annual cruise reports to the Scientific Committee to share with it the preliminary results of JARPA II and to show the extent to which the recommendations of the Committee have been taken into account²⁰. Thus, there appears to be an ongoing dialogue and co-operation between the Japanese scientists involved in JARPA II and the Scientific Committee. This has recently led the Committee to note in one of its reports that the stock structure model used in JARPA II was “simple and potentially powerful” and that “[a]side from the general relevance of the results to understanding [of] Antarctic minke whale dynamics, it might in the future prove useful in allocating historical catches to stocks”²¹. Would the Scientific Committee make such favourable comments about JARPA II if it were not for purposes of scientific research?

39. JARPA II is the successor programme to JARPA and although the legality of JARPA is not in issue here, there can be no doubt that the two programmes pursue overlapping objectives as recognized in the Judgment. In this connection, it is important to note that in 2007, when reviewing the results from the JARPA programme, the review workshop established by the Scientific Committee reiterated the view already expressed by the Commission in 1997 that some use could be found for the data arising from JARPA:

¹⁹ *J. Cetacean Res. Manage* 8 (Suppl.), 2006, p. 50.

²⁰ See, for example, SC Report 2012, p. 85. All the JARPA/JARPA II cruise reports are available at: <http://www.icrwhale.org/CruiseReportJARPA.htm>.

²¹ SC Report 2012, p. 35 and *J. Cetacean Res. Manage* 14 (Suppl.), 2013, p. 26.

“The results from the JARPA programme, while not required for management under the RMP, have the potential to improve management of minke whales in the southern hemisphere in the following ways: (1) reductions in the current set of plausible scenarios considered in Implementation Simulation Trials; and (2) identification of new scenarios to which future Implementation Simulation Trials will have to be developed (e.g., the temporal component of stock structure). The results of analyses of JARPA data could be used in this way perhaps to increase the allowed catch of minke whales in the southern hemisphere, without increasing depletion risk above the level indicated by the existing Implementation Simulation Trials of the RMP for these minke whales.”²²

40. Turning now to the use of lethal methods and the scale of the sampling involved under JARPA II, it should be recalled that Article VIII of the Convention authorizes Contracting Governments to grant special permits to their nationals to kill and take whales for purposes of scientific research subject to such restrictions and other conditions that the Government “thinks fit”. At the same time, following the adoption of paragraph 30 of the Schedule in 1979, the exercise of that right is subject to the review and commentary of the Scientific Committee of the IWC and the respect for the Guidelines issued by the Committee for that purpose, namely Annex P. This Annex, which was approved by consensus by all the States parties to the Convention, requires, as indicated above, “an assessment of why non-lethal methods, methods associated with any ongoing commercial whaling, or analyses of past data have been considered to be insufficient”. Thus, the use of lethal methods for purposes of scientific research or the insufficient consideration of non-lethal methods in scientific research programmes has to be assessed and justified, and is subject to review and comment by the Scientific Committee of the IWC.

41. Did Japan comply with these conditions and did it give adequate consideration to the use of non-lethal methods in JARPA II? Are such non-lethal methods used in JARPA II? The evidence submitted to the Court shows that the JARPA II plan clearly mentions the non-lethal methodologies which are to be employed in the programme, including “sighting” surveys, “ecosystem surveys” of the habitat environment of whales, “oceanographic and meteorological observations . . ., including sea ice, surface temperature, sea surface height and chlorophyll α concentration over the entire research area, using satellite data”²³.

²² See at: <http://iwc.int/jarpa>.

²³ Counter-Memorial of Japan, Ann. 150, pp. 14-15.

42. Moreover, at the oral hearings, Counsel for Japan affirmed that “Japan has put much effort into non-lethal research methods” and that JARPA II “scientists have . . . had some success with biopsy sampling and satellite tagging of large, slow-moving whale species such as the humpback”²⁴. As evidence, he referred to the cruise report of the JARPA II scientists for the year 2009-2010, which gives precise details of the non-lethal sampling conducted on blue, humpback, fin and southern right whales in that year²⁵. Similar data are also available in the most recent JARPA II cruise report for the year 2012-2013²⁶. This gives details of the non-lethal experiments conducted, which included “sighting distance and angle experiment”, “photo-identification experiment”, “biopsy sampling”, “satellite tag”, “vomiting and faecal observation”, “marine debris observation”, and “oceanographic survey”²⁷.

43. With regard to sample sizes, the only requirement laid down in paragraph 30 of the Schedule is that the proposal should specify “number, sex, size and stock of the animals to be taken”; while Annex P refers to the need to include a “sampling protocol for lethal aspects of the proposal”. The JARPA II plan includes such a protocol in Appendices 6-8²⁸. The statistical formula that is used to calculate the sample sizes is also reproduced in the Appendix to Appendix VI of the JARPA II plan. Fuller accounts of the sample size calculations and the statistical methodology used are set out in the JARPA II research plan and in its Appendices 3 to 8, which were submitted to the Scientific Committee of the IWC for comment in 2005. However, the experts presented by the Parties during the oral proceedings disagreed as to whether the sample size eventually determined by Japan for JARPA II is appropriate to the objectives of JARPA II.

44. It is understandable that different scientists could reasonably come to different conclusions about the sample sizes, in view of the computational methodology used in JARPA II, the elements of discretion involved in choosing the statistical parameters upon which sample calculations are made, and the range of variables which can lead to a range of possible sample sizes. However, I must say that I do not understand how the

²⁴ CR 2013/15, p. 61 (Boyle).

²⁵ See at: <http://www.icrwhale.org/pdf/SC62O3.pdf>, p. 9.

²⁶ See at: <https://events.iwc.int/index.php/scientific/SC65a/paper/viewFile/356/331/SC-65a-009>.

²⁷ *Ibid.*, pp. 3-4.

²⁸ JARPA II Research Plan (2005), IWC SC/57/01, Apps. 6-8.

majority came to the conclusion that “the sample sizes are larger than are reasonable in relation to achieving JARPA II’s stated objectives” (para. 212). It is not indicated anywhere in the Judgment what methodology or criteria should be used to arrive at “reasonable” sample sizes in light of the objectives of JARPA II or what “reasonable” sample sizes should be. Nor does the Judgment provide an indication of what sample sizes would be most appropriate to the objectives of JARPA II. Indeed, it would be difficult for a Court of law to reach such a determination, which benefits scientists, not jurists.

45. The above analysis shows that the special permits issued by Japan in connection with JARPA II clearly comply with the requirements and conditions prescribed by the provisions of the ICRW and related Guidelines dealing with special permits issued for purposes of scientific research, and that JARPA II has been acknowledged by the Scientific Committee of the IWC to contribute to the understanding of Antarctic minke whale dynamics and to be useful in the assessment of certain breeding stocks of humpback whales. These are not characteristics that can be associated with a programme the design and implementation of which are not for purposes of scientific research. The Scientific Committee of the IWC has pointed out on several occasions that “only scientific and not ethical issues should be considered” when issuing scientific permits²⁹. A similar consideration should apply in the assessment of the legality of the authorization granted by Japan in connection with JARPA II.

46. Nonetheless, another issue that should have been addressed in the context of the legality of JARPA II is whether the evolving regulatory framework of the Convention setting zero catch limits and establishing the Southern Ocean Sanctuary should be taken into account in interpreting Article VIII of the Convention and assessing the extent to which it might restrict the special permits issued under that provision for purposes of scientific research. It is my view that the Court should have assessed whether a programme, such as JARPA II, that continues to use lethal methods for purposes of scientific research under Article VIII, constitutes an anomaly, which may frustrate the object and purpose of the Convention in light of the conservationist approach adopted in the Convention in recent years. Such an assessment, in addition to anchoring the reasoning and conclusions of the Court on the law applicable to the dispute between the Parties, would have been of great value to the States parties to the Convention in view of the growing disconnect between Article VIII and other provisions of the Convention on commercial whaling.

47. Article V of the Convention authorizes the IWC to make such amendments to the Schedule as are necessary to carry out the objectives

²⁹ SC Report 2005, *J. Cetacean Res. Manage* 8 (Suppl.), 2006, p. 48.

and purposes of the Convention and to provide for the conservation, development and optimum utilization of whale resources. It also provides that such amendments shall be based on scientific research. In view of the recent amendments to the Schedule which have done away with the objective of optimum utilization of whale resources through the establishment of zero catch limits, the special permits issued under Article VIII had to be assessed in light of the overall evolution of the Convention and, in particular, of its object and purpose to ensure an integral and effective interpretation of all its provisions.

III. IS JARPA II CONDUCTED FOR PURPOSES OTHER THAN SCIENTIFIC RESEARCH?

48. It is stated in the Judgment that:

“Taken as a whole, the Court considers that JARPA II involves activities that can broadly be characterized as scientific research . . . but that the evidence does not establish that the programme’s design and implementation are reasonable in relation to achieving its stated objectives. The Court concludes that the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II are not ‘for purposes of scientific research pursuant to Article VIII, paragraph 1, of the Convention’.” (Para. 227.)

49. On the basis of that conclusion, it is further stated that:

“[t]he Court therefore proceeds on the basis that whaling that falls outside Article VIII, paragraph 1, other than aboriginal subsistence whaling, is subject to the three schedule provisions invoked by Australia” (para. 230).

These three provisions are paragraph 10 (*e*) of the Schedule dealing with the obligation to respect zero catch limits for the killing for commercial purposes of whales from all stocks; paragraph 7 (*b*) of the Schedule on the prohibition on commercial whaling in the Southern Ocean Sanctuary and paragraph 10 (*d*) of the Schedule on the factory ship moratorium.

50. The activities conducted under JARPA II are, on the one hand, characterized in the Judgment as scientific research, while, on the other hand, it is concluded that the special permits granted by Japan for JARPA II are not “for purposes of scientific research”. This is very unpersuasive for the following reasons.

51. First, the distinction made in the Judgment between a programme that involves “scientific research” and a programme “for purposes of scientific research” is rather artificial and unsubstantiated (para. 67), par-

ticularly in view of the fact that the term “scientific research” is not defined in the Judgment. It is like saying: “I know how to identify the activities undertaken for the purpose of the ‘term X’, but I do not know how to define the term itself”. It also gives the impression that serendipity was at work here and that JARPA II, though not designed for purposes of scientific research, accidentally stumbled into scientific research activities.

52. Secondly, to the extent that it is not clearly proved that a programme which involves scientific research activities has as its preponderant purpose commercial whaling, and consequently the scientific activities are incidental to the commercial whaling, as provided in Article VIII, paragraph 4, of the Convention, such a programme cannot be deemed not to be for purposes of scientific research.

53. Thirdly, the Court’s conclusion that JARPA II is not for purposes of scientific research is also unpersuasive in light of the indisputable evidence on the recognition by the Scientific Committee of the IWC of the generation by JARPA II of data which is useful to the work of the Scientific Committee, on the use by JARPA II of non-lethal methods which are uncharacteristic of commercial whaling, on the presence of scientists on vessels, and on the continuing review and commentary on JARPA II by the Scientific Committee. In its 2012 Report, the Committee specifically recommended the use of data arising, *inter alia*, from both JARPA and JARPA II for catch-at-age based analyses³⁰. In the subsequent Report, reference is made to non-lethal sampling of humpback whales occurring within the JARPA/JARPA II programmes as useful in the assessment of certain breeding stocks of humpback whales³¹. Similar references were made in this Report to JARPA and JARPA II photographic data concerning blue whales³², and to blubber thickness data arising from lethal sampling in JARPA and JARPA II³³.

54. Fourthly, there is no clear evidence to show that the special permits issued by Japan for JARPA II were not for purposes of scientific research,

³⁰ *J. Cetacean Res. Manage* 14 (Suppl.), 2013, p. 29:

“Section 10.1.4 Continue development of the catch-at-age models: Population dynamics modelling provides a way to explore possible changes in abundance and carrying capacity within Areas III-E-VW, where appropriate data are available. The inputs are catch, length, age and sex data from the commercial harvests and both JARPA programmes, as well as abundance estimates from IDCR/SOWER.”

³¹ IWC Scientific Committee Report 2013, <https://archive.iwc.int/pages/view.php?ref=2128>, para. 10.2.1.1.

³² *Ibid.*, para. 10.3.1.4.

³³ *Ibid.*

unless the bad faith of Japan is presumed. As correctly stated in the *Lac Lanoux* case: “there is a general and well-established principle of law according to which bad faith is not presumed”³⁴. In any case, it is not the function of the Court to investigate the motives lying behind Japan’s conduct in granting special permits to JARPA II, as long as those permits are in compliance with Japan’s obligations. It appears, however, that both the review and the conclusions of the Judgment entail a finding of bad faith which is not explicitly expressed, since JARPA II is considered to be in violation of the commercial whaling provisions of the ICRW.

55. Fifthly, there is also no evidence to support the claim that the programme is being carried out for commercial purposes. The term “for purposes of scientific research” does not, under Article VIII of the ICRW, mean that such killing and taking of whales has to be exclusively for purposes of scientific research. Article VIII (2) explicitly requires that whales killed under the special permits should be processed and dealt with as directed by the Government concerned including for commercial purposes. Thus, Article VIII provides for a subsidiary or incidental purpose which may have a commercial character. Of course, the preponderant purpose must be scientific research, but the sale of whale meat in accordance with Article VIII does not deprive a special permit programme of its quality as a programme conducted for purposes of scientific research.

56. Turning finally to the conclusion in the Judgment that the authorization granted to JARPA II is in breach of three provisions of the Schedule (i.e., paras. 7 (b), 10 (d) and 10 (e)), there is, in my view, no legal basis to such a finding unless it could be clearly shown that JARPA II is commercial whaling in disguise, or that its activities are preponderantly of a commercial nature. In order to affirm that a breach of the commercial whaling moratorium or the prohibition of whaling in the Southern Ocean Sanctuary has occurred, it would be necessary to demonstrate that JARPA II is a programme for the purposes of commercial whaling.

57. The word “commercial” in paragraphs 10 (d) and 10 (e) was not defined at the time of adoption of the amendments of the Schedule, nor afterwards. There is no doubt, however, that it refers to whaling for commercial purposes. The Judgment does not characterize JARPA II as commercial whaling, but the conclusion that the programme is in breach of the moratorium on commercial whaling (para. 10 (e)) and the prohibition on commercial whaling in the Southern Ocean Sanctuary (para. 10 (d)) implies that it is conducted for commercial purposes.

³⁴ *Lac Lanoux* Case, 16 November 1957, at XII *Reports of International Arbitral Awards (RIAA)* 305: “[I]l est un principe général de droit bien établi selon lequel la mauvaise foi ne se présume pas.”

58. How can such a conclusion be reconciled with the use of non-lethal methods in the JARPA II programme or with the recognition by the Scientific Committee of the IWC of the usefulness of the data obtained with these methods as described in paragraph 53 above? How does one account for the evidence of the many scientific outputs produced exclusively with the use of data arising from the non-lethal methods employed in JARPA II? This evidence indicates that 100 scientific outputs were produced between 1988 and 2013 exclusively with the data arising from non-lethal methods in JARPA and JARPA II³⁵. It is doubtful that such a scientific output could be produced by a programme of commercial whaling.

59. It is stated in paragraph 230 of the Judgment that: “the Court sees no reason to evaluate the evidence in support of the Parties’ competing contentions about whether or not JARPA II has attributes of commercial whaling”. This statement is, however, contradicted by the distinction made in the Judgment between activities involving scientific research and a programme for purposes of scientific research. Such a distinction could make sense only if it was proved that JARPA II was a commercial whaling programme with incidental collection and analysis of biological data as provided in Article VIII, paragraph 4, of the ICRW. The statement is equally contradicted by the conclusion that JARPA II is in violation of the moratorium on commercial whaling (para. 10 (*d*) of the Schedule).

