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THE HAGUE

YEAR 2013

Public sitting

held on Wednesday 26 June 2013, at 3 p.m., at the Peace Palace,

President Tomka presiding,

*in the case concerning Whaling in the Antarctic (Australia v. Japan:
New Zealand intervening)*

VERBATIM RECORD

ANNÉE 2013

Audience publique

tenue le mercredi 26 juin 2013, à 15 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

*en l'affaire relative à la Chasse à la baleine dans l'Antarctique
(Australie c. Japon ; Nouvelle-Zélande (intervenant))*

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Present: President Tomka
 Vice-President Sepúlveda-Amor
 Judges Owada
 Abraham
 Keith
 Bennouna
 Skotnikov
 Cançado Trindade
 Yusuf
 Greenwood
 Xue
 Donoghue
 Gaja
 Sebutinde
 Bhandari
Judge *ad hoc* Charlesworth

Registrar Couvreur

Présents : M. Tomka, président
M. Sepúlveda-Amor, vice-président
MM. Owada
Abraham
Keith
Bennouna
Skotnikov
Cañado Trindade
Yusuf
Greenwood
Mmes Xue
Donoghue
M. Gaja
Mme Sebutinde
M. Bhandari, juges
Mme Charlesworth, juge *ad hoc*

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The PRESIDENT: Please be seated. The sitting is open. This afternoon the Court will hear the continuation of the first round of oral arguments of Australia and I invite Mr. Henry Burmester to address the Court. You have the floor, Sir:

Mr. BURMESTER:

THE IWC AT WORK — A ROAD MAP

1. Mr. President, Members of the Court, it is a privilege to appear again before this Court as a representative of Australia. I do so with some nostalgia as I recall the other occasions I have so appeared, including that I first sat in this courtroom 40 years ago when Australia was last a plaintiff before this Court.

2. In this presentation I intend to do two things. The first, building on the presentation you heard before lunch from Professor Boisson de Chazournes, is to offer a road map as to how the International Convention for the Regulation of Whaling — 1946 Convention — underpins an active international organization, the International Whaling Commission (the IWC). The Solicitor-General has already given an outline of the features of the régime. My aim is to give the Court an insight into the key features of the international institutional régime by showing how the ongoing work of the Commission and its subsidiary bodies, particularly the Scientific Committee, takes place. Despite Japan's attempts to dismiss its relevance, this ongoing work is directly relevant when interpreting the 1946 Convention. It is relevant when considering the object and purpose of the Convention and the content of Japan's obligations under the Convention. And this will become clear in further detail in the following days, particularly in the presentation following mine of Professor Crawford on the interpretation of Article VIII of the Convention.

3. The second matter I will cover is to introduce the Court to some of the abbreviations and acronyms that will be regularly used over the next few days and that already appear in the written materials. To assist, you will find in the judges' folders at tab 15 a Glossary of key terms and abbreviations that will enable the Court better to understand some of the terms that may be used. ^{in this regard,} Just as lawyers have their own terms, so do scientists. I will take the Court to certain of the key

terms, particularly those that may be used in connection with the scientific evidence. And the easiest way to do this will be as part of my presentation on the work of the IWC and its bodies.

1. The ICRW Framework

4. As you have already heard, the 1946 Convention establishes the IWC in Article III. And the Convention is set out in tab 1 in your folders. The IWC is the principal body composed of all Contracting Governments with important tasks set out in Articles IV, V and VI of the Convention. And these tasks include organizing studies and investigations relating to whales, amending the Schedule by making regulations and making recommendations relating to the object and purpose of the Convention. I need to say something more about these functions.

5. First, however, I mention the current key subsidiary bodies established by the Commission that also have an important role to play in ensuring the implementation of the object and purpose of the Convention. [Screen on] On your screen, and in your folders, is a simple diagram showing the key IWC bodies.

6. The key subsidiary bodies are:

- (i) the Scientific Committee;
- (ii) the Conservation Committee; and
- (iii) the Finance and Administration Committee.

7. The Scientific Committee is of particular importance to this case. It meets annually, holds workshops on specific topics and appoints Working Groups. It primarily comprises nominees of Contracting Governments, but also includes advisors from relevant international organizations and invited participants. At the recent 2013 meeting, there were about 100 government nominated scientists and around 50 invited scientific observers.

8. The Conservation Committee was established in 2003 as part of the Berlin Initiative¹ of which I will say more a little later. It has been tasked with preparing and recommending to the Commission a conservation programme and with exploring means of collaborating with other organizations on that programme. The Finance and Administration Committee advises the Commission on expenditure, budgets and financial regulations. [Screen off]

¹MA, paras. 2.94 - 2.97.

Both Australia in its Memorial² and Japan in its Counter-Memorial³ have outlined these bodies and the work that they do. So Japan obviously agrees with Australia that an understanding of the work of the bodies established by the Commission is relevant to the resolution of this case. They spend a lengthy chapter three of its Counter-Memorial outlining much of this work. Japan, however, paints a picture of this work as nothing more than adopting changing management measures to ensure the sustainable utilization of whale resources. It argues that its own so-called “scientific” programmes are directly correlated with the changing management measures⁴. And it otherwise purports to dismiss the work done within the organization as irrelevant to its so-called “scientific” whaling.

9. Japan’s skewed account fails to acknowledge the significant emphasis given to conservation in the work of the Convention bodies. It fails to acknowledge the consistently critical attitude expressed by those bodies towards Japan’s special permit whaling. Contrary to Japan’s assertion, Australia does not argue that evolution has changed the object and purposes of the 1946 Convention⁵. Rather, as you heard this morning from Professor Boisson de Chazournes, there has been an evolution in the manner in which the object and purpose of the Convention has been given effect.

