Case No. 1062

Whaling in the Antarctic: Australia v. Japan, New Zealand intervening (2014)

Applicant: Commonwealth of Australia

Respondent: Japan

Case No. 1062 is a closed case. The enclosed record contains the only references permissible to bring forth before the United Nations International Court of Justice. Citation of references outside this record constitute grounds for dismissal.

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Case Summary

UN court rules against Japan's whaling activities in the Antarctic

31 March 2014 – The United Nations International Court of Justice (ICJ) has ruled against Japan in a case involving charges by Australia that the country was using a scientific research programme to mask a commercial whaling venture in the Antarctic.

The Hague-based UN judicial arm ordered a temporary halt to the activities, largely involving fin, humpback and minke whales, finding that the Japanese Whaling Research Programme under Special Permit in the Antarctic (JARPA II) is "not in accordance with three provisions of the Schedule to the International Convention for the Regulation of Whaling (ICRW)."

In May 2010, Australia instituted proceedings alleging that Japan was pursuing a large-scale programme of whaling under JARPA II, and was in breach of its ICRW obligations, as well as its other international obligations for the preservation of marine mammals and the marine environment.

In its application, Australia requested that the ICJ order Japan to "end the research programme, revoke any authorizations, permits or licences allowing the programme's activities; and provide assurances and guarantees that it will not take any further action under the JARPA II or 'any similar programme until such programme has been brought into conformity with its obligations under international law."

Though Japan rejected the charges and countered that its scientific research programme was in line with treaty obligations, 12 of the 16 World Court Judges found that the country was in violation of three ICRW Schedule provisions and, following Australia's request, ordered that the country "revoke any extant authorization, permit or license to kill, take or treat whales in relation to JARPA II, and refrain from granting any further permits" for that programme.

The Court noted that there are three additional aspects of JARPA II which "cast further doubt" on its characterization as a scientific research programme: the open-ended time frame of the programme; its limited scientific output to date; and the lack of cooperation between JARPA II and other domestic and international research programmes in the Antarctic Ocean.

"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," explained the ICJ in a press release today, adding that it found no evidence of such purpose in JARPA II.

Judgments handed down by the ICJ are final and binding on the parties

UN News Centre

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 (hereinafter "the 1937 Agreement"). 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 1937 Agreement also provided for the issuance by a "Contracting Government . . . to any of its nationals [of] a special permit authorizing 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 co-ordination 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.

Questions before the Court

1. Did Japan violate the following provisions of the Schedule to the International Convention for the Regulation of Whaling (ICRW)?

    i. The obligation to respect zero catch limits for the killing for commercial purposes of whales from all stocks (para. 10 (e))
    ii. The factory ship moratorium (para. 10 (d))
    iii. The prohibition on commercial whaling in the Southern Ocean Sanctuary (para. 7 (b)).

2. Does JAPRA II follow the court's definition of the 'for the purposes of scientific research' found in Article VIII, paragraph one of the convention?

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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 "[N]otwithstanding 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 Con-

vention, 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 overfishing", 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 pur-

poses 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 determi-

nation 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 ques-

tions, 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 exten-

sive 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.

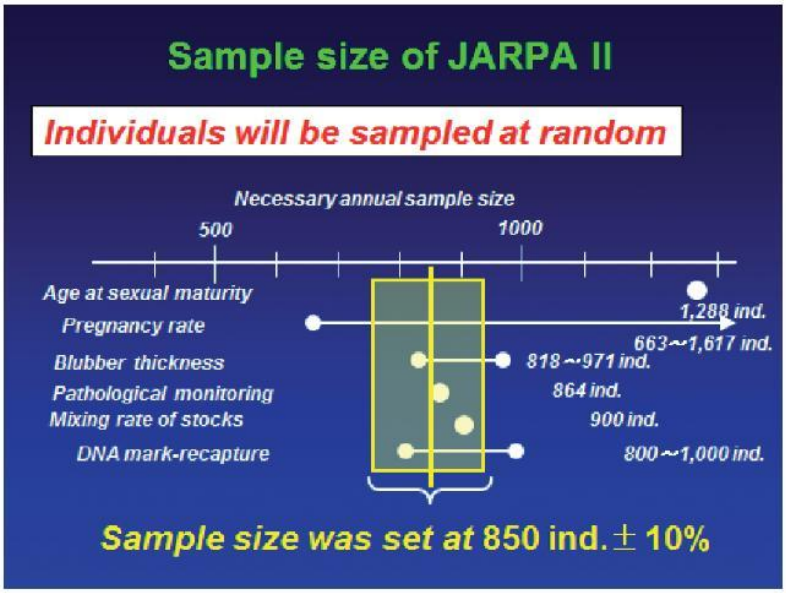
180. The Court also notes that the expert called by Japan, Mr. Walløe, raised concerns about the fin whale component of JARPA II that go beyond the sample size. Mr. Walløe testified that the fin whale proposal was "not very well conceived" for two reasons. He stated that random sampling of fin whales 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 evi-

dence 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 provi-

sions 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 1985-1986 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.

* * *

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.

* * *

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.

(Initialled) P.T.

(Initialled) Ph.C.

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 stocks[1]. 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 stocks[3]. 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 Zealand[5], 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 2007-1[7]. 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 Schedule[8], 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.

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[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) obligation[9] 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 Schedule[10] to the ICRW (resolutory 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 VIII[11] 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 (resolutory 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 biodiversity[12]. 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 flora[13].

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 *Gabčikovo-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 own[14], 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 law[15].

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 Sanctuary[16], 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 effect[17]. 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 whales[19], 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 conventions[21]. 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. Busuttil *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 continents[22], met in Goa, India[23], 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 flourish[26]. 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 ICRW[33].

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 stock[34].

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 tagging[35].

[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 stocks[36]. 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 recognizedly 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 approach[41], 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 whole[47].

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 review[48]. 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 interrelated 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 law[51]. 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 profitability[52]. 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 necessary[56]. 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 path[57]. 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 Convention[58], 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 (resolutory 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 resolutions[59] 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 (resolutory 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" sources[60]. 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 life[61].

[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. Cançado 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 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

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 seised 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 gives 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.

Appendix I: Universal Declaration of Human Rights

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1.
All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2.
Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3.
Everyone has the right to life, liberty and security of person.

Article 4.
No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5.
No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6.
Everyone has the right to recognition everywhere as a person before the law.

Article 7.
All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8.
Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9.
No one shall be subjected to arbitrary arrest, detention or exile.

Article 10.
Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11.
(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12.
No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13.
(1) Everyone has the right to freedom of movement and residence within the borders of each state.
(2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 14.
(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15.
(1) Everyone has the right to a nationality.
(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16.
(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage,

during marriage and at its dissolution.
(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17.
(1) Everyone has the right to own property alone as well as in association with others.
(2) No one shall be arbitrarily deprived of his property.

Article 18.
Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19.
Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20.
(1) Everyone has the right to freedom of peaceful assembly and association.
(2) No one may be compelled to belong to an association.

Article 21.
(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
(2) Everyone has the right of equal access to public service in his country.
(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22.
Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23.
(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
(2) Everyone, without any discrimination, has the right to equal pay for equal work.
(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24.
Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25.
(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26.
(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27.

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28.
Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29.
(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30.
Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

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