IV. CONCLUSION

60. The evidence before the Court does not support the conclusion that the special permits for JARPA II have been issued for a purpose other than scientific research. Nor does it establish that such special permits do not comply with the requirements and conditions prescribed by the provisions of Article VIII of the ICRW, paragraph 30 of the Schedule and related Guidelines dealing with scientific research programmes. The real issue is whether the evolving regulatory framework of the Convention in setting zero catch limits and establishing the Southern Ocean Sanctuary should be taken into account in interpreting Article VIII of the Convention and the legality of the special permits granted by Japan under that provision for purposes of scientific research, and the extent to which Article VIII and the use of lethal methods for purposes of scientific research might have been restricted by the fact that the optimum utiliza-

³⁵ See at: <http://www.icrwhale.org/pdf/ScientificContributionJARPA.pdf>, p. 3.

tion of whale resources has been set aside as one of the central objectives of the Convention.

61. It is a pity that instead of such a legal assessment, the Court has engaged in an evaluation of the design and implementation of the programme and their reasonableness in relation to its objectives, a task that normally falls within the competence of the Scientific Committee of the IWC, which is scheduled to undertake an overall review of the JARPA II programme in 2014. As a matter of fact, when the Scientific Committee took the view in the past that a permit proposal submitted by a State did not meet its criteria, it specifically recommended that the permits sought should not be issued. This has not been the case with regard to JARPA II, but it shows at least that the Committee's practice is adequate to the task of evaluating the design and implementation of scientific research programmes under the ICRW and accordingly advising the IWC on that matter.

(Signed) Abdulqawi A. YUSUF.

SEPARATE OPINION OF JUDGE GREENWOOD

Issue before the Court confined to whether JARPA II compatible with the International Convention for the Regulation of Whaling — Interpretation of the Convention — Object and purpose of the Convention — Resolutions of the International Whaling Commission — Relevance for interpretation of the Convention — Subsequent practice of the parties to the Convention — Withdrawal of Japan's objection to the commercial moratorium — Obligations under Article VIII of the Convention — Relationship between Article VIII of the Convention and paragraphs 7 (b), 10 (d) and 10 (e) of the Schedule — Relationship between JARPA and JARPA — JARPA II not within the exception in Article VIII, paragraph 1, of the Convention — Japan therefore in breach of its obligations under paragraphs 7 (b), 10 (d) and 10 (e) of the Schedule — Whether Japan has acted in bad faith — Whether Japan has breached paragraph 30 of the Schedule — The Court's decision not to order a second round of written argument.

1. JARPA II, like Japan's other whaling programmes, has long been the subject of controversy. To many of its critics, whaling is intrinsically wrong and incompatible with contemporary ethical and environmental principles. For such critics, the adoption of the moratorium on commercial whaling by the International Whaling Commission ("the Commission") in 1986 was a vindication of those principles. Seen in that light, it is to be regarded less as a moratorium, in the true sense of the word, than as a comprehensive and indefinite ban on all forms of whaling. Defenders of Japan's whaling programmes, by contrast, point to the long-standing cultural traditions of whaling in Japan and the economic dependence of certain Japanese communities upon the continuation of whaling. These are large and important questions which arouse strong emotions but they are not the questions the Court is called upon to decide (see Judgment, para. 69). The issue before the Court is a narrower one, namely whether or not JARPA II is compatible with Japan's international legal obligations under the International Convention for the Regulation of Whaling ("ICRW") and it is that issue alone which the Court has determined in the present Judgment.

DIFFERENT APPROACHES TO THE INTERPRETATION OF THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING

2. The broader debate to which I have alluded is, however, reflected in a marked difference between the Parties regarding the approach which

should be taken to the interpretation of the Convention. For Australia, the Convention is — or, at least, has become — an agreement about the conservation of whales. Australia relies upon the references to conservation in the Preamble of the Convention and the approach taken in a series of resolutions adopted by the Commission which, Australia considers, show that “the legal regime for the regulation of whaling has evolved from a system primarily designed to manage the exploitation of a natural resource to an increasingly conservation-oriented regime” (Memorial of Australia, para. 2.125). On that basis, Australia argues that the ban on whaling introduced when the moratorium was adopted in 1986 is to be regarded as the general rule to which Article VIII of the Convention provides a very limited exception justifying whaling for purposes of scientific research, an exception which must be restrictively construed.

3. By contrast, Japan focuses on the final paragraph of the Preamble, which records the decision “to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry”, from which Japan deduces that conservation was not intended to be an end in itself but only a means for securing the orderly development of the whaling industry. Japan emphatically rejects Australia’s evolutionary argument, maintaining that the resolutions of the Commission on which Australia relies were frequently adopted by very narrow majorities and against the opposition of Japan. In that context, Japan suggests that the Commission has, in effect, been hijacked by those who are fundamentally opposed to all whaling. For Japan the adoption of the moratorium in 1986 was the product of that fundamentalism, rather than scientific assessment. When the Commission amended the Schedule to the Convention to incorporate the moratorium, Japan exercised its right under Article V, paragraph 3, of the Convention to object to that amendment, thus rendering it inapplicable to Japan, and withdrew its objection only because of pressure from the United States. Against that background, Japan argues for a broader interpretation of Article VIII of the Convention.

4. I do not find either of these approaches wholly persuasive. Australia’s approach is difficult to reconcile with the language of the Preamble and, in particular, the passage quoted in the preceding paragraph. The language of the Convention and its *travaux préparatoires* make clear that an important objective of the Convention was to ensure a future for the whaling industry by making sustainable whaling possible. On the other hand, Japan’s argument that the Convention treats conservation as wholly subordinate to the development of whaling is also untenable. The Preamble shows that both conservation and ensuring a future for sustainable whaling were considered to be purposes of the Convention.

5. That balance between the two goals is not, in my opinion, altered by the resolutions of the Commission, at least not in the way, or to the extent, suggested by Australia. In this context, it is important to recall that the Convention makes provision for two very different types of resolutions. Article V, paragraph 1, provides that the Commission may adopt regulations which amend the Schedule. Since the Schedule is an integral part of the Convention (in accordance with Article I, paragraph 1, of the Convention), such regulations are, in effect, amendments to the Convention itself, although the Commission does not have the power to remove Article VIII or to negate the effects of that provision. Regulations require a three-fourths majority (Art. III, para. 2) and are binding on every State party to the Convention, unless that State raises and maintains an objection in accordance with the procedure laid down in Article V, paragraph 3. It has been the use made by the Commission of this power to adopt regulations that has been the main force in making the Convention “an evolving instrument” (Judgment, para. 45). The second type of resolution is one adopted under Article VI, by which the Commission may “make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention”. The adoption of a recommendation requires only a simple majority. There is no dispute about the legal effect of regulations. The question is whether recommendations from the Commission assist in the interpretation of the Convention.

6. Where a treaty creates a body such as the International Whaling Commission in which all the member States are represented, resolutions adopted by that body form part of the subsequent practice of the parties to the treaty. As such, they are capable of constituting an aid to the interpretation of the treaty, in accordance with the principle set out in Article 31 (3) (b) of the 1969 Vienna Convention on the Law of Treaties. However, subsequent practice is valuable as an aid to the interpretation of a treaty only to the extent that it establishes the agreement of the parties. Australia referred to 40 resolutions of the Commission. Of those, ten were adopted by consensus (the last one in 1994) and should therefore be considered as establishing the agreement of the parties to the Convention. Of the remaining 30 resolutions cited by Australia, all were adopted by majority vote. In many cases, the vote was very close. For example, resolution 2003-3, on southern hemisphere minke whales and special permit whaling, was adopted by 24 votes to 20 with 1 abstention. Resolution 2005-1 criticizing JARPA II was adopted by 30 votes to 27 with one abstention. Even where the majorities were larger, the record frequently shows substantial dissent. For example, the resolution by which the Commission endorsed the Berlin Initiative of 2003 (resolution 2003-1), a resolution emphasized by counsel for Australia (see, e.g., CR 2013/8, p. 21,

para. 27), was adopted by only 25 votes to 20. In almost every one of these cases Japan was one of the dissenters. Far from establishing the agreement of the parties to the Convention, these resolutions demonstrate the absence of any agreement and cannot, therefore, be relied on to sustain an interpretation of the Convention which can bind Japan.

7. Moreover, any assessment of the potential relevance of recommendations as an aid to the interpretation of the Convention must take into account the relationship between recommendations, which (as their name suggests) are not mandatory, and regulations, which are legally binding. As explained in paragraph 5, above, the exercise of that power is subject to important safeguards in that it requires a three-fourths majority of those States voting and is subject to the objection procedure, which enables a State to opt out in whole or in part from the application of the new provision. It would be entirely at odds with that carefully constructed power to treat recommendations, adopted by simple majority and without any procedure for objection, as capable of producing effects similar to those of regulations. Since the power to amend the Schedule gives the Commission scope for adapting the Convention to changing circumstances, the need to interpret and apply the treaty as a "living instrument" has already been accommodated. There is thus less of a case for treating recommendations as having significant effects on the basis of an evolutionary interpretation of the provisions of the Convention. Moreover, it is evident that the Commission has frequently been divided over major issues and that changes which some member States would like to bring about have not commanded the degree of support necessary for the adoption of an amendment to the Schedule. To permit such changes to be introduced through the back door by means of recommendations would destroy the balance of the Convention.

8. Finally, whatever criticisms Japan may have of the commercial moratorium, the fact remains that it withdrew its objection to that moratorium and has been legally bound by it for more than 25 years. It is not now open to Japan to come to the Court and seek to defend a broad interpretation of the principal exception to that moratorium by casting doubt upon the manner in which the moratorium was adopted. Whether there was a sound scientific basis for the adoption of the moratorium in 1986 and whether Japan was pressured into withdrawing its objection to the moratorium cannot influence the decision of the Court on whether the killing of whales as part of JARPA II is, or is not, "for purposes of scientific research" within Article VIII of the Convention. In my opinion, the Court was quite right to hold that this question has to be answered by examination of the terms of Article VIII without any predisposition towards a restrictive or an expansive interpretation of that provision (Judgment, para. 55).

THE STRUCTURE OF THE CONVENTION
AND THE OBLIGATIONS OF JAPAN

9. While the interpretation of Article VIII is at the heart of the present case, it is not that provision which imposes the obligations Japan is accused of having violated. Both the text of Article VIII and the structure of the Convention make that clear. Article VIII provides that:

“Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.

Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.

Each Contracting Government shall transmit to such body as may be designated by the Commission, in so far as practicable, and at intervals of not more than one year, scientific information available to that Government with respect to whales and whaling, including the results of research conducted pursuant to paragraph 1 of this Article and to Article IV.

Recognizing that continuous collection and analysis of biological data in connection with the operations of factory ships and land stations are indispensable to sound and constructive management of the whale fisheries, the Contracting Governments will take all practicable measures to obtain such data.” (ICRW, paras. 1-4.)

10. That provision imposes a number of obligations. Some are purely ancillary in character, in that they come into existence only as a consequence of a State's decision to issue a special permit. Thus, the penultimate sentence of Article VIII, paragraph 1, requires that any State issuing a special permit must report that fact to the Commission. Article VIII, paragraph 2, lays down an important obligation to ensure that, so far as practicable, whales taken under special permit shall be processed (presumably so that their meat is not wasted). On the other hand, Article VIII, paragraph 3, imposes an obligation upon all Contracting Governments to

communicate to a body designated by the Commission (which has designated the Scientific Committee for these purposes) scientific information regarding whales and whaling available to that Government irrespective of whether that information has been obtained pursuant to Article VIII, paragraph 1. Similarly, Article VIII, paragraph 4, imposes a general obligation to take practicable measures to collect data.

11. Important as these obligations are, none is in issue in the present case. Australia has not suggested that Japan has failed to comply with any of the obligations described in the preceding paragraph. These proceedings are about the provision in the first sentence of Article VIII, paragraph 1. That provision does not expressly impose an obligation; rather, it grants to a Contracting Government a power to authorize the killing, taking and treating of whales for the purposes of scientific research and provides that if any whale is killed, taken or treated in accordance with that provision, that action will “be exempt from the operation of this Convention”. In other words, the first sentence of Article VIII, paragraph 1, is a shield, not a sword. So long as any killing, taking or treatment of whales is in accordance with the requirements of Article VIII, there will be no breach of any other provision of the Convention (including any provision of the Schedule). On the other hand, if a Contracting Government purports to exercise the power granted by Article VIII, paragraph 1, but in fact exceeds the scope of that power, then that exemption will not apply and the lawfulness of any killing, taking or treating of whales will have to be measured against the other provisions of the Convention. Of course, there is an implicit obligation upon a State which exercises the power to grant special permits to act in good faith but for the reasons given below (see para. 29), I do not accept that Japan has violated that obligation.

12. Australia’s principal case is rather that, because JARPA II does not meet the requirements of Article VIII, paragraph 1, the killing, taking and treating of whales under JARPA II contravenes other provisions of the Convention, specifically paragraphs 7 (*b*), 10 (*d*) and 10 (*e*) of the Schedule. Those paragraphs were added to the Schedule over the years by the International Whaling Commission in the exercise of its powers under Article V of the Convention. It is those three paragraphs (together with paragraph 30, the claim in respect of which has a somewhat different character) which constitute Australia’s cause of action in the present proceedings. It is, therefore, necessary to examine each of those paragraphs in turn.

13. Paragraph 7 (*b*) of the Schedule prohibits commercial whaling in the area designated as “the Southern Ocean Sanctuary” (see Judgment, para. 233). The prohibition applies to all species of whale but Japan is not bound by it with regard to minke whales, since Japan exercised its right to lodge an objection to this amendment of the Schedule in so far as it applied to minke whales. That objection has not been withdrawn. Since Japan has not, in fact, taken any humpback whales during JARPA II, the

only question which arises under paragraph 7 (*b*) is whether the killing, taking and treating of fin whales under JARPA II is contrary to Japan's obligations under this paragraph.

14. Paragraph 10 (*d*) of the Schedule prohibits "the taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships" (see Judgment, para. 232). Since minke whales are expressly excluded from the application of this provision and it applies only to actual taking, killing or treating, the only question is whether the taking, killing or treating of fin whales under JARPA II is contrary to Japan's obligations under paragraph 10 (*d*).

15. Paragraph 10 (*e*) of the Schedule is more far-reaching. This provision creates what is known as "the moratorium on commercial whaling" (see Judgment, para. 231). The relevant part of the paragraph provides that "catch limits . . . for commercial purposes of whales from all stocks for the 1986 coastal and the 1985-1986 pelagic seasons and thereafter shall be zero". The obligation which this provision imposes applies to all three species of whales that are the subject of JARPA II. It is thus the only provision of the Schedule which is applicable to the killing of minke whales, the species which constitutes the overwhelming majority of whales killed in the course of JARPA II. In addition, it is not confined to the actual killing, taking and treating of whales but applies to the setting of a catch limit above zero. It is therefore capable of applying to Japan's act of setting a catch limit of 50 for humpback whales under the permits granted in each year of JARPA II, notwithstanding that no humpback whales have in fact been taken.

16. All three of these paragraphs impose obligations upon Japan. If JARPA II complies with the requirements of Article VIII, paragraph 1, then the killing, taking and treating of whales (and, by implication, the setting of a catch limit above zero) under JARPA II is exempt from the provisions of these three paragraphs and Japan cannot be in breach of the obligations which they impose. On the other hand, if JARPA II does not meet those requirements, then Article VIII, paragraph 1, provides Japan with no exemption and it becomes necessary to consider whether Japan has violated its obligations under any or all of the three paragraphs.

17. There is no room for doubt regarding paragraph 10 (*d*). That prohibits any taking, killing or treating of fin whales by factory ships or vessels attached to factory ships. The principal vessel employed in JARPA II, the *Nisshin Maru*, is plainly a factory ship. Accordingly, the taking of fin whales by the *Nisshin Maru*, or the vessels attached to her, will entail a violation of Japan's obligations under this paragraph unless Japan is exempted from that obligation by the operation of Article VIII, paragraph 1.