10. Mr. President, the Court will be taken in forthcoming presentations to detailed accounts of particular resolutions and to work done by the Commission and Scientific Committee of relevance to this case. My task is to outline the important and extensive work and to show the increasing focus on conservation and to point to the critical scrutiny given to so-called “scientific” whaling by Japan. This outline that I intend to give is to make it easier for the Court to understand the context in which Convention bodies adopted particular resolutions and took particular actions that will subsequently be referred to in some detail.

²MA, paras. 2.22 - 2.29, 2.96.

³CMJ, paras. 2.44 - 2.57, 3.1-3.107.

⁴*Ibid.*, para. 3.3.

⁵*Ibid.*, para. 6.4.

2. The Commission (IWC)

11. I turn first to the Commission in terms of convention bodies. This had met annually until 2012 when it was decided to meet only once every two years. It is the body comprising representatives of all the Contracting Governments. And, as I have mentioned, among its main functions are amendment of the Schedule and adoption of recommendations under Article VI, commonly referred to as resolutions.

(a) *The Schedule*

12. So let me say some more about the Schedule. The Commission has power to amend the Schedule by a three-quarters majority of members voting⁶. And Article V (2) sets out the requirements for a Schedule amendment. Since 1946 the IWC has exercised its collective role by making regular amendments to the Schedule reflecting the Commission's changing understanding of how best to give effect to the object and purpose of the Convention.

13. The Schedule as it currently stands is at tab 2 of the judges' folders directly behind the Convention, of which it is an integral part⁷. And as can be seen, the Schedule is very detailed, with definitions, prohibitions on certain operations and restrictions on catch limits, supervisory and reporting requirements, and so on.

14. The Solicitor-General has already mentioned the key provisions which Australia says Japan has breached. I do so again to indicate some of the key terms referred to in this case. And so I want to draw the Court's attention specifically to:

- [screen on] (Tab 35) Paragraph 7 (b) of the Schedule — the Southern Ocean Sanctuary — and on your screen, you will notice references in that provision to pelagic operations, land stations, baleen and toothed whales.
- [next screen] (Tab 36) In Paragraph 10 (d) — the factory ship moratorium — you will see references to factory ships, whale catchers, sperm, killer, baleen and minke whales.
- [next screen] (Tab 37) And in Paragraph 10 (e) — the commercial whaling moratorium — there are references all stocks. And 'Stock' is defined in the Glossary. [Screen off]

to whales from

⁶ICRW, Art. III (2).

⁷*Ibid.*, Art. I (1).

15. As you have seen in these paragraphs of the Schedule, there are references to a number of different whales, such as baleen and minke whales. I will provide a brief introduction to these different types of whales. Whales are members of the mammalian order, *cetacea*. There are two suborders: baleen whales and toothed whales, based on their feeding mechanism⁸. The Glossary contains relevant definitions. Paragraph 1 (a) of the Schedule to the Convention lists the various species of whales under these two categories. Sperm and killer whales are toothed whales. The whales of relevance to this dispute, Antarctic minke, humpback and fin whales are baleen whales.

16. At times you may also hear references to “blue whales” or “blue whale unit”. The blue whale is the largest animal on earth and was previously close to extinction. The blue whale unit, or BWU, was used in the early days of the IWC to set catch limits — one blue whale was considered equivalent to 2 fin, 2.5 humpback or 6 sei whales⁹. This unit is no longer used. Instead, the blue whale is today the subject of a scientific study under the Southern Ocean Research Partnership (SORP), to which I will return and say more¹⁰.

17. In the Schedule, as you have seen, reference is made to “factory ship”, “land station”, “whale catcher” and “pelagic operations”. (Tab 38) [Screen on] In Article II of the Convention there are definitions of those first three terms, also set out in the Glossary. “Pelagic operations” simply means operations on the open sea as opposed to coastal or land-based.

18. [Next screen] On the screen, and at tab 39, is a diagram that shows the different sizes of a number of whale species, including those of relevance to this case, with the minke whale in the middle, at the top there. In Appendix 1 to the Australian Memorial you can find a description of the history of whaling in the Antarctic in relation to the main relevant species of whales and an estimate of current stock numbers.

19. [Next screen] I have now put up on your screen, and at tab 40 in the folder, a graphic which shows the changing catches of the different species of whale. As various species were hunted to low stock levels, so industry attention turned to another species. Minke whales, the main

⁸MA, para. 2.113.

⁹Mangel, *An Assessment of Japanese Whale Research Programs Under Special Permit in the Antarctic (JARPA, JARPA II) as Programs for Purposes of Scientific Research in the Context of Conservation and Management of Whales (“Original Expert Opinion”)*, para. 3.2; MA, App. 2.

¹⁰*Statement by Dr. Nick Gales dated 15 April 2013 (“Expert Statement”)*, paras. 6.8-6.13.

focus of JARPA II— and that is the light brown— have only been subject to exploitation relatively recently.

20. (Tab 41) [Next screen] The other key provision of the Schedule is paragraph 30 dealing with proposed special permits. The Scientific Committee is given a specific role in reviewing proposed permits and this role is reflected in the IWC Rules of Procedure. The permits are required to specify a number of matters, set out, as you can see, in sub-paragraphs (a) to (d).
[Screen off]

(b) Resolutions of the IWC

21. I turn next to the resolutions of the IWC and obviously the Commission is the key Convention body in this regard. The relevance of the work of the Commission in passing resolutions is reflected in the fact that many of its resolutions and records of its meetings are attached as annexes to both the Australian Memorial and the Japanese Counter-Memorial¹¹. Resolutions, as recommendations of the principal Convention body, are obviously of importance and matters to be taken seriously by members. Their legal significance will be further elaborated by Professor Crawford and the Solicitor-General in subsequent speeches.

22. Mr. President, you will be pleased to know I do not propose to take the Court to a myriad of resolutions that have come from the Commission. Rather, I wish to draw attention to just a couple of illustrative examples to show, in particular, how closely involved the Commission has been in reviewing and commenting on special permit whaling, both generally and specifically in relation to Japan.

23. In many of its resolutions relating to Japan, the Commission, reflecting the widespread view of the Convention's Contracting Governments, has been robust in its criticism. The Commission has over the years passed resolutions stating, for instance: that special permit whaling should only be permitted where it is required or essential for the management of whales; that it be conducted in accordance with the Commission's conservation policy; that it only be permitted in exceptional circumstances; that it should be replaced by research using non-lethal techniques; and

¹¹See MA, Anns. 7-47; CMJ, Anns. 27-72.

that it not undermine conservation of whales in sanctuaries or other conservation measures adopted by the IWC¹². This can be found in the resolutions at Annexes 7 to 36 of the Australian Memorial.

24. These broad proscriptions for special permit whaling have been accompanied by specific criticism of JARPA and JARPA II. For instance, as long ago as the 1990s, the Commission, taking into account the views of the Scientific Committee, was calling on Japan to restructure its research program so that research interests could be properly addressed without using lethal methods¹³.

25. There have been Commission resolutions repeatedly calling on Japan to refrain from issuing permits to take whales in the Southern Ocean¹⁴. I mention as an example specifically Resolution 1997-5¹⁵, which is on your screen (tab 42) [screen on]. In its language, as can be seen, it is highly critical of Japan's issue of special permits. Among other matters, the Commission "reiterates its deep concern" over Japan's taking of whales in the Southern Ocean and "strongly urges" Japan to "refrain from issuing any further special permits for the take of any whale . . .". In 1998 and 1999 the relevant resolutions noted the grave concerns of eminent members of the international scientific community¹⁶. But what these resolutions — these numerous resolutions — have not done is commend or support JARPA or JARPA II or confirm that those programs are consistent with Article VIII. [Screen off]

26. The Solicitor-General in his overview has already summarized the three common concerns reflected in the collective view of the Commission. The Court will hear more about these resolutions, as I have indicated, in presentations by other counsel. What becomes clear from considering Commission resolutions in relation to whaling by Japan in the Southern Ocean is that the Commission, for a long period, has, firstly:

(a) consistently emphasized the conservation object and purpose of the Convention, reflected in many resolutions including, but not only, in the 2003 Resolution on the Berlin Initiative¹⁷;

¹²MA, Anns. 7-36.

¹³*Ibid.*, Anns. 18-19, 21, 25, 28-29.

¹⁴*Ibid.*, Anns. 27-29, 31-33.

¹⁵*Ibid.*, Ann. 29.

¹⁶*Ibid.*, Anns. 28-29, 31-33.

¹⁷*Ibid.*, Ann. 37.

- (b) secondly, it has been concerned with lethal take of whales, including in the sanctuaries under the guise of special permit whaling; and
- (c) thirdly, it has been constantly critical of Japan's research program, affirming that it does not address critically important research needs for management of whaling in the Southern Ocean or require lethal take.

27. The 2003 Resolution, the Berlin Initiative, is at tab 43 in the judges' folders. In that Resolution, the Commission decided to establish a Conservation Committee with the task of identifying a conservation agenda. (Tab 44) [Screen on] ^{In its} ~~the~~ third preambular paragraph, which is on your screen, the resolution highlighted that the Commission had evolved into an organization recognized for its meaningful contributions to the conservation of great whales, and that through resolutions and Schedule amendments, the Commission had developed an extensive conservation agenda. [Screen off] In that Resolution, Annex I sets out a long history of more than 100 conservation-oriented resolutions¹⁸. Annex II to the Resolution sets out an annotated compilation of IWC conservation work from 1976 to 2001. Among the issues dealt with in the compilation in Part 10 is management of lethal scientific research and the Annex records the response of the Commission up to that time¹⁹.

(c) Guidelines

28. An important aspect of the work of the Commission in relation to special permits and the adoption of resolutions has been the adoption of resolutions calling on the Scientific Committee to adopt and revise Guidelines governing the grant of these permits. These Guidelines have been designed to assist the Scientific Committee and Commission to assess proposals to take whales under special permits which, as you have heard, under paragraph 30 of the Schedule, are required to be submitted to the Scientific Committee in advance. The first Guidelines were adopted in 1985 as Annex L and the most recent Guidelines, known as Annex P, were adopted by the Scientific Committee by consensus and endorsed by the Commission in 2008²⁰.

¹⁸See MA, Vol. 114-7.

¹⁹*Berlin Initiative*, Annex II, IWC Conservation Work (An Annotated Compilation, 1976-2001), para. 10*nbis*, ("*Berlin Initiative*"); MA, Ann. 37.

²⁰MA, Ann. 49, paras. 4.25-4.29.

29. And copies of the key instruments containing the Guidelines are in the folders chronologically at tabs 5 to 12. The first resolution by the Commission on this issue in 1986, at tab 5, sets out detailed recommendations to Governments considering the issue of special permits, including whether the objectives of the research are feasible through non-lethal means, whether the proposed research is intended and structured to contribute information essential for rational management of the stock, and whether the number, age and sex of whales to be taken will facilitate the comprehensive assessment proposed to be completed following the adoption of the commercial whaling moratorium. One can see similar recommendations in Commission resolutions in 1988 and in 1999.