18. The position as regards paragraphs 7 (*b*) and 10 (*e*) requires closer examination. Japan's obligation under paragraph 7 (*b*) is to refrain from "commercial whaling" of fin whales in the Southern Ocean Sanctuary. The obligation under paragraph 10 (*e*) is to refrain from setting catch limits above zero for the killing "for commercial purposes" of any of the three species of whale. Australia contends that the Convention recognizes only three types of whaling: subsistence whaling (under paragraph 13 of the Schedule), whaling for scientific purposes (under Article VIII of the Convention) and commercial whaling. Since Japan has never suggested that whaling carried out under JARPA II is subsistence whaling, Australia maintains that if JARPA II whaling does not fall within the provisions of Article VIII, then it must be classified as commercial whaling. Japan did not disagree with this analysis during the proceedings. Indeed, counsel for Japan commented that "[t]he [Commission] recognizes three categories of whaling: commercial, aboriginal subsistence, and special permit whaling" (CR 2013/12, p. 44, para. 14). Japan has not attempted to suggest that even if its whaling under JARPA II fell outside the exemption granted by Article VIII, paragraph 1, it might nevertheless avoid violating the prohibitions in paragraphs 7 (*b*) and 10 (*e*) on the basis that it was not to be regarded as commercial whaling.

19. The position taken by the Parties in the present proceedings is in accordance with what appears to be the understanding of other States parties to the Convention and of the Commission itself. Thus, when the adoption of the commercial moratorium was under consideration in the Commission in the mid-1980s, it seems to have been accepted by all concerned that if the moratorium was adopted, the effect would be to ban all whaling for States bound by the moratorium with the exception only of subsistence whaling and scientific whaling which complied with Article VIII. The intention behind paragraph 10 (*e*) was a comprehensive ban on whaling, subject only to the two exceptions just mentioned. Moreover, since the adoption of the moratorium, there appears to have been no suggestion by any State that the scope of paragraph 10 (*e*) was more limited.

20. An examination of what actually takes place in the course of JARPA II also supports the conclusion that, if whaling under JARPA II does not fall within the provisions of Article VIII and thus benefit from the exemption granted by paragraph 1 of that Article, then it must be regarded as whaling for commercial purposes and, therefore, thus as contrary to paragraph 10 (*e*). The meat from whales taken under JARPA II is sold, so far as practicable and so far as there is a market for it, to customers in Japan. The sale of whale meat is a commercial activity and if whales are taken with a view to their meat being sold, then one of the purposes of that whaling is a commercial purpose. So long as JARPA II

whaling is in conformity with the provisions of Article VIII, paragraph 1, the existence of that commercial purpose raises no legal issue. On the contrary, paragraph 2 of Article VIII expressly permits (and indeed requires) that whales taken under special permits should be processed and the proceeds dealt with in accordance with the directions of the appropriate government. However, paragraph 2 is relevant only if whaling under JARPA II is in conformity with Article VIII, paragraph 1. If that is not the case, then that whaling falls to be assessed by reference to the provisions of paragraph 10 (*e*) (and, to the more limited extent that it is relevant, paragraph 7 (*b*)). At that point, the fact that meat from whales taken is intended for sale is sufficient to make the whaling activity one conducted for commercial purposes and thus a breach of the moratorium.

21. Demand for whale meat in Japan has been falling in recent years and significant quantities of whale meat acquired as a result of JARPA II whaling remain unsold. Yet that fact does not mean that the sale of whale meat ceases to be a commercial activity, or that the taking of whales whose meat is to be sold is not commercial whaling. An activity does not lose its commercial character simply because the commerce is unprofitable any more than, in the field of sovereign immunity, an activity has to be characterized as sovereign rather than commercial because the State engaging in it is making a loss.

22. That the supply of whale meat from JARPA II for Japanese consumers remains an important part of Japan's thinking regarding JARPA II is demonstrated by a statement made by the Director of the Japan Fisheries Agency, Mr. Kazuyoshi Honkawa, in the Japanese Diet in October 2012. That statement was made after the written pleadings in the present proceedings had closed, so it must be assumed that all concerned would have been aware of the significance of what he was saying. The statement is sufficiently important that it deserves to be quoted at some length.

“Before the earthquake, Japan's scientific whaling programme supplied approximately 3,700 or 3,800 tonnes of whale meat. 2,000 tonnes of that was from the Southern Ocean. Most of that was minke whale. Minke whale meat is prized because it is said to have a very good flavour and aroma when eaten as sashimi and the like.

Another 1,700 tonnes came from the North West Pacific Ocean in 2010, 120 tonnes of which was from coastal scientific whaling. So, just over 1,500 tonnes was from whales taken by the ICR [the Institute for Cetacean Research]. Most of this was from sei whales and Bryde's whales.

In addition, 470 tonnes was from whales caught by small-type coastal whalers in 2010. These were Baird's beaked whales, which are whales that are very similar to dolphins. Meat from Baird's beaked whales is processed into a dried meat something like jerky. When you went to Ayukawa recently, the whalers from Ayukawa were engaged in taking Baird's beaked whales, and I believe it would be most unlikely that they would be handling minke whales from the Southern Ocean.

Consequently, we have said that the scientific whaling programme in the Southern Ocean was necessary to achieve a stable supply of minke whale meat." (Minutes of the Meeting of the Sub-committee of the House of Representatives Committee on Audit and Oversight of Administration, 23 October 2012; translation provided by Australia.)

This statement and, in particular, the final paragraph, clearly shows that the supply of whale meat from JARPA II to Japanese consumers has not ceased. So long as JARPA II whaling falls within the exemption granted by Article VIII, paragraph 1, of the Convention, this commercial aspect of JARPA II is perfectly lawful. If, however, JARPA II is not in conformity with Article VIII, paragraph 1, then this commercial aspect shows that Japan is in breach of its obligations under paragraphs 7 (*b*) and 10 (*e*) of the Schedule.

23. The critical question before the Court is, therefore, whether JARPA II whaling is in conformity with Article VIII, paragraph 1. If the conclusion is that it is not in conformity with Article VIII, paragraph 1, however, the result is not that Japan has violated its obligations under Article VIII. The question is critical because the answer will determine whether or not Japan has violated its obligations under paragraphs 7 (*b*), 10 (*d*) and 10 (*e*) of the Schedule.

WHETHER JARPA II WHALING FALLS WITHIN ARTICLE VIII, PARAGRAPH 1

24. I agree with the reasoning in the Judgment that JARPA II whaling does not meet the requirements of Article VIII, paragraph 1, of the Convention. The principal reason why Japan is unable to rely upon the exemption conferred by Article VIII, paragraph 1, is that the numbers of whales authorized to be killed under JARPA II are not objectively reasonable in the light of the objectives of JARPA II. As explained above, the effect of Article VIII, paragraph 1, is to exempt the killing, taking and treating of whales from the other provisions of the Convention. Accordingly, it cannot be sufficient to establish that a research project like JARPA II has scientific objectives. To take advantage of the exemption contained in Article VIII, paragraph 1, it is necessary that the numbers of

whales to be killed are sufficiently related to the achievement of those objectives. That is where, in my opinion, Japan's case breaks down.

25. To see why, it is important to consider the relationship between JARPA II and the earlier JARPA programme. JARPA II shares certain objectives with JARPA and Japan has insisted upon the need for continuity between the two programmes. Thus, Japan has sought to explain its decision to embark upon the feasibility study for JARPA II before it received the results of the Scientific Committee's review of JARPA by maintaining that the need for continuity in the provision of data justified such a step. In addition, in designing JARPA II, Japan relied heavily upon work done in the course of JARPA. An important example is that, when it was asked by a Member of the Court what assessment it had made of the potential for using non-lethal methods in JARPA II, Japan referred only to a study carried out some years earlier in the course of JARPA; there was no suggestion that a fresh assessment had been carried out in respect of JARPA II. Yet JARPA II involved a dramatic increase in the number of whales to be killed. Under JARPA only minke whales were to be killed and the sample size for that species was initially set at 300, with numbers rising to 400 in the latter years of the programme. By contrast, the sample size for minke whales under JARPA II was set at more than double that for JARPA (850 whales with the possibility of going to a maximum of 935 a year). JARPA II also envisaged an annual take of 50 fin whales and 50 humpback whales. While Japan acceded to a request from the then Chair of the Commission not to kill any humpback whales and has not taken any during the lifetime of JARPA II, the permits issued each year under JARPA II continue to provide for the taking of up to 50 humpback whales. Japan maintains that this substantial increase in killing is justified by the more extensive research goals of JARPA II.

26. The objectives of JARPA II are set out at paragraphs 113-118 of the Judgment. A key difference from JARPA lies in the second objective, which is described as "modelling competition among whale species and future management objectives" (see Judgment, par. 115). That clearly requires research into more than one species of whale and was the principal reason for adding a sample size for fin whales and humpback whales. Yet, from the outset Japan has taken no humpback whales and the number of fin whales taken has been very small, falling far short of the sample size provided in JARPA II. It is noticeable that the independent expert called by Japan, Professor Walløe, stated, in answer to a question from a Member of the Court, that the fin whale sample size was unjustifiable and would not have yielded any useful data. Japan did not attempt to refute his answer. Japan is certainly not to be criticized for not having killed more fin whales and it deserves more credit than it has perhaps received for its decision to accede to the request from the Chair of the Commission

not to go ahead with its plan to take humpback whales. Nevertheless, there is no sign that Japan has made any adaptation to JARPA II as a result of these changed circumstances. It still maintains the sample size of 850 minke whales a year (though it has actually taken significantly fewer). Yet that figure was initially justified on the basis that it was necessary for modelling competition. It is not possible to model competition by the study of only one species. Japan maintains that it is obtaining data in respect of other species by the use of non-lethal methods but that merely begs the question why, if such methods supply the relevant information in respect of fin and humpback whales, can such methods not be employed more extensively in respect of minke whales.

27. If one sets aside the objective of modelling competition between whale species, the dramatic increase in the number of minke whales to be taken under JARPA II from those taken under JARPA becomes extremely difficult to justify. The other research objectives of JARPA II are sufficiently close to those of JARPA that it is difficult to see how they could justify more than doubling the sample size of minke whales. Moreover, there is no evidence that Japan has engaged in any serious attempt to assess what sample size is required in light of the changed circumstances resulting from the actual implementation of JARPA II.

28. That is just one aspect of the weakness of Japan's case but it is one which I found particularly significant. For that and for the other reasons given in the Judgment, I consider that JARPA II whaling cannot be brought within the provisions of Article VIII, paragraph 1. Consequently, in my view, that whaling entails a breach by Japan of its obligations under paragraphs 7 (*b*) and 10 (*d*), in respect of fin whales, and paragraph 10 (*e*) in respect of all three species.

29. I do not consider, however, that Japan has been shown to have acted in bad faith. In advancing its case for a finding of bad faith, Australia quoted a number of statements by serving or retired Japanese officials which, it maintained, demonstrated that Japan's true purpose in launching its programmes of scientific whaling in the Antarctic (JARPA and then JARPA II) was a desire to keep its whaling industry alive. Australia particularly highlighted three such statements (CR 2013/7, pp. 27-28). The first was a statement to the Diet by the then Director-General of the Japan Fisheries Agency in 1984 (20 years before the start of JARPA II and at a time when Japan still maintained an objection to the commercial moratorium) that

“after the moratorium commences, the path to ensure the continuation of whaling would be, for Southern Ocean whaling, to position it

as a research whaling activity which has a scientific nature . . . the continuation of whaling ought to be planned for . . .”.

The second was an extract from a memoir by a retired Director-General about how “scientific whaling was viewed as the only method available to carry on with the traditions of whaling”, a statement which is even less persuasive as evidence of bad faith if, as Australia now accepts, the correct translation should have been “pass on the traditions of whaling”. The third was a 2013 statement by a minister that “I don’t think there will be any kind of an end for whaling by Japan”. These statements, like the others cited in the Memorial (and the statement quoted at paragraph 22, above) suggest that science was not the only consideration for Japan, but that is not enough in itself to take JARPA II outside the scope of Article VIII, paragraph 1. It certainly does not suffice to make out a case of bad faith.

JAPAN’S PROCEDURAL OBLIGATIONS

30. I have voted in favour of the finding, in operative paragraph 6 of the Judgment, that Japan has not breached its obligations under paragraph 30 of the Schedule, because I consider that Australia has not made out its case that Japan failed to give the Scientific Committee the information regarding JARPA II permits required by that paragraph. Paragraph 30 requires the submission of certain information regarding proposed special permits to the Scientific Committee in sufficient time for the Committee to consider those permits and report to the Commission. Paragraph 30 gives the Committee a power of review, it does not confer upon it a power of approval (a point made clear by the late Sir Derek Bowett in his advice to the Commission regarding the proposal to insert what became paragraph 30 in the Schedule). While the JARPA II permits themselves are uninformative, the information required was nonetheless contained in the JARPA II research plan, which was shown to the Committee in good time.

31. Nevertheless, I must express my disquiet about one aspect of Japan’s behaviour in this respect. Paragraph 30 of the Schedule has to be understood in the context of the broader duty of co-operation to which all Contracting Governments are subject. Japan did not contest the existence of that obligation. In my opinion, that duty means that a State is not free to adopt a formalistic approach to paragraph 30. On the contrary, the information which it gives must be such as to enable a meaningful review and the State must take account of the outcome of that review, even though it is not obliged to implement any recommendations that the Committee might make or to agree with the Committee’s assessment of

the proposed permits. The Judgment demonstrates that — for whatever reason — Japan has not been able to implement the JARPA II research plan; it has abandoned the attempt to take humpback whales and its actual take of fin and minke whales has fallen far short of the sample sizes identified in the plan. Yet, the record shows that Japan has continued to submit special permits in identical terms throughout the years of JARPA II. It has not provided any information regarding whether, or how, the plan has been adapted to take account of the changed circumstances. It must, therefore, be open to question whether there has been a full compliance with the duty of co-operation.

THE DECISION NOT TO ORDER A SECOND ROUND OF WRITTEN ARGUMENT

32. Paragraph 6 of the Judgment records the fact that Japan requested, but Australia opposed, a second round of written argument in this case. The Court did not order a second round but decided instead to proceed straight to the oral phase. Since Japan made clear its disappointment with this decision and since the Judgment says almost nothing about it, I want briefly to explain why I consider the Court's decision to be justified.

33. The Rules of Court make clear that a second round of written pleadings is by no means automatic. Article 45, paragraph 2, provides that the Court *may* authorize a second round if the parties are so agreed or if the Court decides, *proprio motu*, or at the request of one of the parties, that a second round is necessary. In other words, unless the parties are agreed, the Court has a discretion to decide whether or not to order a second round if it considers that further pleadings are necessary.

34. Three considerations seem to me to be important in this regard. First, it must always be open to the Court to order a second round of written pleadings if the Court decides that this is necessary, for example because the Court considers it does not have sufficient information on a particular matter.

35. Secondly, the number of cases now being brought before the Court means that the Court has an obligation to ensure that proceedings do not become unnecessarily protracted. The Rules of Court make clear that the Applicant should set out the entirety of its case in the Memorial and the Respondent in the Counter-Memorial (Art. 49, paras. 1 and 2). A State should never hold part of its case — whether argument or evidence — in reserve for a second round.

36. Lastly, there is, in my view, a distinction between the Applicant and the Respondent when the Court comes to consider whether to accede to a request for a second round made by one party but opposed by the

other. The first round of written pleadings closes with the Counter-Memorial. That document will usually be the first indication which the Applicant receives of the Respondent's case. It may raise matters which the Applicant has not considered, or evidence which the Applicant needs the opportunity to refute. There is, therefore, a strong case for ordering a second round of written pleadings when the Applicant so requests; not to do so may occasion serious injustice if the Applicant is denied the opportunity to respond to evidence or argument raised by the Respondent in the Counter-Memorial. By contrast, when the Respondent prepares its Counter-Memorial, it has the benefit of having seen both the Application and the Memorial. It has a duty to set out its case in response in full in the Counter-Memorial. If, having seen the Counter-Memorial, the Applicant considers that it does not need a second round of written pleading, it is difficult to see on what grounds the Respondent can claim to need such a second round. It has already had the last word and no injustice is done by denying it the opportunity to rehearse or add to its case.

37. The one consideration in favour of ordering such a second round in the present case was that Japan had raised an objection to jurisdiction (though not as a preliminary objection) and wished to have an idea of the response it could expect from Australia. I accept that in some cases the nature of the jurisdictional objection might be such that a second round of written argument became necessary but I do not think that such was the case here. Japan's objection was based upon the interpretation of Australia's declaration under Article 36 (2) of the Statute. Consideration of that objection required no documents or other evidence beyond what had been submitted by Japan and what was already freely and publicly available and Japan, represented by very experienced counsel, can have been in little doubt what form Australia's response would take.

38. Accordingly, I think the Court was right to refuse the request for a second round of written argument.

(Signed) Christopher GREENWOOD.

SEPARATE OPINION OF JUDGE XUE

1. Although I concur with the Court's conclusion that special permits granted by Japan under JARPA II do not fall within the meaning of Article VIII, paragraph 1, of the International Convention for the Regulation of Whaling, much to my regret, I do not agree with all of the reasonings upon which the Judgment is based. My votes on paragraphs (3), (4) and (5) of the operative part are not based on the same legal considerations as those stated by the Court. As required by my judicial duty, I append this separate opinion to the Judgment with the explanation of my position.

I. INTERPRETATION OF ARTICLE VIII, PARAGRAPH 1,
OF THE CONVENTION

2. The dispute between the Parties in the present case with regard to the issue whether or not Japan's granting of special permits to the JARPA II programme is in compliance with the International Convention for the Regulation of Whaling ("the Convention") essentially concerns the meaning of Article VIII, paragraph 1, of the Convention and its relationship with the rest of the treaty provisions. To adjudicate the dispute, the Court may arguably need to examine the scientific aspects of the case, but the legal aspects, in my opinion, should take the centre-stage of judicial review. In its reasoning, although the Court deals with each of the issues relating to treaty interpretation, these crucial issues do not receive sufficient consideration in relation to the legality of the JARPA II programme. Consequently its reasoning for the conclusions regarding alleged violations of the Schedule lacks some coherence.

3. Article VIII, paragraph 1, of the Convention states:

"Notwithstanding anything contained in this Convention, any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which

it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.”

In the pleadings, Japan insists on its right to grant special permits for JARPA II by adopting a strictly textual interpretation of this Article. Australia, on the other hand, challenges the legality of JARPA II's use of lethal sampling on the basis of the object and purpose of the Convention. Each Party underscores one side of the Convention.

4. Article VIII sets up a special category of whaling under the Convention, pursuant to which, a Contracting Party may issue special permits to its nationals to kill, take, and treat whales for purposes of scientific research (scientific whaling). In issuing such special permits, a Contracting Party may specify the number of killing and other conditions as it “thinks fit”. Moreover, killing, taking and treating under special permits are exempt from the restrictions imposed on commercial whaling under the Convention, including the Schedule, which forms an integral part of the Convention.

5. It is clear that by these terms the Convention confers a discretionary power on the Contracting Parties with regard to scientific whaling. What is not clear from these terms, however, is to what extent a Contracting Party may exercise such discretion in granting special permits for scientific whaling. This is the very question that divides the Parties.

6. By its plain meaning, Article VIII, paragraph 1, of the Convention apparently leaves the matter of granting special permits in the hands of each Contracting Party. The term “thinks fit” implies a certain degree of appreciation by the authorizing State, given the fact that scientific programmes are designed and implemented at national level. In addition to the exemption from the operation of the Convention, procedural requirements under the Convention for reporting of such authorizations to the International Whaling Commission (“the Commission”) and transmitting data and information to the designated organ of the Convention (Art. VIII, paras. 1 and 3) do not substantively affect or restrain this discretionary power. Furthermore, review process in the Scientific Committee does not contain, apart from procedural formalities, any mandatory obligations on the authorizing State with respect to the granting of special permits; resolutions relating to scientific whaling are generally of a recommendatory nature. From that viewpoint, Japan's claim that the Contracting Parties enjoy an expansive right in issuing special permits, cannot be said to be untenable.

7. The weakness of Japan's interpretation of Article VIII, however, lies in the fact that the discretionary power of the Contracting Parties is derived from the regulating régime of the Convention, therefore it cannot be deemed unlimited. The reason for this is threefold. First, in granting special permits for killing, taking and treating whales for scientific purposes, the Contracting Party must avoid any adverse effect on the stocks with a view to maintaining sustainable utilization and conservation of the resources, otherwise the very object and purpose of the Convention would be undermined, a point on which the Parties hold no different views.

8. Secondly, in assessing the state of the stocks for the consideration of scientific whaling, the Contracting Party inevitably has to pay attention to the situation of commercial whaling. Restrictions imposed thereof indicate the manageable level of the stocks. In other words, there is an intrinsic link between commercial whaling and scientific whaling, particularly when scientific whaling is purportedly to be carried out on a large scale and on a continuous basis. This aspect is borne out by the fact that prior to the moratorium on commercial whaling, such dispute as the current one with the JARPA II programme would not arise; lethal sampling did not pose an issue.

9. Thirdly, as it is true with every right, discretion under Article VIII, paragraph 1, as a corollary, also means a duty on every authorizing party to exercise the power properly and reasonably by virtue of the principle of good faith under the law of treaties. For these reasons, it cannot be said that Article VIII has bestowed a self-defined right on the Contracting Parties.

10. On the issuance of special permits, the Court states that notwithstanding the discretion enjoyed by a Contracting Party, "whether the killing, taking and treating of whales pursuant to a requested special permit is for purposes of scientific research cannot depend simply on that State's perception" (Judgment, para. 61). This statement, however, is left unexplained. The Court's view may be taken as self-evident; such determination has to be based on objective scientific assessment, checked against by external review. However, Japan's claim that according to the rules of treaty interpretation the meaning of Article VIII must be given first and foremost by its express terms, and so long as the relevant treaty provision on the issuance of special permits is not revised to that effect, it is up to each authorizing party to determine the granting of special permits, is a relevant issue. Technically speaking, the granting of special permits and review of proposed programmes are two subject-matters under the Convention. In my view, the Court should, first of all, address the issue whether the authorizing party can or cannot, as asserted by Japan, freely determine, as it "thinks fit", the number of killing, taking and treating of whales for purposes of scientific research, an issue that bears on the relationship between Article VIII and the other provisions of the Convention.

11. In the course of its 68 years' operation since 1946, the Convention, as an evolving instrument, has undergone considerable change by way of its Schedule amendments. Although terms on scientific whaling under Article VIII remain intact, various restrictions on commercial whaling for purposes of conservation have indeed exerted a creeping effect on the way in which scientific research may be conducted, particularly with respect to methodology and scale of sample size. Notwithstanding policy differences between the anti-whaling group and the whaling parties, the parties have generally recognized the importance of conservation for the protection of whale resources. Moreover, revision of guidelines and reviews of special permits by the Scientific Committee also move in the direction of conservation. With these developments, it is hard to claim that scientific whaling is totally detached, freestanding, from the operation of the Convention and that the "margin of appreciation", if any, for the Contracting Parties in granting special permits stays the same as before.

12. That said, as the decision to grant special permits solely rests within the discretion of the authorizing party, there is no point in considering whether such a decision is subjectively taken or not; the authorizing party is obliged to use its best knowledge to determine, as it perceives proper, whether or not to grant special permits for proposed scientific research programmes. Once adopted, that decision nevertheless is subject to review, scientific or judicial. The assessment of the decision of course cannot simply rely on the perception of the authorizing party, but must be conducted on an objective basis. The authorizing party should justify its decision with scientific evidence and sound reasoning.

II. THE STANDARD OF REVIEW

13. In light of the foregoing, it is apparent that the standard of review by the Court should focus on legal issues. In the Judgment, the Court states that

"[w]hen reviewing the grant of a special permit authorizing killing, taking and treating of whales, the Court will assess, first, whether the programme under which these activities occur involves scientific research. Secondly, the Court will consider if the killing, taking and treating of whales is 'for purposes of' scientific research by examining whether, in the use of lethal methods, the programme's design and implementation are reasonable in relation to achieving its stated objectives" (Judgment, para. 67).

This approach poses a number of questions, as revealed in the subsequent reasoning.

14. First, in assessing Japan's exercise of its right under Article VIII, paragraph 1, in granting special permits, judicial review of the Court should link with treaty interpretation. The question whether activities under JARPA II involve scientific research is a matter of fact rather than a matter of law, therefore it should be subject to scientific review. I take the view that it is not for the Court to determine what elements a scientific research should or should not contain, nor is it for the Court to adjudicate what kind of activities involve scientific research. As special permits are granted by the authorizing party pursuant to Article VIII, paragraph 1, of the Convention to programmes for purposes of scientific research, it should be presumed that activities under such programmes involve scientific research. It is up to Australia to prove with convincing evidence to the Court that such is not the case with JARPA II, with Japan having the right to rebuttal. As the Court stated in the *Pulp Mills* case, that, in accordance with the well-established principle *onus probandi incumbit actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts. This principle has been consistently upheld by the Court (see case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010 (I)*, p. 71, para. 162; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 86, para. 68; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, *I.C.J. Reports 2008*, p. 31, para. 45; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007 (I)*, p. 128, para. 204; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, *I.C.J. Reports 1984*, p. 437, para. 101). It is not necessary for the Court itself to go over the key elements of JARPA II as part of its judicial review and ascertain that JARPA II activities "can broadly be characterized as 'scientific research'" (Judgment, para. 127); its finding, on the basis of the evidence presented to the Court, that Australia has failed to prove that JARPA II activities, in order to be qualified as scientific research, must satisfy the four criteria as identified by Australia, could sufficiently lead to the conclusion that Australia's claim against JARPA II activities as not involving scientific research is unfounded.

15. In its reasoning, the Court draws the distinction between the term "scientific research" and the phrase "for purposes of" in Article VIII, paragraph 1, of the Convention, which to a certain extent, dictates the standard of review as articulated by the Court. Accepting Australia's interpretation that these two terms are cumulative, the Court actually sets up two conditions for review: the programme activities must first be characterized as scientific research and additionally, they must serve purposes

of scientific research. As is stated above, determination of scientific research is primarily a matter of fact subject to scientific scrutiny. The phrase “for purposes of” cannot stand on its own without the modifier “scientific research”. When the Court is tasked to determine whether, in the use of lethal sampling, the elements of JARPA II’s design and implementation are reasonable in relation to its stated scientific objectives, it is actually set to assess the scientific merit of the programme. In that case the term “for purposes of” would mean to evaluate the design and implementation of JARPA II so as to see whether they are justifiable for achieving the objectives of the research programme. This interpretation, in my opinion, unduly complicates the meaning of the phrase “for purposes of scientific research” in Article VIII, paragraph 1, rendering the Court’s role beyond its judicial purview.

16. Notwithstanding the above, I agree with the majority that in order to ascertain whether special permits for JARPA II genuinely serve purposes of scientific research, the Court may have to examine some relevant aspects of the design and implementation of JARPA II in the light of its stated objectives. As the case hinges on the legality of Japan’s determination to grant special permits to JARPA II, the Court, in my view, should focus its review on the question whether Japan’s issuance of special permits to JARPA II satisfies the requirement under Article VIII, paragraph 1, namely, for purposes of scientific research. The standard of review as agreed by the Parties that tests whether a State’s decision to grant special permits is objectively reasonable, supported by coherent reasoning and respectable scientific evidence, should therefore primarily relate to special permits rather than the programme in general.

III. THE JARPA II PROGRAMME IN LIGHT OF ARTICLE VIII, PARAGRAPH 1, OF THE CONVENTION

17. In the Court’s review, a few of its findings pertaining to Japan’s determination to grant special permits to the JARPA II programme are important.

18. First, the Court finds that Japan does not prove that it has duly conducted feasibility studies on the use of non-lethal methods with an effort to reduce lethal sampling, thus failing its obligation to give due regard to the resolutions and Guidelines adopted by the Commission. It concludes that,

“the papers to which Japan directed [the Court] reveal little analysis of the feasibility of using non-lethal methods to achieve the JARPA II research objectives. Nor do they point to consideration of the possibility of making more extensive use of non-lethal methods in order to reduce or eliminate the need for lethal sampling, either when JARPA II was proposed or in subsequent years. Given the expanded use of lethal methods in JARPA II, as compared to JARPA, this is difficult to reconcile with Japan’s obligation to give due regard to IWC resolutions and Guidelines and its statement that JARPA II uses lethal methods only to the extent necessary to meet its scientific objectives.” (Judgment, para. 144.)

19. Secondly, two pieces of probative evidence support the Court’s finding that Japan’s determination of sample sizes is influenced by its funding consideration. One is the 2007 document referred to by Japan to prove that it has given necessary consideration to the use of non-lethal methods in JARPA II. The document explains why certain biological parameters require lethal sampling, but it also suggests that lethal sampling be preferred because it provides a source of funding to offset the cost of the research. Secondly, Dr. Walløe, the expert called by Japan, also testifies in the oral proceedings before the Court that “Japanese scientists have not always given completely transparent and clear explanations of how sample sizes were calculated or determined”. He admits that he is under the impression that JARPA II sample sizes had been “influenced by funding consideration”, although he does not find that objectionable.

20. Thirdly, the Court finds that the JARPA II Research Plan lacks transparency in the reasons for selecting particular sample sizes for individual research items, a point agreed by the experts called by both Parties. The shortcomings in the design of the Research Plan are not explained by Japan with supporting evidence, which casts doubt on the reasonableness of the sample sizes in relation to achieving its objectives.

21. Lastly, in view of the evidence regarding the gap between the target sample sizes and the actual take in the implementation of the programme, the Court draws the conclusion that the target sample sizes are larger than reasonable for achieving JARPA II’s objectives. The Court notes that the sample sizes for fin and humpback whales and review periods chosen cast doubt on the centrality of the objectives that Japan highlights as the rationale for the annual number of minke whale samples that it sets up.

22. These findings, among others, are decisive for the Court’s ruling on Japan’s decision to issue special permits for JARPA II. Important as they

are, in relation to the purposes of JARPA II, I think the Court should have given further consideration to the question of funding, as it bears directly on the pivotal issue of the case — the size of lethal sampling.

23. In its pleadings, Japan does not deny that funding consideration is involved in the determination of granting special permits, but asserts that such practice is normal in fishery research. Dr. Walløe does not deem it questionable either. Besides, Japan's explanation that for certain scientific research and data collection, non-lethal methods are "impractical, cost-ineffective and prohibitively expensive" does not appear a mere excuse for its lethal sampling, as this kind of situation often exists elsewhere in scientific research.

24. It is apparent that the use of lethal sampling in JARPA II per se does not pose an issue under the Convention; Article VIII clearly confers that discretion on the Contracting Parties. The Court agrees that under Article VIII, paragraph 2, the fact that a programme involves the sale of meat and the use of proceeds to fund research is not sufficient, taken alone, to cause a special permit to fall outside Article VIII. What remains at issue is whether the scale of lethal sampling for JARPA II is reasonable.

25. In my view, Japan fails to explain to the satisfaction of the Court how the sample sizes are calculated and determined with the aim of achieving the objectives of the programme. Technical complexity of the matter does not release it of the burden of proof, as the issue lies at the core of the dispute. Moreover, Japan does not succeed in refuting with solid evidence Australia's allegation that the funding consideration actually dictates its sample sizes and in proving that fundraising is just incidental and derivative from the research activities. It could have explained how JARPA II activities are funded and whether there are other financial sources that support the programme.

26. Furthermore, in response to Australia's claim that Japan's real intention in conducting JARPA II is to maintain its whaling operation and that the programme is commercial whaling in disguise, Japan's rebuttal is weak and unpersuasive. Even if fundraising through commercial means may not necessarily render the programme as commercial whaling, or commercial whaling in disguise, given the scale of lethal sampling and the unlimited duration of JARPA II, the cumulative effect of its lethal take on the conservation of whale resources is not insignificant and negligible, which gives all the more reason for requiring Japan to justify its decision on special permits.