30. The most recent Guidelines, adopted by the Scientific Committee as Annex P in 2008, have been closely scrutinized by the Commission. As recently as its last meeting in 2012, the Commission endorsed revised Guidelines especially related to data availability and timing adopted that year by the Scientific Committee, and now known as Annex P3. Tab 45 in your folders contains the extract from the 2012 IWC Annual Report. What Annex P contains is a detailed set of requirements as to how special permits should be structured. A proposal for a special permit should set out: the objectives; the methods to achieve the objectives; an assessment of the potential effects of catches on the stock involved. The Guidelines also contain details of a review process, involving initial, interim and final reviews at specialist workshops. Not surprisingly, the expert evidence by Professor Mangel — as essential indicia of any scientific program — points to similar things to those identified in the Guidelines as being necessary to support a notification under paragraph 30 of the Schedule.

31. And to summarize the contents of the Guidelines, I draw on the words of the Australian delegation in 1988 but still applicable:

“[T]he guidelines make it clear that it is incumbent on those who draft proposals [for the conduct of research under Article VIII] to ensure that the scientific justification for the research is fully presented. The proposal document should explain how the research will lead to reliable answers to the questions being addressed, if the research is intended to [meet] critically important research needs then it is also critically important that the proposal explain why this is the case. If a case is made which establishes that the research is critically important, then the next step is to show that the proposed kill of whales makes a sufficient contribution to the aims of the

research and that no other practical approach to the problem is possible through non-lethal means.”²¹

And that statement still applies today under the Guidelines.

32. You will hear more from Professor Sands about the essential indicia of a proper program of scientific research. And you will also be referred to these Guidelines again by Professor Crawford in relation to the interpretation of Article VIII.

3. The Scientific Committee

33. Mr. President, I turn then to the next important body, the Scientific Committee. The primary and important role of the Scientific Committee is that of reviewing scientific research carried out by Contracting Governments and making recommendations for future research needs. The statement by Dr. Gales, including particularly Annexure 2, contains detail on how the Scientific Committee goes about its work. As part of its work, it has a particular role in reviewing special permits issued under Article VIII in accordance with paragraph 30 and the Guidelines to which I have just referred²².

34. Among the other important work done by the Committee has been that leading to the adoption by the IWC of the *New Management Procedure* — the NMP — used from 1975 to 1981, and the acceptance of the *Revised Management Procedure* — the RMP — in 1994²³. And the Court will hear these abbreviations NMP and RMP regularly mentioned so I need to say a little more about them.

35. The NMP was adopted by the Commission in 1975 and incorporated in paragraphs 10 (a) to 10 (c) of the Schedule to the Convention. The NMP was designed to calculate catch limits for whale populations using mathematical models, where the key focus was the change in population size from one year to the next²⁴. In so doing, it utilized concepts of maximum sustainable yield (MSY), maximum sustainable yield level (MSYL) and maximum sustainable yield rate (MSYR). Definitions of those terms are in the Glossary in your folders.

²¹IWC40, Verbatim Record of Fourth Plenary Session, 3 June 1988, IWC/40/VR, 71-72.

²²MA, paras. 2.25-2.29. The Scientific Committee’s Rules of Procedure are located at CMJ, Ann. 121.

²³MA, paras. 2.47-2.54; 2.71-2.78.

²⁴*Ibid.*, paras. 2.48-2.49.

36. The NMP was dependent on precise knowledge of various biological parameters in the whale population. However, the experience of the Scientific Committee in attempting to implement the NMP showed that it was not possible to know these parameters to the required level of precision to make the NMP work²⁵.

37. By 1976-1977 it became apparent that the Scientific Committee could not provide the necessary advice on MSY for a number of stocks. Some alternative approach was needed.

38. The adoption of the commercial whaling moratorium in 1982 provided a circuit breaker and allowed the Scientific Committee to develop revised management procedures. Work was done in the Scientific Committee from 1986 to 1993 that led to adoption by the Commission in 1994 of the RMP²⁶. Japan describes the RMP in its Counter-Memorial as “a precautionary, risk-averse procedure designed to calculate catch limits . . . [with] many built-in safety factors”²⁷. The RMP is a conservative management tool designed to eliminate the need for data obtained through lethal whaling²⁸. It does not require a precise knowledge of biological parameters such as the productivity of a whale population. These parameters simply cannot be known with sufficient precision. Instead, what the RMP does is it eliminates the need for reliance on biological parameters and uses computer modelling to examine a range of plausible scenarios as to how catch limits could be set²⁹.

39. The RMP has been accepted by the Commission as the appropriate vehicle for determining any future catch limits³⁰. In that respect, it forms the scientific part of a suite of management measures known as the Revised Management Scheme (RMS). The broader RMS would need further work before commercial whaling could resume. However, it is clear that the RMP is the accepted procedure by the Commission for setting future catch limits.

²⁵Gales, *Expert Statement*, paras. 3.4, 5.4, 5.8, and Annexure 2, para. 8; Mangel, *Supplement to An Assessment of Japanese Whale Research Programs Under Special Permit in the Antarctic (JARPA, JARPA II) as Programs for Purposes of Scientific Research in the Context of Conservation and Management of Whales* (“*Supplementary Expert Opinion*”), para. 4.1.

²⁶MA, paras. 2.50-2.54.

²⁷CMJ, para. 3.71.

²⁸MA, para. 2.72-2.75; Mangel, *Original Expert Opinion*, paras. 3.21-3.27 [MA, Appendix 2].

²⁹Gales, *Expert Statement*, Annexure 2, paras. 13-18.

³⁰MA, paras. 2.76-2.78, Mangel, *Original Expert Opinion*, paras. 3.21-3.31 [MA, Appendix 2]; Gales, *Expert Statement*, Annexure 2, paras. 7-21.

40. The RMP uses a catch limit algorithm — a CLA, a term defined in the Glossary. This algorithm calculates catch limits and, in so doing, takes into account the uncertainties in biological parameters referred to earlier. The RMP also uses Implementation Stimulation Trials (ISTs), also defined in the Glossary, to account for uncertainties over stock structure and movements.

41. Importantly, the RMP only requires abundance estimates and data on past catches and is not reliant on lethal data sources. As you will hear shortly, lethal take under JARPA II is irrelevant and of no assistance in the use of this management tool, a management tool described by Dr. Gales as “a new paradigm of fishery type models” which “has now become increasingly embedded in modern approaches to fisheries management”³¹.

42. Non-lethal research has become the key research approach embraced by the IWC. In this context, two abbreviations that are used in discussions about the previous work of the Scientific Committee in estimation of the abundance of whale stocks are IDCR and SOWER. IDCR stands for the International Decade of Cetacean Research. SOWER means Southern Ocean Whale and Ecosystem Research. These were non-lethal research programs overseen by the Scientific Committee which included sighting surveys. They provided the most important sources for current estimation of Antarctic baleen whale numbers³². The notable current program involving non-lethal research on whales is the Southern Ocean Research Partnership (SORP). Dr. Gales, in his evidence, outlines the projects currently being undertaken by SORP³³. These projects were reviewed and endorsed by the Scientific Committee and were drawn from scientific questions previously identified by the Scientific Committee as priorities.

43. One of the Scientific Committee’s other important tasks, other than developing management techniques based on population abundance, has been review of special permit whaling in accordance with the Guidelines which I have mentioned.

44. This review of special permits has led to trenchant criticism of JARPA and JARPA II in the Scientific Committee, which has then been taken up in the resolutions of the Commission, to which I have already referred. And the Court will hear in coming days more detail about this. For

³¹Gales, *Expert Statement*, Annexure 2, para. 12.

³²See de la Mare et al, *Antarctic Baleen Whale Populations*, [MA, Appendix 1]. See also Gales, *Expert Statement*, paras. 5.1-5.7.

³³Gales, *Expert Statement*, para. 6.3.

example, in its final review of JARPA in 2006, the Scientific Committee was unable to conclude that any of the objectives of JARPA had been met³⁴. I have already mentioned the many resolutions by the Commission where Japan was formally urged to withdraw from JARPA³⁵. In 2005 Japan presented JARPA II — the new program designed to replace JARPA which had run for 18 years. JARPA II, as you have heard, has no proposed end date.

45. Japan was criticized for bringing forward JARPA II before there had been a proper opportunity for the Scientific Committee to review JARPA itself³⁶. And this is reflected in critical comments by 63 scientists³⁷. A very brief review of the JARPA II proposal by the Scientific Committee took place in the absence of participation of these scientists. The Committee could not reach a consensus on any of the objectives or methods of JARPA II. And Japan, as the Court will hear, has not materially responded to any of the comments of the Scientific Committee in relation to JARPA II. It has had a completely deaf ear in this regard and Professor Crawford will say more on this.

46. The Scientific Committee has also established a number of working groups to assist its work. One is a working group on Maximum Sustainable Yield Rate and that, among other things has been looking at the plausible range of MSYR currently used in the RMP with a view to determining whether current evidence suggests the range needs modification. In 2009 the Working Group dismissed as of low reliability estimates of MSYR derived from lethal data collected by Japan³⁸. And at its most recent meeting in 2013, the Scientific Committee, after receiving the Working Group's most recent report, agreed to raise slightly the lower end of the plausible range. But importantly the Scientific Committee reached this conclusion based entirely on non-lethal data and made no use of lethal data arising from either JARPA or JARPA II in its considerations. That is, JARPA and JARPA II data proved absolutely useless in trying to amend the assumptions made in the RMP regarding MSYR and productivity.

³⁴MA, para. 5.11, fn 536.

³⁵*Ibid.*, para. 5.16.

³⁶*Ibid.*, para. 5.24.

³⁷“Report of the Standing Working Group on Scientific Committee”, Annex O1, Appendix 2, *J. Cetacean Res. Manage. 8 (Suppl.)*, 2006, 260 [AM 5.86, Annex 52].

³⁸MA, para. 5.91.

Conclusion

47. Mr. President, in this presentation I have sought, as well as introducing key terms, to provide a snapshot or roadmap as to how the international organization, the IWC, has adopted changing approaches to management of whales as scientific information and understanding of conservation requirements has developed. Both the Commission and its Scientific Committee have been particularly critical of Japan's JARPA programs in considerable numbers of resolutions and reports. And you will hear more about this in coming days.

48. The organization, the IWC, and its views cannot be dismissed as legally irrelevant. The Court cannot shut its eyes to this material as Japan would want you to do. And this will be made clear in the presentations that follow, including that by Professor Crawford on Article VIII. I invite you, Mr. President to now call Professor Crawford. Thank you.

The PRESIDENT: Thank you very much, Mr. Burmester, and I give the floor to Professor Crawford. You have the floor, Sir. This time to plead on behalf of your native country. Please.

Mr. CRAWFORD:

ARTICLE VIII (INTERPRETATION AND APPLICATION)

Introduction

Mr. President, Members of the Court, it is an honour to appear before you on behalf of Australia in these proceedings.

1. In the conduct of its whaling program in the Southern Ocean, Japan relies on Article VIII, which allows Contracting Governments to grant special permits authorizing whaling operations "for purposes of scientific research". That presents you with a binary question: either Article VIII covers JARPA II or it does not. My task today is to discuss how Article VIII should be interpreted. I will, Mr. President, with your permission, return tomorrow to discuss, in light of the evidence and the documentary record, how Article VIII is to be applied in this case.

2. My presentation today is in three parts. First, I will explain the development of Article VIII from its origins in the 1937 Agreement³⁹.