27. Prior to the moratorium on commercial whaling, use of proceeds from the sale of whale meat to fund scientific research might be an acceptable practice among the Contracting Parties, inasmuch as the stocks were not affected. Such “margin of appreciation” enjoyed by the parties, if any, however, becomes questionable when the moratorium on commercial whaling is imposed, because excessive scientific whaling would unavoidably undermine the collective effort of the Contracting Parties in the conservation measures. The term “for purposes of scientific research” under Article VIII, paragraph 1, should thus be strictly interpreted; sample sizes that are dictated by fundraising consideration, therefore, cannot be considered as “objectively reasonable”, or “for purposes of scientific research”.

28. It is based on these considerations that I agree with the Court’s conclusion that JARPA II does not fall with the meaning of Article VIII, paragraph 1, of the Convention.

IV. RELATIONSHIP BETWEEN ARTICLE VIII, PARAGRAPH 1, AND THE SCHEDULE

29. Having reached the above conclusion, the Court turns to examine Australia’s contention that Japan has breached three provisions of the Schedule by conducting JARPA II. The three provisions of the Schedule include: the obligation to respect zero catch limits for the killing, for commercial purposes, of whales from all stocks (paragraph 10 (*e*) of the Schedule); the factory ship moratorium (para. 10 (*d*)); and the prohibition on commercial whaling in the Southern Ocean Sanctuary (para. 7 (*b*)).

30. Under the Convention, there are basically three types of whaling involved: commercial whaling, scientific whaling and aboriginal subsistence whaling. Pursuant to Article 1, paragraph 1, of the Convention, the Schedule constitutes an integral part thereof. “All references to ‘Convention’ shall be understood as including the said Schedule either in its present terms or as amended in accordance with the provision of Article V.” At the same time, Article VIII, paragraph 1, also provides that scientific whaling shall be exempt from the operation of this Convention, which means that restrictions and conditions relating to the granting of special permits for purposes of scientific research are not subject to the Schedule. Therefore, before addressing Australia’s contention, the Court has to first determine the applicability of these three paragraphs to JARPA II.

31. The Court takes the view that all killing, taking and treating of whales that fall within neither scientific whaling under Article VIII, nor aboriginal subsistence whaling under paragraph 13 of the Schedule, will

be considered subject to the same restrictions as laid down in the three paragraphs. That is to say, since the Court reaches the conclusion that JARPA II does not fall within the meaning of Article VIII, paragraph 1, of the Convention, it would be regarded as commercial whaling. This is because, the Court says,

“[t]he reference to ‘commercial’ whaling in paragraphs 7 (*b*) and 10 (*e*) of the Schedule can be explained by the fact that in nearly all cases this would be the most appropriate characterization of the whaling activity concerned. The language of the two provisions cannot be taken as implying that there exist categories of whaling which do not come within the provisions of either Article VIII, paragraph 1, of the Convention or paragraph 13 of the Schedule but which nevertheless fall outside the scope of the prohibitions in paragraphs 7 (*b*) and 10 (*e*) of the Schedule. Any such interpretation would leave certain undefined categories of whaling activity beyond the scope of the Convention and thus would undermine its object and purpose.” (Judgment, para. 229.)

Paragraph 10 (*d*), although without an explicit reference to commercial whaling in its terms, should equally apply to all the cases with regard to the prohibition of the use of factory ships except in scientific and aboriginal subsistence whaling.

32. Based upon the above reasoning, the Court finds that since the special permits under JARPA II do not fall within the meaning of Article VIII, paragraph 1, of the Convention, Japan thereby has not acted in conformity with its obligations under paragraphs 10 (*e*), (*d*) and 7 (*b*) of the Schedule. With due respect, I find this line of reasoning quite confusing.

33. In the first place, the premise for the application of paragraphs 10 (*e*), (*d*), and paragraph 7 (*b*) to JARPA II is that the Court has determined that JARPA II is in fact a commercial whaling operation rather than a programme for purposes of scientific research. There is no evidence identified by the Court that supports this conclusion. On the contrary, in the Judgment, the Court ascertains that the programme has scientific objectives and its use of lethal methods per se is not objectionable. Moreover, it concludes that Japan has complied with its obligations under paragraph 30 of the Schedule in submitting in time proposed special permits to the Scientific Committee for review and comments.

34. Moreover, most of the shortcomings in JARPA II as analysed by the Court are, by and large, technical flaws associated with the design and implementation of the programme, which do not by themselves transform JARPA II into a commercial whaling operation. Fundraising, albeit by market sale of whale meat, does not necessarily alter the scientific nature of the programme, unless the Court finds bad faith on the part of Japan.

The conclusion of the Court that JARPA II activities do not fall within the meaning of Article VIII, paragraph 1, cannot be understood to mean that JARPA II activities thereby do not involve scientific research. That is to say, scientific whaling, even if with flaws, remains scientific in nature. It does not fall outside that category.

35. Furthermore, from a legal point of view, consequences of breach of Article VIII and that of the Schedule paragraphs can be different. In the former case, the conditions and the number of special permits may be revised or revoked upon the review and comments by the Scientific Committee. To put it in another way, as a technical matter, when the granting of special permits by Japan for JARPA II is found not within the meaning of Article VIII, paragraph 1, Japan is not prohibited to issue special permits for the programme, provided such issuance is brought in line with the requirement of Article VIII, paragraph 1. In this regard, JARPA II continues to fall within the purview of the Scientific Committee for periodical reviews. In the latter situation, however, as Japan is deemed breaching its international obligation under the Schedule of the Convention by violating the moratorium on commercial whaling, its international responsibility shall be invoked. Consequently, under the rules of State responsibility, Japan shall be obliged to revoke all the extant special permits and refrain from granting further for JARPA II, which would apparently forestall the Scientific Committee's review.

36. I vote with the majority on paragraphs (3), (4) and (5) of the operative clause because I am of the view that Japan's granting of special permits for JARPA II has been unduly excessive in relation to achieving its stated objectives, which may arguably have adverse impact on the effectiveness of the moratorium on commercial whaling. Nevertheless, JARPA II remains a programme for scientific research, in my opinion. Japan should be given the opportunity to address the shortcomings in the design and implementation of the programme in the Scientific Committee during the upcoming periodical review.

(Signed) XUE Hanqin.

SEPARATE OPINION OF JUDGE SEBUTINDE

The Court should have clarified more precisely the limits of discretion of a Contracting Government under Article VIII as well as the scope of the Court's power to review the exercise of that discretion — In particular, the Court should have specified the criteria which have guided and informed its determination of whether the special permits issued under JARPA II were "for purposes of scientific research" — Japan has not fully complied with the procedural obligations under paragraph 30 of the Schedule to the ICRW.

1. I concur, in principle, with the Court's findings in points 1, 2, 3, 4, 5 and 7 of the operative part of the Judgment and I agree, in general, with the reasoning upon which those findings are predicated. Nonetheless, I believe that there are certain key aspects of this dispute in respect of which the Court has missed an opportunity to elaborate its views and articulate the reasoning underpinning its findings. These include the extent of a Contracting Government's discretion under Article VIII of the International Convention for the Regulation of Whaling (ICRW) as well as the scope of the Court's power to review such discretion. In my view, these aspects merit further elaboration than that accorded to them in the Judgment. Furthermore, I have voted against the finding of the Court, in point 6 of the operative paragraph, that "Japan has complied with its obligations under paragraph 30 of the Schedule to the International Convention for the Regulation of Whaling with regard to JARPA II", because in my opinion, the facts before the Court do not bear out this conclusion. It is precisely these points in respect of which this opinion is offered.

2. The Judgment deals briefly with the question of the discretion of a State party issuing special permits under Article VIII of the ICRW, without elaborating on the nature or extent of that discretion (Judgment, para. 61). Yet, as the Court points out at a later stage, it is precisely the exercise of this discretion that the Court is called upon to review (*ibid.*, para. 67).

I. THE NATURE AND EXTENT OF DISCRETION EXERCISABLE UNDER
ARTICLE VIII OF THE ICRW

3. The ICRW is a historical attempt by the States parties (consisting of both whaling and non-whaling nations) to regulate whaling, in recognition of their common interest in "ensuring the conservation of all species of whales while allowing for their sustainable exploitation" (*ibid.*,

para. 56). To this end, the ICRW was intended to replace unregulated unilateral whaling by individual States with a system of collective regulation whereby States parties to the ICRW chose to work collectively and to abide by the obligations they assumed thereunder, in order to protect their common interests and achieve their common goals. It is against this historical background that the discretion referred to in Article VIII of the ICRW must be understood and appreciated.

4. Article VIII sets up a mechanism whereby a State party may issue special permits to conduct whaling strictly “for purposes of scientific research”. In the light of the object and purpose of the ICRW, the scientific research to be conducted under such permits is intended for the benefit of not only the State issuing the permits but also the International Whaling Commission (IWC) and the international whaling community as a whole. Any whaling conducted outside the special permits is subject to the restrictions set out in the ICRW. The discretion afforded by Article VIII is thus an integral part of the collective regulatory mechanism and is necessarily limited in scope and character.

5. First, the discretion to issue special permits must be exercised judiciously or “reasonably” and in accordance with the object and purpose of the ICRW. Second, the special permits must be strictly “for purposes of scientific research”. Third, the issuing State must ensure that it sets a catch limit in the permits, and lastly, the issuing State must ensure that the procedural requirements set out in paragraph 30 of the Schedule to the ICRW are complied with. In short, these are the yardsticks that the Court ought to examine in reviewing Japan’s exercise of discretion in issuing special permits under Article VIII of the ICRW.

II. THE STANDARD OF REVIEW FOR DETERMINING WHETHER A WHALING PROGRAMME FALLS WITHIN THE SCOPE OF ARTICLE VIII

6. Similarly, I also consider that in stating its standard of review (see Judgment, para. 67), the Court should have elaborated upon the criteria that guided its determination of whether or not JARPA II fits within the scope of Article VIII. In my view, the criteria logically flow from the yardsticks outlined above. Furthermore, the Court should have regard to the parameters that the States parties to the ICRW consider relevant in this regard. These parameters are reflected in paragraph 30 to the Schedule, which sets out the elements that must be specified in any proposed special permit submitted for review to the Scientific Committee. They are elaborated further in the binding resolutions and Guidelines of the IWC. Among the latter, the Annex P Guidelines may be given a particular weight, since they are the most recent set of Guidelines adopted by consensus and on the basis of which JARPA II will be assessed by the

Scientific Committee in 2014. These criteria are set out in greater detail below.

7. In determining whether a special permit is issued “for purposes of scientific research”, it is perhaps only logical that one should start by defining the term “scientific research” as used in Article VIII and elsewhere in the ICRW, since the Convention itself does not define the term. Without this first step, it is difficult to envisage how one can meaningfully determine whether a special permit is issued “for purposes of scientific research”.

8. In the Judgment, the Court rightly discards the criteria proposed by Australia as to what amounts to “scientific research”, noting that those criteria “appear largely to reflect what one of the experts that [Australia] called regards as well-conceived scientific research, rather than serving as an interpretation of the term as used in the Convention” (Judgment, para. 86). However, the Court then declines to give its own interpretation of the phrase, simply stating that it does not “consider it necessary to devise alternative criteria or to offer a general definition of ‘scientific research’” (*ibid.*).

9. Whilst I accept that the Court should not attempt a forensic definition of what is or is not “scientific research” (a task more suited to scientists rather than lawyers), in my view, the Court should at least have considered the ordinary grammatical (dictionary) meaning of the phrase, as a basis for the reasoning and analysis that follows in the Judgment. Although the concept of “science” is inherently vague, “scientific research” must, in its most basic sense, involve “a systematic pursuit of knowledge concerning the structure and behaviour of the physical and natural world through observation and experiment” (*The Oxford English Dictionary*). In my view, this is a workable definition that could have been adopted as a basis for the Court’s reasoning and analysis.

10. Regarding the parameters or criteria that should be taken into account in reviewing a State party’s exercise of its discretion to issue special permits under Article VIII, I consider that the Court should take into account the following factors gleaned from the provisions of the ICRW, its Schedule and the binding resolutions of the IWC.

11. First, the whaling programme for which the special permit is sought must include defined research objectives as required by paragraph 30 of the Schedule. While the Schedule is silent on how precise and elaborate the stated objectives should be, some guidance can be found in this regard in Annex P, which states that research objectives should “be quantified to the extent possible”. In terms of substance, the Guidelines in Annex P affirm that these objectives do not have to relate exclusively to the conservation and management of whales, but may also be directed at “improv[ing] the conservation and management of other living marine resources or the ecosystem of which the whale stocks are an integral part

and/or, . . . test[ing] hypotheses not directly related to the management of living marine resources”. In addition, any scientific research programme must be based on appropriate scientific methodology.

12. Secondly, Article VIII explicitly requires that the Contracting Government issuing a special permit for scientific research whaling must set limits on the number of whales to be killed, in addition to any other conditions it sees fit. Paragraph 30 of the Schedule requires that the permits specify the “number, sex, size and stock of the animals to be taken”. While a Contracting Government enjoys considerable discretion in determining the catch limits, it must exercise that discretion consistent with the object and purpose of the ICRW, in that whales may be killed only to the extent necessary for achieving the stated goals of the scientific research programme. In this regard, Annex P, which provides some guidance on how the Scientific Committee assesses the appropriate balance between lethal and non-lethal methods, requires that the special permit proposal must provide “an assessment of why non-lethal methods . . . have been considered to be *insufficient*” (emphasis added). Thus, the use of lethal methods where non-lethal alternatives are a viable option may serve to indicate that a particular whaling programme is not genuinely designed and/or implemented “for purposes of scientific research”.

13. Thirdly, the issuing State must ensure that the proposed scientific research programme is designed and implemented so as not to endanger the target whale stocks. In this regard paragraph 30 of the Schedule requires the proposed permit to specify the “possible effect [of the research programme] on conservation of [whale] stock[s]”.

14. Lastly, paragraph 30 of the Schedule requires a State party to submit the proposed special permits to the Scientific Committee for prior review and comments. This procedural requirement enables the IWC and its Scientific Committee to play a monitoring role in respect of special permit whaling, while obligating the issuing State to co-operate with the IWC, a duty I elaborate upon in the paragraphs below. As stated before, it is my considered opinion that the foregoing criteria or parameters should have served to guide and inform the Court in its task stated in paragraph 67 of the Judgment, and should have been set out in the Judgment.

III. THE DUTY OF CO-OPERATION UNDER PARAGRAPH 30 OF THE SCHEDULE

15. I have voted against point 6 of the operative part of the Judgment because I disagree with the reasoning and findings of the Court regarding

Japan's compliance with its obligations under paragraph 30 of the Schedule to the ICRW. In my view, that paragraph imposes more than a formal or procedural obligation to notify the Scientific Committee of certain information. The obligation entails a substantive duty of meaningful co-operation with the IWC and its subordinate organs such as the Scientific Committee. Thus in determining whether or not Japan is in breach of its obligations under paragraph 30 of the Schedule, the real issue to be addressed is not whether Japan complied with the required procedures in relation to JARPA II but rather, whether Japan fulfilled its obligation of meaningful co-operation with the IWC in relation to that programme. I examine this issue in greater detail below.

16. It will be recalled that under the ICRW system of collective regulation, the IWC (and its subsidiary bodies such as the Scientific Committee) play a crucial role in regulating whaling. The IWC does so through amendments to the Schedule to the ICRW, for example, by designating protected species and ocean sanctuaries, and setting annual catch limits. The IWC is also entrusted with monitoring scientific research whaling. It is this role of the IWC, when viewed in the overall context of the object and purpose of the ICRW, that forms the basis of the duty of co-operation by the States parties. As part of this duty of co-operation, a Contracting Government is required under Article VIII of the ICRW to "report at once" to the IWC all authorizations that it has granted for special permit whaling, and secondly, to transmit to the Scientific Committee, "in so far as practicable and at intervals of not more than one year", scientific information available to that Government resulting from the scientific research conducted pursuant to those permits. (See Art. VIII, paras. 1 and 3.)