3. Secondly I will address the essential characteristic of Article VIII as a limited exception to the regulatory régime for the conservation and recovery of whale populations established under the 1946 Convention, rather than the free-standing, effectively self-judging, general exception which Japan presents.

4. The third part will discuss the requirements which must be satisfied for a Contracting Government to be able to rely on Article VIII.

1. The Development of Article VIII

5. I turn then to the development of Article VIII. Three key points must be emphasized:

- First, the origins of Article VIII reveal the exceptional character of the power to issue special permits. Special permits are exactly that — they are “special”, adapted to the specific proposal, specially justified. They are not *pro forma*, a mere piece of bureaucratic routine.
- Secondly, the drafters envisaged that Article VIII would be used only to authorize killing of relatively small numbers of whales, and not to authorize continuous, long-term, open-ended, indefinite, nondescript research involving large, incessantly increasing numbers of whales.
- Thirdly, when the IWC was established in 1946, it was already intended that it would have collective oversight of special permits under Article VIII. The subsequent elaboration of that function involves no new principle.

(a) *The antecedents of Article VIII*

6. Mr. President, Members of the Court, the precursor of Article VIII was Article 10 of the 1937 Agreement — you’ll find the 1937 Agreement in tab 4. This provided for whaling under special permit for purposes of scientific research for the first time in an international agreement. It was the UK which proposed the text of Article 10: in doing so it drew upon its own legislation, the

³⁹International Agreement for the Regulation of Whaling, London, 8 June 1937, 190 *LNTS* 79 (entered into force 7 May 1938) (“the 1937 Agreement”) [MA, Ann. 3].

Whaling Industry (Regulation) Act of 1934, which is tab 46⁴⁰. The language of Article 10 was almost identical to the special permit exception contained in section 7 of the 1934 Act⁴¹.

7. The United States' whaling legislation of 1936 also contained a special permit whaling exception, the Act is tab 47 and I am pleased to say that the Regulations are tab 48⁴². Through the Congressional Hearings relating to this Bill, which are at tab 49⁴³, the origin of the provision in the regulations may be traced back to Article 2 of the bilateral UK-US Convention for the Protection of Migratory Birds of 1916, which likewise contained an exception for hunting for scientific purposes under permit⁴⁴.

8. But there was a notable distinction between Article 2 of the Migratory Birds Convention and Article 10 of the 1937 Agreement. That was the addition of the qualifier "special" to describe permits issued under Article 10. The description of such permits as "special" records the belief of the Contracting Governments that Article 10 permits were to be exceptional.

9. Moreover the "special" character of such permits is confirmed by the practice of the parties to the 1937 Agreement. As far as we can discover, permits issued under Article 10 authorized the killing of only small numbers of whales.

10. Article VIII was proposed at the 1946 Conference by the United States⁴⁵. It was based on Article 10 of the 1937 Agreement. The participants would have had in mind the small takes of whales under Article 10.

11. In short Article VIII of 1946 was intended to operate as a limited exception to the commercial whaling regulations under the Convention. Special permits were not intended to

⁴⁰24 & 25 Geo 5, c 49.

⁴¹"Agreement for the Regulation of Whaling: Additional Article", ICW/1937/31 (3 June 1931) [CMJ, Ann. 10].

⁴²Joint Regulations of the Secretary of the Treasury and the Secretary of Commerce Concerning Whaling, 9 October 1936, Article 5 (a) made under the authority of section 2 of The Whaling Treaty Act 1936 Pub. No. 535, 74th Cong. [49 Stat. 1247].

⁴³Hearings before the Committee on Foreign Affairs House of Representatives, Seventy-Fourth Congress, First Session on S. 3413: The Whaling Treaty Act (11, 18, 25 February and 3, 7 and 10 March 1936), U.S. Government Printing Office 1936, 76.

⁴⁴Convention between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States, opened for signature 16 August 1916, TS 007/1917: Cd 8476 (entered into force 7 December 1916).

⁴⁵"United States Proposals for a Whaling Convention", International Whaling Conference, 29 October 1946, 1946/IWC/3, 11 [CMJ, Ann. 14].

authorize something equivalent in size to commercial whaling, or to authorize long-term, open-ended whaling.

12. It is true that Article VIII (4) required Contracting Governments to take all practical measures to collect biological data from their *commercial* whaling, the operations of their factory ships and land stations. But this provides no support for Japan's suggestion that it requires "continuous, long-term research"⁴⁶, involving the killing of a large number of whales during a period when commercial whaling has ceased.

13. Japan claims that Article VIII (4) had no parallel in the 1937 Agreement⁴⁷. But in fact it derives from Article 16 of that Agreement. This required the parties to obtain, "with regard to all factory ships and land stations under their jurisdiction", specified biological data from their commercial whaling operations. Article VIII (4) is likewise "focussed upon factory ships and land stations"⁴⁸.

14. Japan points to the *travaux* of the 1946 Convention, which it claims highlight the importance of the continuous collection of biological data⁴⁹. But the discussions quoted at length in the Counter-Memorial concerned the need to set stable commercial catch limits "for a few years", in order to have sound data for determining stock populations⁵⁰. These discussions did not envisage the conduct of continuous, long-term, open-ended programs of lethal research involving large numbers of whales.

(b) *The text of Article VIII in the context of the 1946 Convention as a whole*

15. I turn, as eventually one must in interpretation, to the text of Article VIII. The core of Article VIII (1) — when I refer to Article VIII I am referring, unless otherwise stated, to paragraph 1 — reads as follows — it is tab 52: [Screen on]

"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

⁴⁶CMJ, paras. 5.42 and 7.19-7.21.

⁴⁷*Ibid.*, paras. 7.18.