17. Furthermore, paragraph 30 of the Schedule, which forms an integral part of the ICRW, was introduced as a procedural guarantee to ensure that States parties do not circumvent the duty of co-operation envisaged under Article VIII. Paragraph 30 thus obliges a Contracting Government, before it issues the special permits, to submit them to the IWC "in sufficient time to allow the Scientific Committee to review and comment on them". In turn, the Scientific Committee is mandated to review and comment upon the proposed special permits and to submit its report and recommendations thereon to the IWC. The IWC may, in turn, make recommendations to the Contracting Government in relation to the proposed permit. (See paragraph 30 of the Schedule and Rule M (4 (a)) of the IWC's Rules of Procedure.) There is therefore a link between the Article VIII obligations of notification, reporting and dissemination of scientific information on the one hand, and the obligations of prior review in paragraph 30 of the Schedule, on the other. Thus, while the gathering and dissemination of scientific information is central to the functioning of the IWC and forms part of the system of collective regulation under the ICRW, the review procedures under paragraph 30 serve as the mecha-

nism through which special permit whaling may be monitored and the collective interests of the States parties protected.

18. The review procedure under paragraph 30 is designed to ensure that Article VIII is applied as the parties to the ICRW intended it to. Accordingly, all aspects of a proposed special permit are subject to prior review by the Scientific Committee, including the objectives of the research programme, the number, sex, size and stock of the animals to be taken, opportunities for participation in the research by scientists of other nations, and possible effect on conservation of whale stocks. The duty of co-operation by States parties must be viewed and appreciated in light of the above provisions, and in the context of the overall objectives of the ICRW. In this context, meaningful co-operation requires a State party to do the following:

- (a) to submit to the IWC the proposed special permits before they are issued and in sufficient time to allow the Scientific Committee to review and comment on them;
- (b) to provide to the IWC, in relation to the proposed permits, the information specified in paragraph 30 (a) to (d) of the Schedule;
- (c) to give due consideration, in good faith, to the views and recommendations of the IWC, with a readiness to modify the terms of the special permits or the decision to issue them, taking into account such recommendations;
- (d) on an annual basis, to keep the Scientific Committee informed of the progress and results of scientific research conducted under the special permits, including by providing accurate information regarding any modifications in the implementation of the research programme; and
- (e) to offer opportunities for collaboration to other researchers within the international scientific community.

19. Assessed against these benchmarks, the evidence in the present case clearly shows the following shortcomings in relation to JARPA II. First, against the recommendation of the IWC that no additional Japanese special permit programmes be conducted in the Antarctic until the Scientific Committee had completed an in-depth review of the results of JARPA, Japan launched JARPA II before the Scientific Committee had completed a review of JARPA (see, for example, IWC resolutions 2003-3 and 2005-1). Secondly, there is no indication that Japan has duly considered the IWC comments and recommendations in respect of certain controversial aspects of JARPA II such as its resort to lethal methods (see, for example, IWC resolutions 2005-1 and 2007-1). Thirdly, although the JARPA II Plan provided the essential information required under paragraph 30 of the Schedule, much of the information is not detailed enough

to be considered compliant with the relevant IWC guidelines, a shortcoming likely to hamper the Scientific Committee's upcoming review of JARPA II. Fourthly, Japan has failed to submit the specific special permits issued in respect of JARPA II to the Scientific Committee for prior review, as required by paragraph 30. Given that these permits are virtual replicas of the permits issued under JARPA and that JARPA II differs in implementation at least, from its predecessor, it is imperative that the Scientific Committee ought to have had prior opportunity to review and comment on them. Fifthly, as noted in the Judgment (para. 222), apart from reference to collaboration with Japanese research institutes in relation to JARPA I, there is no evidence of co-operation between JARPA II and other domestic and international research institutions other than an undertaking, in the JARPA II Plan, that "[p]articipation of foreign scientists will be welcomed, so long as they meet the qualifications established by the Government of Japan".

20. In view of the above shortcomings and having regard to the duty incumbent upon States parties to meaningfully co-operate with the IWC, I am unable to join the majority in finding that "Japan has complied with its obligations under paragraph 30 of the Schedule to the [ICRW] with regard to JARPA II".

(Signed) Julia SEBUTINDE.

SEPARATE OPINION OF JUDGE BHANDARI

Paragraph 30 of the Schedule to the International Convention for the Regulation of Whaling — Duty of States parties to the Convention to co-operate with the International Whaling Commission and its Scientific Committee is implied by paragraph 30 and its accompanying Guidelines — Duty of co-operation is to be given a broad and purposive construction — Japan's formal compliance with paragraph 30 and the Guidelines does not amount to substantive compliance — Japan has consequently breached paragraph 30 of the Schedule — Characterization of JARPA II as a commercial whaling programme — JARPA II's failure to qualify as a programme for purposes of scientific research under Article VIII, paragraph 1, of the Convention necessarily renders it a commercial whaling programme — Evidentiary record strongly supports the conclusion that JARPA II is a commercial enterprise — The Court ought to have made an affirmative pronouncement that JARPA II is a commercial whaling programme.

INTRODUCTION

1. I generally agree with conclusions reached by the majority, and thus have voted in favour of all but one of the operative clauses contained in the *dispositif* of the present Judgment. However, for reasons I shall expand upon presently, I cannot agree with the majority's conclusion that Japan has complied with paragraph 30 of the Schedule to the International Convention for the Regulation of Whaling (“ICRW” or “Convention”).

2. Moreover, while I concur with the majority that JARPA II is not a programme for purposes of scientific research in accordance with Article VIII, paragraph 1, of the ICRW, I feel that the evidentiary record in these proceedings plainly demonstrates that JARPA II is a commercial enterprise. As I shall endeavour to explain hereunder, in my view it would have been appropriate for the Court to make a formal finding to that effect.

I. PARAGRAPH 30 OF THE SCHEDULE TO THE ICRW

3. Article III of the Convention establishes the International Whaling Commission (“IWC” or “Commission”), which is responsible for, *inter alia*, monitoring and regulating the study of whale stocks and the activities of the whaling industry (Articles IV-VI of the Convention). Since 1950, the Commission has been assisted in the execution of this broad mandate by a body known as the Scientific Committee (Judgment, para. 47).

4. Under paragraph 30 of the Schedule to the Convention, a principal responsibility of the Scientific Committee is to review and comment upon special permits issued pursuant to Article VIII, paragraph 1, of the ICRW. Paragraph 30 reads as follows:

“A Contracting Government shall provide the Secretary to the International Whaling Commission with proposed scientific permits before they are issued and in sufficient time to allow the Scientific Committee to review and comment on them. The proposed permits should specify:

- (a) objectives of the research;
- (b) number, sex, size and stock of the animals to be taken;
- (c) opportunities for participation in the research by scientists of other nations; and
- (d) possible effect on conservation of stock.

Proposed permits shall be reviewed and commented on by the Scientific Committee at Annual Meetings when possible . . . Preliminary results of any research resulting from the permits should be made available at the next Annual Meeting of the Scientific Committee.”

5. According to Article I, paragraph 1, of the ICRW, the Schedule forms an integral part of the Convention. For this reason, paragraph 30, being binding authority, is the primary legal provision governing procedural compliance with the special permit review process. However, this somewhat terse régime has been significantly expanded upon by what is commonly referred to as “Annex P”, a set of procedural “Guidelines” endorsed by the Commission (Judgment, para. 47) through its power to issue recommendations “which relate to whales or whaling and to the objectives and purposes of this Convention” under Article VI of the Convention. Although technically hortatory in nature, because Annex P was adopted by consensus, it provides weighty guidance as to the protocols to be followed in submitting and reviewing prospective scientific permits issued by a State party to the Convention under Article VIII, paragraph 1.

6. The majority has found that JARPA II is in compliance with the timing requirements of paragraph 30 because “Japan submitted the JARPA II Research Plan for review by the Scientific Committee in advance of granting the first permit for the programme”, and because the Parties do not dispute that subsequent permits issued under JARPA II on the basis of that original Research Plan have been reported “at once to the Commission” (*ibid.*, para. 238). As to the substantive components of paragraph 30 (i.e., subparas. (a)-(d)), the majority finds that these have been “set[] forth”(*ibid.*, para. 239) in the Research Plan.

7. I regret that I must respectfully dissent from the view of the majority on this point. I can accept that the information provided by Japan, and relied upon by the majority, may at the most constitute *formal* compliance with paragraph 30. However, in view of the significant expansion of this régime by Annex P, I believe that *substantive* compliance with paragraph 30 encompasses an implicit duty to co-operate with the Commission and the Scientific Committee by providing information that is reflective of the evolving character of JARPA II. Indeed, a duty to co-operate emanating from paragraph 30 and Annex P was recognized by both Parties and the intervening State, and was endorsed as an imperative interpretative principle by the Court in the present Judgment (para. 240). Given the broad consensus of opinion on this point, I cannot share the majority's conclusion that Japan's perfunctory compliance with the strict letter of paragraph 30 is consonant with the apparent broad and purposive scope of this duty to co-operate.

8. As I shall explain in the ensuing analysis, I take the position that Japan's failure to abide by its duty to co-operate under paragraph 30 is evident from an analysis of the *chapeau* of that provision and at least three out of its four substantive subparagraphs. I shall address each of these shortcomings in turn.

1. *The Chapeau of Paragraph 30 of the Schedule*

9. The *chapeau* of paragraph 30 requires that “[a] Contracting Government shall provide the Secretary to the International Whaling Commission with proposed scientific permits before they are issued *and in sufficient time to allow the Scientific Committee to review and comment on them*” (emphasis added). It is true that the Parties do not contest the fact that Japan submitted the JARPA II Research Plan in March 2005, that it was reviewed by the Scientific Committee prior to the launch of JARPA II in November 2005, and that the annual issuance of special permits under JARPA II was promptly reported to the Scientific Committee during the life of the programme (Judgment, paras. 109 and 238). However, it is to be recalled that 63 Scientific Committee participants declined to take part in the 2005 review of the JARPA II Research Plan, citing the need for the Committee to complete its final review of the original JARPA programme before the new proposal could be assessed (*ibid.*, para. 241). Indeed, although Japan launched JARPA II in November 2005, it was not until December 2006 that a final review of JARPA by the Committee was conducted (*ibid.*, para. 105).

10. I believe a truly co-operative approach on the part of Japan would have entailed a proper dialogue with the Committee concerning the scientific output of JARPA with the aim of possibly revising JARPA II prior to its launch. Instead, the relevant history evinces what I can only describe as a rush to renew what effectively amounted to a replication of its prior

“scientific” whaling programme — only this time with an indefinite mandate — well before any critical review of said programme could take place. For these reasons, I find that the duty to co-operate implicit in the *chapeau* of paragraph 30 has been violated by Japan.

2. Paragraphs 30 (a) and (b) of the Schedule

11. My review of the evidentiary record leads me to the firm conclusion that Japan has failed in its duty to co-operate with the IWC and its Scientific Committee in accordance with paragraph 30, by not providing timely and accurate information pertaining to the objectives of its ostensible research (subpara. (a)), as well as the quantitative and qualitative dimensions of the whales to be killed pursuant to JARPA II permits (subpara. (b)). To that end, it is to be recalled that the JARPA II Research Plan, promulgated in 2005 and under which Japan has been issuing its special permits until the close of proceedings in this case, has never been altered (Judgment, para. 209). Similarly, the permits issued annually by Japan under this programme have remained identical in their descriptive contents (*ibid.*). This despite the fact that since the inception of JARPA II, the programme has seen a marked decline in the actual output of the programme vis-à-vis its originally stated goals.

12. Indeed, the JARPA II Research Plan, in its stated pursuit of a programme that would, *inter alia*, engage in “[m]onitoring of the Antarctic ecosystem”¹ and construct a “[m]odelling competition among whale species”², mandates a perennial take of 850 minke whales (plus or minus ten per cent), 50 fin whales and 50 humpback whales. However, in reality, during the entire lifespan of the programme JARPA II has taken *zero* humpback whales (Judgment, para. 201). As to fin whales, JARPA II took a paltry *combined* total of 18 during the *first seven seasons* of the programme, and a mere zero to three were captured annually in subsequent years (*ibid.*). Moreover, while Japan caught 853 minke whales during the inaugural 2005-2006 pelagic season under JARPA II in accordance with the stated objectives of the programme, these numbers have dropped precipitously in recent years. At the time of the close of proceedings in this case, the evidentiary record revealed that an average of approximately 450 minke whales (or barely half the target established under the original and unchanged Research Plan) had been killed each year under JARPA II, with those numbers plummeting in the latter years of the programme (to wit, 170 minke whales were killed in the 2010-2011 season and 103 minke whales were killed in the 2012-2013 season) (*ibid.*, para. 202).

13. In my opinion, the manifest and repetitive failure of JARPA II to achieve its ambitiously stated original objectives warrants more than a

¹ Memorial of Australia, Vol. III, Ann. 105, p. 160.

² *Ibid.*, p. 161.

rote annual recitation of what are now clearly outmoded catch projections as contained in the original 2005 Research Plan. Consequently, I find that the duty to co-operate implied in paragraphs 30 (a)-(b) and Annex P requires, *at the very least*, the submission by Japan of a revised JARPA II Research Plan and/or revised annual special permits bearing some semblance with the reality of the programme's performance. Consequently, Japan's failure to do either constitutes a material breach of this duty.

3. Paragraph 30 (c) of the Schedule

14. Paragraph 30 (c) of the Schedule states that proposed scientific permits to be issued pursuant to Article VIII, paragraph 1, of the Convention shall state what opportunities for participation by scientists of other nations have been provided for in the research programme. The majority acknowledges that in the course of these proceedings, Japan has adduced no evidence of any co-operation with scientists of other nations under JARPA II (Judgment, para. 222), yet stops short of any finding that Japan has failed to comply with paragraph 30. Rather, the majority admonishes Japan that "some further evidence of co-operation between JARPA II and other . . . international research institutions could have been expected" (*ibid.*).

15. Contrary to the view of the majority, I believe that the conspicuous dearth of peer review by scientists of other nations seriously undermines any conclusion that Japan has complied with its duty to co-operate under paragraph 30 (c) of the Schedule. In this regard, I endorse the opinion of the witness-expert for Australia, Professor Mangel, who testified that "scientific opinion can be wrong, but reliable science responds to valid criticism, which is how science advances"³. I further find that the following submission by Australia captures the situation succinctly:

"Peer review in scientific research . . . leads to a *continuous process of revision and amendment of the research* as necessary. *There is no indication of Japan adopting any such approach.* Japan commenced JARPA II without proper peer review, and continues it without substantial adjustment, despite serious and sustained criticism from members of the scientific community that its objectives and methods are flawed and likely to fail. It is thus unsurprising that JARPA II has produced a paucity of peer reviewed results, as did its predecessor JARPA."⁴

³ Memorial of Australia, Vol. 1, para. 5.83 and note 687.

⁴ *Ibid.*, para. 5.83; emphasis added.

16. In my respectful view, the majority ought to have concluded that JARPA II's failure to collaborate in any meaningful way with the scientists of other nations fails to satisfy the broad and purposive duty to co-operate that arises under paragraph 30 (c).

4. *Conclusion regarding Japan's Violation of Paragraph 30 of the Schedule*

17. In sum, I consider that the following factors clearly establish that Japan has not complied with its duty to co-operate with the Commission and the Scientific Committee pursuant to paragraph 30 and Annex P:

- (i) JARPA II was launched before a review of JARPA had taken place.
- (ii) Despite the fact that the quantity and quality of data gathered over the lifespan of JARPA II differs in significant respects from the original design of the programme as envisaged in the Research Plan, Japan has never submitted a revised plan nor altered its special permits in observance of these changes.
- (iii) Whereas the JARPA II Research Plan was designed, *inter alia*, to conduct a "modelling of the Antarctic ecosystem" in conjunction with a multi-species competition programme, not a single humpback whale was taken during the duration of the programme and a negligible amount of fin whales were captured. This leaves minke whales as the only remaining species actually taken in meaningful quantities under the programme, and Japan has neither satisfactorily explained how its multi-species Antarctic ecosystem research can be salvaged under such circumstances, nor has it adapted the objectives of the programme to reflect changing circumstances.
- (iv) Japan has not provided any evidence of international scientific co-operation under JARPA II.

18. As the majority affirms, paragraph 30 of the Schedule to the Convention implies a duty of co-operation for all States parties when submitting permits to the Scientific Committee to be reviewed for compliance with Article VIII, paragraph 1, of the Convention. However, for the reasons I have outlined above, I cannot share the majority's conclusion that Japan's formal compliance with paragraph 30 constitutes satisfactory substantive compliance with that provision. Given my view that the duty to co-operate is a broad and purposive obligation that entails an ongoing dialogue with the Scientific Committee, I conclude that Japan has failed to comply with this duty in respect of the *chapeau* and subparagraphs (a)-(c) of paragraph 30, as elucidated by the Guidelines promulgated in Annex P.

19. Consequently, I respectfully dissent in respect of the conclusion reached by the majority in paragraph 247 (6) of the present Judgment.

II. JARPA II AS A COMMERCIAL WHALING PROGRAMME

20. Apart from the dissent I have expressed immediately above, I join the majority with respect to all remaining subparagraphs of the *dispositif*. Specifically, I concur that the evidence on record establishes that JARPA II is not a programme for purposes of scientific research within the meaning of Article VIII, paragraph 1, of the ICRW, and therefore the lethal methods employed under said programme violate Japan's international legal obligations pursuant to paragraphs 7 (*b*) (the establishment of the "Southern Ocean Sanctuary"), 10 (*d*) (the "factory ship moratorium"), and 10 (*e*) (the "moratorium on commercial whaling") of the Schedule to the Convention.

21. In my estimation there is ample evidence on the record to support the conclusion that JARPA II is not a programme for purposes of scientific research, but in fact, a commercial whaling programme. While an exhaustive account of the rationales underpinning my conclusion is not feasible for present purposes, I wish to seize upon the following four salient considerations: (*a*) the inevitable logical conclusion that JARPA II's failure to qualify as a programme for purposes of scientific research requires its classification as one for commercial purposes; (*b*) the historical context in which JARPA and JARPA II came into existence and continued to operate; (*c*) the indefinite duration of JARPA II; and (*d*) compelling evidence that the lethal take of minke whales under JARPA II is responsive to market forces, as well as efforts by the Government of Japan to stimulate the domestic market for minke whale meat under the broader auspices of that programme.

1. ICRW only Allows for Three Mutually Exclusive Categories of Whaling

22. As a preliminary matter, I find that a proper reading of the Convention envisages only three exhaustive and mutually exclusive purposes for whaling: (i) scientific research; (ii) commercial enterprise; and (iii) aboriginal subsistence. It is uncontested that aboriginal subsistence whaling is not a live issue in this case. It therefore stands to reason that a finding by this Court that JARPA II is not a programme for purposes of scientific research necessarily leads to the corollary that it is a commercial whaling programme.

23. The deductive approach I have adopted above is but the first pillar upholding my conclusion that JARPA II is a commercial whaling pro-

gramme. As I shall now explain, this conclusion is further buttressed by numerous inductive inferences available from the evidence adduced during these proceedings. For present purposes, I find it sufficient to focus on three of the most prominent types of evidence, though by no means do I consider the foregoing to constitute an exhaustive treatment of the subject.

2. *Historical Context Surrounding JARPA and JARPA II*

24. I begin by considering the historical context surrounding the adoption and operation of the original JARPA programme. In so doing, I am fully cognizant that the legality of this programme per se is not under consideration by the Court. That being said, I believe the evidentiary record abundantly sustains the inference that JARPA II is essentially a *de facto* extension of JARPA, for all intents and purposes. Given, *inter alia*, the uninterrupted lineage between JARPA and JARPA II as well as their numerous commonalities, I believe a more holistic appraisal of the entire “scientific whaling” scheme practised by Japan over the past several decades is appropriate.

25. The record demonstrates that the Government of Japan has a long history of strenuous objection to the adoption and continuation of a complete moratorium on commercial whaling. To begin, I would recall that Japan was one of only seven countries to unsuccessfully vote against the imposition of the moratorium when it was adopted at the IWC’s Thirty-Fourth Annual Meeting on 23 July 1982⁵. It was also one of only four countries to subsequently lodge a formal objection to the amendment when it did so on 4 November 1982⁶, thus exempting itself from the application of the moratorium by the time it went into full effect in 1986⁷. I would further recall that the Court received considerable evidence, by way of statistics and political declarations made by representatives of the Japanese Government, which strongly indicate that Japan’s resistance to the imposition of the moratorium was motivated by a perceived need to aggressively protect critical socio-economic, cultural and historical links between the fabric of Japanese society and a deeply-rooted commercial whaling industry dating back centuries⁸.

26. This position was encapsulated when Japan’s formal notification of its objection to the moratorium expressly underscored “the important role played by the whale products and the whaling industry in the Japa-

⁵ Memorial of Australia, Vol. I, para. 2.57 and note 82; para. 3.6. At the meeting, 25 countries voted in favour of the moratorium, seven against, and five abstained.

⁶ *Ibid.*, para. 2.60 and notes 84-87; para. 3.8. In addition to Japan, those countries lodging objections were Peru, Norway and the Union of Soviet Socialist Republics.

⁷ *Ibid.*, paras. 2.57-2.60.

⁸ *Ibid.*, paras. 3.5-3.8.

nese traditional diet and in the socio-economy of certain local communities in Japan”⁹. A more expansive expression of this impetus can be found in a statement made by the Japanese Prime Minister when speaking before the national legislative body of Japan just a few months prior to the lodging of the objection. On that occasion, he explained how

*“Japan’s whaling industry has an extremely long history and it also occupies an important place in the Japanese diet . . . [L]ately we have seen . . . the anti-whaling movement driven by environmental protection organizations and other groups grow larger and larger worldwide . . . [T]hey are . . . trying to use their numbers to lead the IWC in the direction of a ban on whaling. The situation is truly regrettable . . . The Government intends to place even greater efforts than it has to date into the protection and growth of the whaling industry into the future.”*¹⁰

This theme was prevalent again when, speaking just days after the adoption of the commercial moratorium, Japan’s Minister for Agriculture, Forestry and Fisheries reported to his national legislature how

*“[i]t is the Prime Minister’s view that precisely since the problems facing whaling in Japan are so extremely significant, and as there are so many people who are reliant primarily on this industry for their livelihood, we must actively continue to build an environment where whaling can be practiced . . . [The Prime Minister] was of the view that we ought to push harder ahead with a response on whaling . . . And so, for my part too, since there are people who are unable to get jobs elsewhere in the fishing industry other than in whaling . . . I intend to redouble efforts in actively dealing with the whaling problem and to live up to the expectations which have been placed upon me.”*¹¹

A year after the adoption of the moratorium, this position remained resolute. As Japan’s Director-General of its Fisheries Agency recounted to the legislature:

“at last year’s IWC, a decision was taken to invoke a total ban on commercial whaling with a grace period of three years. Japan has filed an objection to this decision . . . Our basic position is that this moratorium has no basis in science . . . What’s more, should it come to pass that Japan’s whaling industry would be finished by this, being mindful of the people who work directly in whaling and the large number of

⁹ Memorial of Australia, Vol. II, Ann. 53, p. 186.

¹⁰ *Ibid.*, Vol. III, Ann. 88, pp. 69-70; emphasis added.

¹¹ *Ibid.*, Ann. 89, p. 74; emphasis added.

*people who work in related industries . . . the Government will make the utmost efforts to obtain the understanding of the countries concerned to ensure that our whaling can continue in some form or another.”*¹²

27. The staunch commitment of the Government of Japan to these “utmost efforts” is encapsulated by a Whaling Issues Study Group Report published by the Japanese Ministry of Agriculture, Forestry and Fisheries in 1984, which recommended that “[t]he continuation of whaling ought rightly to be accepted”¹³. During legislative hearings held at the time of the Report’s release, numerous high-ranking Japanese officials affirmed their commitment to its recommendation to continue Japan’s whaling programme to the greatest extent possible. For instance, the Head of the Ocean Fisheries Department of the Fisheries Agency proclaimed that

“[t]he Fisheries Agency’s view is that this report has given us valuable recommendations for future solutions in this extremely challenging environment. *Our intention is to use the report as a reference and . . . to make our utmost efforts to ensure that our whaling will be able to continue both in the Antarctic and coastal whaling, in some form or another.”*¹⁴

In remarks made that same day, the Head of the Marine Fisheries Department of the Fisheries Agency reassured legislators that “we intend to make our utmost efforts to ensure the continuation of whaling *in some form or another*”¹⁵. The next day, the Director-General of the Fisheries Agency explained how

“after the moratorium commences, *the path to ensure the continuation of whaling would be, for Southern Ocean whaling, to position it as a research whaling activity which has a scientific nature, and, for coastal whaling, to position it as whaling which is absolutely essential to the livelihood of regional communities from the perspectives of their societies, economies and cultures*”¹⁶.

¹² Memorial of Australia, Vol. III, Ann. 90, p. 77; emphasis added.

¹³ *Ibid.*, Ann. 98, p. 111.

¹⁴ *Ibid.*, Ann. 91, p. 82; emphasis added.

¹⁵ *Ibid.*, p. 83; emphasis added.

¹⁶ *Ibid.*, Ann. 92, p. 88; emphasis added.

Lest there be any doubt about the consistency of the Government of Japan's intentions, this view was again reinforced when the Japanese Minister for Agriculture, Forestry and Fisheries took the floor and personally vowed that: "*I intend to do my utmost to ensure that Japanese whaling continues in some form or another.*"¹⁷

28. Finally, I must underscore that the foregoing examples are merely illustrative of considerable other evidence contained in the record of these proceedings demonstrating Japan's political hostility toward the commercial whaling moratorium and its resultant resolve to work around the moratorium to ensure the continuation of the Japanese whaling industry "in some form or another".

29. A review of subsequent events only further strengthens this conclusion. While the Government of Japan did eventually accede on 1 July 1986 to a gradual elimination of its objection to the moratorium by 1 April 1988¹⁸, a sizable body of evidence indicates that Japan took this step very reluctantly and in the face of persistent international pressure, by way of, *inter alia*, highly punitive economic sanctions, emanating in particular from the United States¹⁹, a prized trading partner. Against the backdrop of the rather serendipitous launch of the original JARPA programme following the 1986-1987 whaling season, just as the moratorium was entering into force for Japan (Judgment, para. 100), the record reveals that in an interview given on 1 June 1986, the Secretary-General of the Japan Whaling Association made the following trenchant remarks:

"Japan's decision to withdraw from whaling came after the resolution of the 1982 IWC annual meeting to invoke the moratorium on commercial whaling, followed by pressure from the United States . . . However, *Japanese whaling is an industry with a long history and tradition and it has a firm place in our diet. When I think of the livelihoods of the 50,000 people affected, those who work in whaling-related industries and their families, as someone involved in the industry it is only natural that I would want to find some way of enabling the industry to stay alive.*"²⁰

Similarly, in an interview conducted in 1997, the former Director-General of the Japan Fisheries Agency, who was responsible for pivotal international negotiations involving the implementation of scientific whaling, reflected as to how "[t]he implementation of scientific whaling was viewed

¹⁷ Memorial of Australia, Vol. III, Ann. 92, p. 89; emphasis added.

¹⁸ *Ibid.*, Vol. I, para. 2.63.

¹⁹ *Ibid.*, paras. 3.9-3.12; Vol. III, Ann. 89, p. 73; Ann. 95, pp. 99-100.

²⁰ *Ibid.*, Ann. 125, p. 306; emphasis added.

as the only method available to carry on with the traditions of whaling”, before explaining that

“[w]hatever the issues for which Japan’s past whaling deserves criticism the [whalers] are not to blame. *I want[ed] to somehow retain the work and workplaces, where these men have spent their whole lives, in the form of scientific whaling.*”²¹

More recently, speaking before a sub-committee of the Japanese national legislature in October 2012, the Director-General of the Japan Fisheries Agency recalled how “[m]inke whale meat is prized because it is said to have a very good flavour and aroma when eaten as sashimi and the like”, and that “*the scientific whaling program in the Southern Ocean was necessary to achieve a stable supply of minke whale meat*”²².

30. When these multiple contemporaneous and retrospective statements are considered against the remainder of the evidentiary record in these proceedings, including the detailed analysis in the Judgment demonstrating JARPA II’s shortcomings as a properly designed and implemented programme for purposes of scientific research, as well as statistics showing that Japan has killed the vast majority of whales under special permit since the inception of the moratorium through the 2010-2011 whaling season²³, in my view the conclusion that JARPA II is a commercial whaling programme becomes inescapable.

3. Indefinite Duration of JARPA II

31. The majority makes passing reference to the indefinite duration of JARPA II, noting the open-ended time frame of the programme and opining that “with regard to a programme for purposes of scientific research, as Annex P indicates, a ‘time frame with intermediary targets’ would have been more appropriate” (Judgment, para. 216). In keeping with my observations made above regarding the dearth of international peer review made in the context of my analysis of paragraph 30, I believe that in assessing the character of JARPA II, a stronger statement as to the incongruity between a programme of indefinite duration and one that is genuinely established for purposes of scientific research would have been appropriate. To this end, recalling Japan’s well-chronicled intention to carry on a whaling programme “in some form or another” in spite of

²¹ Memorial of Australia, Vol. II, Ann. 75, pp. 346-347 (internal quotations omitted); emphasis added.

²² CR 2013/11, p. 18 (Crawford), para. 60 (28 June 2013), referring to judges’ folder of Australia, First round of oral arguments, 26-28 June 2013, Vol. II, tab 108; emphasis added.

²³ Memorial of Australia, Vol. I, para. 2.69 and note 99; Fig. 1 at p. 37.

the moratorium, I find great merit in Australia's contention that an indefinite programme suggests it is "geared towards the perpetuation of whaling by any means until the commercial whaling moratorium is lifted", and that "the open-ended nature of JARPA II precludes a meaningful assessment of whether it has achieved its research objectives" (Judgment, para. 215).

32. Not only do I find such reasoning persuasive, but aside from positing that JARPA II "has no specified termination date because its primary objective (i.e., monitoring the Antarctic ecosystem) requires a continuing programme of research", and providing a vague promise that "a review will be held and revisions made to the programme if required" (*ibid.*, para. 214), I see no convincing answer to these valid critiques raised by Australia. Indeed, Japan openly concedes that a primary objective of JARPA II is to provide "scientific advice" in order to further the aim of eventually lifting the moratorium (*ibid.*, para. 96).

33. Consequently, I believe the indefinite nature of JARPA II is a useful piece of supplementary evidence that militates in favour of its characterization as a commercial whaling programme.

4. Evidence that JARPA II Is Driven by Market Forces

34. The Court received detailed evidence that the dwindling lethal take of minke whales in the latter years of JARPA II was not only directly correlated with a concomitant decline in demand for whale meat on the Japanese market, but that the Government of Japan, both directly and through parastatal agencies ostensibly mandated to advance scientific objectives — such as the Institute of Cetacean Research — actively promoted the consumption of whale meat amongst the Japanese population²⁴. One particularly illustrative news report from the Japanese press in 2006 captures a compelling overview of the prevailing situation when JARPA II was in its infancy:

"Amid concerns about the surplus of whale meat resulting from the expansion in scientific whaling, a new whale meat wholesaler company . . . was established on 1 May with assistance from the Japan Fisheries Agency and other organizations. Its charter is to develop new sales channels for whale meat, which has almost disappeared from dining room tables during the 25 years since the commencement of the ban on commercial whaling . . . While middle-aged and older people retain

²⁴ Memorial of Australia, Vol. I, paras. 6.18-6.23; Vol. III, Ann. 135, p. 336; Ann. 136, pp. 338-341; Ann. 137, pp. 343-344; Ann. 139, p. 352; Ann. 141, p. 356; Ann. 143, pp. 364-369; Ann. 145, pp. 373-374; Ann. 147, p. 380; Ann. 148, pp. 382-384; Ann. 152, pp. 396-398.

a fondness for whale meat, it is far less familiar to the younger generation . . . The aim is to encourage its use mixed with other meats and extol its nutritional superiority as a high-protein low-fat meat . . . With the negative image of whaling and the drift away from whale meat among young people, *the key question is whether during such adverse times it will be possible to protect Japan's traditional culture of eating whale meat and carrying out whaling . . . The majority of the budget for scientific whaling is earned from sales of whale meat — courtesy of the Institute of Cetacean Research.*"²⁵

In another report published that same year, we are told that the

"Shimonoseki Marine Sciences Academy . . . has become a major shareholder in Kyodo Senpaku . . . *Japan's only scientific whaling enterprise . . . [and] will use the data [gathered] on whales . . . [to] lend further support towards the resumption of commercial whaling.*"²⁶

And yet another report from later that year informs us that

"[a]n unexpected excess sees a forgotten taste gain 'regular' status on pub menus and targeted at school lunches. *The number of food companies and eateries using whale meat is on the rise.* But while whale meat for culinary purposes is being placed on the market, whale meat inventories have also been expanding. *The people involved with whaling are trying hard to expand consumption. Whale meat sales are a very important financial source for research whaling.* Future research whaling is likely to be obstructed unless whale meat consumption increases, and *this is why industry insiders see it as an emergency issue . . . The Institute of Cetacean Research and other related organizations are aiming to expand sales channels [of] whale meat . . . There is also the fact that Japan is seeking the resumption of commercial whaling at the International Whaling Commission.* At the Annual Meeting, which was held in June this year, the joint declaration put forward by Japan and other pro-whaling nations . . . included the statement that *the temporary ban on commercial whaling was 'no longer necessary'.*"²⁷

In my opinion, the evidence on record (of which the above quotations constitute only an illustration) plainly supports the conclusion that the output of JARPA II was not only responsive to market forces, but in fact

²⁵ Memorial of Australia, Vol. III, Ann. 130, pp. 321-322; emphasis added.