⁴⁸*Ibid.*

⁴⁹CMJ, paras 7.34 – 7.36.

⁵⁰*Ibid.*, Ann. 19, "Minutes of the Fourth Session", IWC/22 (21 November 1946), 9; CMJ, Ann. 20, "Minutes of the Seventh Session", IWC/32 (25 November 1946), 30–31.

research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit . . .”.

According to its ordinary meaning, this language envisages two separate functions.

[Screen off]

16. The first function is the act of granting the permit itself. A Contracting Government *may* issue a special permit to a national which, on its face, authorizes an activity which can be characterized as killing, taking and treating whales “for purposes of scientific research”.

17. This function is limited to the power to issue a special permit, or not. The necessity of the proposed research, whether the relevant activity is “scientific research” or not, are not matters for determination by the Contracting Government alone. Article VIII (1) does not give Contracting Governments a discretion of a unilateral and subjective character as for the issue of a special permit. Indeed Japan, eventually, concurs that Article VIII does not establish a “self-judging right”⁵¹.

18. The second function of Contracting Governments arises from the second phrase of Article VIII — “subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit”. It must be stressed that the phrase “as the Contracting Government thinks fit” relates only to the “number” of whales to be taken and the “other conditions” attached to the special permit. It does not extend to the description of a special permit itself, notably the phrase “for purposes of scientific research”.

19. Consistent with your decision in *Gabčíkovo-Nagymaros*, the principle of good faith obliges Contracting Governments to exercise this second function in a reasonable way, and in such a manner that the purpose of the Convention can be realized⁵². Failure to do so — for example, by taking many more whales than was necessary to achieve the objectives of the relevant research — would indicate that the so-called research was in truth commercial whaling in disguise.

(c) *The subsequent development of Article VIII in practice*

20. I turn to address the central role of the IWC in defining the limited permission granted to Contracting Governments to authorize whaling operations “for purposes of scientific research”.

⁵¹ *Written Observations of Japan on New Zealand's Written Observations* (WOJ), para. 9.

⁵² *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, pp. 78–79, para. 142.

21. The IWC was established as the organ with collective responsibility for ensuring the conservation and recovery of whale populations, an extreme necessity at that time. Consistent with this mandate, the drafters envisaged that the IWC would act as a collective watchdog on the operation of Article VIII, and imposed reporting requirements on Contracting Governments to that end: first, a requirement under Article VIII (1) to report at once to the IWC each special permit authorizing the killing of whales for purposes of scientific research; and secondly, an obligation under Article VIII (3) to report the results of the research.

22. As put by the Chairman of the 1946 Conference:

[t]he Commission is to have responsibility for planning and recommending research on whales and whaling . . . It is believed that this will provide coordination of research programs and investigation in fields not adequately covered . . .”⁵³

23. This explicit provision of collective oversight in relation, *inter alia*, to Article VIII, was conspicuously absent from the 1937 Agreement. It was an early and important example of an implementing body — an international commission established by a multilateral environmental treaty. Indeed, as noted by the late lamented Patricia Birnie⁵⁴, the IWC was the first such commission to be established on a global scale and it was given general powers. In this respect, the role of the IWC was of high importance and, in accordance with its powers of oversight, the IWC has taken significant steps to define the proper scope of Article VIII.

24. First, in 1979, it adopted a procedure for prior review of special permits — this is Paragraph 30 of the Schedule, which Mr. Burmester showed you.

25. Secondly, in response to the exponential increase of special permit whaling following the entry into force of the moratorium, it endorsed a series of instruments, which I shall refer to collectively as “the Guidelines”. The Guidelines set out criteria against which special permit proposals are to be assessed prior to the issue of a special permit; they are also for use by the Scientific Committee when providing advice in relation to proposed special permits. The Guidelines sought to prevent what the United Kingdom and others described as “potential abuse of

⁵³CMJ, Ann. 17, “Minutes of the Second Session”, IWC/14, 20 November 1946, 25.

⁵⁴P. Birnie, *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale Watching*, Vol. I, (Oceana Publications Inc., 1985), 143.

the procedures for granting permits for scientific purposes to [permit] the continuation of something which can only be regarded as commercial whaling”⁵⁵. (Tab 54)

(i) Paragraph 30

26. I turn first to paragraph 30 of the Schedule. Under Article I(1) of the Convention, paragraph 30 constitutes an integral part of the Convention and is binding.

27. The development of a procedure of prior review was the result of concerns expressed by members of the Scientific Committee from 1963 onwards, of “rather large” samples being taken pursuant to special permit including, I freely admit, by Australia. These samples were much larger than had been taken in previous years⁵⁶. The Report of the Scientific Committee expresses the intent as follows: “to recognize and assure validity and utility of the proposed research, and to assure that proposed permits will not adversely affect the conservation of whale stocks”⁵⁷. Validity and utility.

As you can see, [screen on], paragraph 30 expressly requires Contracting Governments to provide proposed special permits to the Secretary of the IWC in sufficient time to allow the Scientific Committee to review and comment upon them.

28. Paragraph 30 also sets criteria to be addressed by the proponent Government. It is to provide all necessary information on the objectives, methods and effects of the proposed permit on whale conservation to enable the Scientific Committee to assess the proposal. This process of prior review confirms that the granting of special permits is not left to the unilateral and subjective determination of the proponent Government. [Screen off]

29. Japan contends that there can be no question of the Scientific Committee assuming a power to authorize or disallow a permit under paragraph 30⁵⁸. But that is not the point. The requirements of paragraph 30 are mandatory and must be complied with.

⁵⁵Intervention by the United Kingdom, IWC39, Second Plenary Session, Wednesday 24 June 1987, 31. See also Intervention by Australia, IWC39, Opening Plenary Session, Monday 22 June 1987, 18; Intervention by the United States, IWC39, Second Plenary Session, Wednesday 24 June 1987, 38.