²⁶ *Ibid.*, Ann. 131, p. 325; emphasis added.

²⁷ *Ibid.*, Vol. III, Ann. 133, pp. 329-331; emphasis added.

the broader auspices of the programme were used as a tool to stimulate the commercial consumption of minke whale meat amongst the Japanese population. These explicitly commercial attributes only further entrench the conclusion that JARPA II is a commercial whaling programme.

5. Conclusion regarding JARPA II as a Commercial Whaling Programme

35. In sum, the analysis above regarding the commercial nature of JARPA II may be distilled into the following propositions:

- (i) A correct reading of the ICRW requires that a programme that is not for purposes of scientific research (or aboriginal subsistence) must necessarily be one for commercial purposes.
- (ii) The history of JARPA and JARPA II demonstrates a strenuous and persistent opposition to the IWC's moratorium on commercial whaling by the Government of Japan, and a correlative sustained effort on its part to protect whaling as a sacrosanct component of Japanese society "in some form or another".
- (iii) The indefinite duration of JARPA II is suggestive of its role as an interim measure to promote some vestige of Japan's whaling industry until the ultimate objective of lifting the moratorium on commercial whaling can be achieved.
- (iv) The correlation between JARPA II output and market demand for minke whale meat, as well as the use of ostensibly scientific government agencies operating under the banner of JARPA II, to actively promote whale meat consumption amongst the Japanese populace are by their very nature quintessential hallmarks of commercial enterprise.

36. For these reasons, I am clearly of the opinion that JARPA II is not a programme for purposes of scientific research, but a commercial whaling programme.

(Signed) Dalveer BHANDARI.

SEPARATE OPINION
OF JUDGE *AD HOC* CHARLESWORTH

Special permit whaling under Article VIII of the ICRW — The use of lethal methods “for purposes of scientific research” under the ICRW must be indispensable to the research — The precautionary approach is relevant to the interpretation of the ICRW — States parties to the ICRW have a duty to co-operate with the IWC and its committees — Japan has breached paragraph 30 of the Schedule to the ICRW.

1. As my vote indicates, I largely agree with the conclusions the Court has reached and its reasoning. There are, however, two areas in which my views differ from those of the majority.

LETHAL METHODS

2. My first point of difference from the majority turns on the nature of the restrictions on lethal methods in scientific research on whales in Article VIII of the International Convention for the Regulation of Whaling (1946) (ICRW): can lethal methods be used when a State party considers it necessary or only when no other methods for the relevant scientific research are available? Both Parties to this dispute accept that lethal methods may be essential for research on some scientific questions about whales.

3. At the time the ICRW was adopted, scientific research on whales was largely dependent on lethal methods. As the Court notes, however, the ICRW is an evolving instrument (Judgment, para. 45). The most obvious mechanism of evolution is contained in the ICRW itself. Article V gives the International Whaling Commission (IWC) the power to amend the ICRW though the adoption of amendments to the ICRW's Schedule by a three-fourths majority of those IWC members voting (Art. III, para. 2). The Schedule has the same legal status as the Convention by virtue of Article I, paragraph 1.

4. A second, less direct, mode of evolution is through recommendations of the IWC (Art. VI) which are adopted by a simple majority of members voting (Art. III, para. 2). Although such recommendations do not bind IWC members, they are relevant to the interpretation of the ICRW if they come within the terms of Article 31, paragraph 3 (*a*) or (*b*) of the Vienna Convention on the Law of Treaties 1969. Article 31, para-

graph 3 (a) requires that “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” be taken into account in its interpretation, together with the treaty’s context. Article 31, paragraph 3 (b) takes the same approach to “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. Since the moratorium on commercial whaling came into effect in the 1985-1986 pelagic and 1986 coastal seasons, most IWC resolutions on special permit whaling have attracted a number of negative votes, which precludes them as evidence of the parties’ agreement on the ICRW’s interpretation. However, there remain some significant resolutions that were adopted by consensus and thus must inform the interpretative task. I note that resolutions adopted by a vote of the IWC have some consequence although they do not come within the terms of Article 31, paragraph 3, of the Vienna Convention. Particularly when they are adopted by a large majority of IWC members, the resolutions are relevant to the duty of co-operation, discussed below.

5. The issue of the status of IWC resolutions is of special significance in this case with respect to the use of lethal methods “for purposes of scientific research” under Article VIII. While Article VIII envisages the killing of whales for scientific ends, it must be read in light of developments in the treaty parties’ views on lethal research methods. Although the Court acknowledges at a general level that resolutions adopted by consensus or by a unanimous vote “may be relevant for the interpretation of the Convention or its Schedule” (Judgment, para. 46), with respect to lethal research methods it states that any such resolutions “do not establish a requirement that lethal methods be used only when other methods are not available” (*ibid.*, para. 83). In my view, however, the applicable resolutions establish a principle that lethal methods should be of last resort in scientific research programmes under Article VIII. IWC resolution 1986-2 on “Special Permits for Scientific Research” was adopted by consensus and records the views of parties to the ICRW that both permit-issuing Governments and the IWC’s Scientific Committee in reviewing permits should take into account whether the relevant scientific research objectives “are not practically and scientifically feasible through non-lethal research techniques”. Annex P, the most recent version of the Guidelines for the Review of Scientific Permit Proposals, adopted by consensus by the Scientific Committee and endorsed by the IWC in 2008, requires an assessment of “why non-lethal research methods . . . have been considered to be insufficient”. These resolutions and Guidelines give primacy to non-lethal methods in scientific research relating to whaling and insist that permit-issuing States explain why non-lethal methods are inadequate. In turn, the Scientific Committee must assess such explanations against current scientific knowledge and practice. These instruments

thus support an interpretation of Article VIII that lethal methods should be essential to the objectives of the scientific research programme.

6. The precautionary approach to environmental regulation also reinforces this analysis of the conditions in which lethal research methods may be undertaken. The approach was formulated in Principle 15 of the Rio Declaration on Environment and Development in 1992 as “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”. The precautionary approach entails the avoidance of activities that may threaten the environment even in the face of scientific uncertainty about the direct or indirect effects of such activities. It gives priority to the prevention of harm to the environment in its broadest sense, including biological diversity, resource conservation and management and human health. The essence of the precautionary approach has informed the development of international environmental law and is recognized implicitly or explicitly in instruments dealing with a wide range of subject-matter, from the regulation of the oceans and international watercourses to the conservation and management of fish stocks, the conservation of endangered species and biosafety.

7. This Court has referred to the precautionary approach in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (although not using this term) and *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. In both these cases, the Court contemplated the interpretation of treaty obligations in light of new approaches to environmental protection. In the *Gabčíkovo-Nagymaros (Hungary/Slovakia)* case, dealing with a bilateral treaty signed in 1977, the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System, the Court stated:

“The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number

of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.” (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *Judgment*, *I.C.J. Reports 1997*, p. 78, para. 140.)

8. In the *Pulp Mills* case, the Court considered that “a precautionary approach may be relevant in the interpretation and application of the provisions of [the 1975 Statute of the River Uruguay]” (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment*, *I.C.J. Reports 2010 (I)*, p. 71, para. 164). It went on to state that:

“the obligation to protect and preserve, [under the Statute] [. . .], has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource” (*ibid.*, p. 83, para. 204).

9. These observations suggest that treaties dealing with the environment should be interpreted wherever possible in light of the precautionary approach, regardless of the date of their adoption. This is also consistent with the Court’s statement in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*: “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation” (*Advisory Opinion*, *I.C.J. Reports 1971*, p. 31, para. 53).

10. Both Parties to this dispute endorsed the precautionary approach at a theoretical level, although they disagreed about its application to the facts. In my view, the precautionary approach requires that non-lethal methods of research be used wherever possible. In relation to Article VIII, which contemplates the killing of the subject of research by the research activity, an implication of the precautionary approach is that lethal methods must be shown to be indispensable to the purposes of scientific research on whales.

DUTY OF CO-OPERATION

11. The second point on which I differ from the majority is whether Japan has acted consistently with paragraph 30 of the Schedule to the ICRW. Paragraph 30 sets out the process by which States parties submit

proposed scientific permits to the IWC's Scientific Committee for review and comment. In my view, paragraph 30 must be read in light of a duty of co-operation of States parties to the ICRW with the IWC and its committees. While the Judgment of the Court recognizes such a duty of co-operation (paras. 83 and 240), it does not specifically address Japan's compliance with the duty. As the duty of co-operation is a critical element of the fabric of the ICRW, it merits some elaboration.

12. The ICRW was designed as a new form of international regulation of whaling after the failure of two earlier attempts. The Convention for the Regulation of Whaling (1931), prepared under the auspices of the League of Nations, and the International Agreement for the Regulation of Whaling (1937) (amended by several protocols) had relied on the parties' national regulatory systems for enforcement. Although they laid the foundations for international co-operation to bring scientific knowledge to bear on the whaling industry, neither instrument was able to respond to rampant commercial whaling. The ICRW departed from these treaties' national enforcement schemes by creating an international institution, the IWC, of which each treaty party was a member. The fact that membership of the ICRW is open to all States reinforces its purpose of internationalizing the regulation of whaling beyond those States directly involved in whaling. As noted above, the IWC has the power to regulate whaling closely through amending the Schedule to the ICRW. The IWC can deploy a variety of mechanisms to this end, including the designation of protected species and sanctuaries, or setting annual catch quotas and size limits (Art. V, para. 1).

13. Article VIII of the ICRW was based on Article 10 of the 1937 Agreement, which aimed to promote scientific research. An important difference in the ICRW provision is the monitoring role of the IWC in relation to whaling for purposes of scientific research. This entails a duty of co-operation by States parties with the IWC and its subsidiary bodies reflecting the overarching object and purpose of the Convention, which is to create "a system of international regulation" for the conservation and management of whale stocks (Preamble, para. 6). The concept of a duty of co-operation is the foundation of legal régimes dealing (*inter alia*) with shared resources and with the environment. It derives from the principle that the conservation and management of shared resources and the environment must be based on shared interests, rather than the interests of one party. Article VIII incorporates a specific aspect of this duty in mandating immediate reporting to the IWC of the grant of any special permits for lethal activities for purposes of scientific research (Art. VIII, para. 1). Article VIII, paragraph 3, makes another element of this duty explicit in providing that States parties

“shall transmit to such body as may be designated by the Commission [the Scientific Committee], in so far as practicable, and at intervals of not more than one year, scientific information available to that Government with respect to whales and whaling, including the results of research conducted pursuant to [Art. VIII, para. 1] and to Article IV [general whaling research]”.

Resolutions adopted by the IWC under Article VI, whether by consensus or by vote, may also inform the duty of co-operation. The resolutions express the views of the IWC and, when adopted by consensus or a large majority vote, they represent an articulation of the shared interests at stake in the regulation of whaling. States parties to the ICRW are thus required to consider these resolutions in good faith.

14. The duty of co-operation in relation to lethal whaling for purposes of scientific research was given further definition by paragraph 30, inserted in the Schedule in 1979. The object of paragraph 30 was to deter abuse of Article VIII by States parties authorizing commercial whaling in the guise of scientific research (P. W. Birnie, *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale Watching*, 1985, Vol. 1, p. 190). While the Scientific Committee's views on special permit proposals are not legally binding on States parties under the terms of paragraph 30, the IWC has empowered the Committee to review and comment on such proposals, thereby creating an obligation on the proposing State to co-operate with the Committee. If the proposing State had no such obligation, it would deprive paragraph 30 of any effect.

15. In this context, the duty of co-operation at the heart of paragraph 30 requires a permit-authorizing State to provide the IWC with the permits “before they are issued and in sufficient time to allow the Scientific Committee to review and comment on them”; to provide specified information about the proposed scientific permits; to engage and promote the participation of the international scientific community in the research; and to give consideration in good faith to the views of the IWC and the Scientific Committee. This means that, although a State is not bound to accept the Committee's assessment of proposed permits, it must show genuine willingness to reconsider its position in light of those views. The duty entails keeping the Scientific Committee apprised of the results of scientific research on an annual basis. The duty also implies that permit-authorizing States should provide the Scientific Committee with timely and accurate information about modifications in the implementation of scientific research programmes already reviewed by the Committee and the implications for the authorization of special permits. States may not take a narrow or formalistic approach to the duty of co-operation. It is a substantive duty to consider the views of the IWC and

the Scientific Committee and to co-operate with the international scientific community in any research on whales.

16. The Judgment of the Court states that “consideration by a State party of revising the original design of the programme for review would demonstrate co-operation by a State party with the Scientific Committee” (para. 240), but it nevertheless finds that Japan has met the requirements of paragraph 30 with respect to permits issued under JARPA II. In this connection, the Court observes that the submission of the JARPA II Research Plan as the basis for annual permits accords with the practice of the Scientific Committee.

17. In my respectful view, however, the evidence indicates that Japan has not complied with the duty of co-operation with the Scientific Committee and thus that it has breached paragraph 30. First, JARPA II was launched before a review of JARPA by the Scientific Committee had taken place, and there is no sign that the findings of that review were taken into account as JARPA II continued. Second, while the JARPA II Research Plan provided the information specified in paragraph 30 (for example, objectives, sample sizes, methods and possible effects of the programme), as the Court has observed, there was no evidence of Japan’s meaningful consideration of the feasibility of non-lethal methods in the design of JARPA II (paras. 137 to 141). Third, paragraph 30 provides that “opportunities for participation in the research by scientists of other nations” should be specified in proposed permits. This matter is reinforced in the Annex P Guidelines. The JARPA II Research Plan referred to the use of data from the Commission on the Conservation of Antarctic Marine Living Resources relating to krill predators (p. 10) and Japan’s intention “to actively co-operate with international organizations and projects on oceanographic surveys” (p. 15). The Research Plan also noted that “[p]articipation of foreign scientists will be welcomed” if they meet Japan’s qualification standards (p. 20). However, there is no evidence of international scientific collaboration in JARPA II’s implementation. In response to a question on this issue from a Member of the Court, Japan pointed to JARPA II scientists’ collaboration with other Japanese institutions, but did not identify any broader research participation. Finally, as is noted in the Court’s Judgment, the conduct of JARPA II has differed in substantial ways from the scheme set out in the Research Plan and yet Japan has not modified the terms of its permits accordingly (para. 240). Japan’s continued reliance on JARPA II’s original Research Plan as a basis for subsequent annual permits is inconsistent with the duty of co-operation. For these reasons, I am unable to join my colleagues in voting for paragraph 6 of the *dispositif*.

(Signed) Hilary CHARLESWORTH.