⁵⁶Report of the Scientific Committee, Appendix IV, *Fourteenth Report of the Commission*, 1964, 25-26, para. 15. See also Chairman’s Report, Appendix III, *Sixteenth Report of the Commission*, 1966, 20, para. 18.

⁵⁷Report of the Scientific Committee, *Rep. int. Whal. Commn* 28, 1978, 41, para. 9.3.2.

⁵⁸CMJ, para. 8.30.

30. Moreover, the Guidelines recommend that Contracting Governments refrain from issuing permits or revoke permits already issued if the IWC considers they are inconsistent with its conservation policy⁵⁹. While the ability to issue and revoke special permits rests with the proponent Government, it is not unconstrained. In this respect, the views of the IWC as to the proper scope of special permit whaling operations are highly relevant.

(ii) The Guidelines

31. As Mr. Burmester has outlined, the Guidelines comprise six instruments, which are in your folders in chronological order, beginning at tab 5 with Annex L of 1985⁶⁰, and concluding at tab 12 with Annex P, entitled “Process for the Review of Scientific Permits and Research Results from Existing Permits”, adopted in 2008⁶¹.

32. As noted by the United States at the IWC meeting in 1987 (tab 55), these instruments represent a collective statement as to “the minimum criteria that should be met before whales are killed for research”⁶². If a research proposal does not satisfy each of these criteria, the proposed research is inconsistent with the IWC’s conservation policy⁶³.

33. The criteria have evolved between 1985 and 2008 in order “to bring [the IWC’s] approach to research conducted under Article VIII up to date”, the words are those of the United Kingdom delegate in 1995 (tab 56)⁶⁴. In particular, the IWC has placed increasing emphasis on non-lethal means, reflecting developments in modern research techniques, and the increasing ability to obtain necessary information, without killing the objects of the putative research.

34. In all, the IWC has adopted 40 resolutions since 1985 setting out its views on special permit whaling: these are set out in a table which is at tab 57 of your folders. No less than 21 —

⁵⁹MA, Ann. 44, Resolution on Scientific Research Programmes, Appendix 1, Chairman’s Report of the Thirty-Ninth Annual Meeting, *Report of the International Whaling Commission* 38, 1988, 27-28 (Resolution 1987-1); MA, Ann. 46, Resolution on Whaling under Special Permit, Resolution 1995-9, Appendix 10, Chairman’s Report of the Forty-Seventh Annual Meeting, *Annual Report of the International Whaling Commission 1995*, 46-47 (Resolution 1995-9).

⁶⁰Proposed Guidelines for Review of Scientific Permits, Annex L, Report of the Scientific Committee, *Rep. int. Whal. Commn* 36, 1986, 133 (Ann. L); MA, Ann. 42.

⁶¹Process for the Review of Scientific Permits and Research Results from Existing Permits, Report of the Scientific Committee, Annex P, *J. Cetacean Res. Manage. 11 (Suppl.)*, 2009, pp. 398-401 (Ann. P); MA, Ann. 49].

⁶²IWC39, Verbatim Record of Opening Plenary Session, 22 June 1987, IWC/39/VR, pp. 16-17.

⁶³Resolution 1987-1, MA, Ann. 44; Resolution 1995-9, MA, Ann. 46.

⁶⁴Intervention by the United Kingdom, IWC47, Verbatim Record of the Fourth Plenary Session, 1 June 1995, pp. 146-147.

more than 50 per cent — of these resolutions urge Japan to reconsider its programmes of lethal research; to refrain from issuing special permits and to halt the lethal aspects of its programmes⁶⁵.

(iii) Status of subsequent practice

35. Mr. President, Members of the Court, the IWC resolutions concerning special permit whaling, in particular the Guidelines, reflect the subsequent practice of the Parties, establishing their understanding of Article VIII, as contemplated under Article 31 (3) (b) of the Vienna Convention. As noted in the ILC's Commentary to that paragraph, "[s]ubsequent practice in the application of a treaty . . . is *authoritative evidence* as to its interpretation when the practice is

⁶⁵Resolution on Japanese Proposal for Special Permits, App. 4, Chairman's Report of the Thirty-Ninth Annual Meeting, *Rep. int. Whal. Commn* 38, 1988, 29 (Resolution 1987-4) [MA, Ann. 10]; Resolution on the Proposed Take by Japan of Whales in the Southern Hemisphere under Special Permit, App. 3, Chairman's Report of the Forty-First Annual Meeting, *Rep. int. Whal. Commn* 40, 1990, 36 (Resolution 1989-3) [MA, Ann. 16]; Resolution on Special Permit Catches by Japan in the Southern Hemisphere, App. 2, Chairman's Report of the Forty-Second Meeting, *Rep. int. Whal. Commn* 41, 1991, 47-48 (Resolution 1990-2) [MA, Ann. 18]; Resolution on Special Permit Catches by Japan in the Southern Hemisphere, App. 2, Chairman's Report of the Forty-Third Meeting, *Rep. int. Whal. Commn* 42, 1992, 46 (Resolution 1991-2) [MA, Ann. 19]; Resolution on Special Permit Catches by Japan in the Southern Hemisphere, App. 5, Chairman's Report of the Forty-Fourth 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 Forty-Fifth Annual Meeting, *Rep. int. Whal. Commn* 44, 1994, 33 (Resolution 1993-7) [MA, Ann. 21]; Resolution on Special Permit Catches by Japan in the North Pacific, Resolution 1994-9, App. 15, Chairman's Report of the Forty-Sixth Annual Meeting, *Rep. int. Whal. Commn* 45, 1995, 47 (Resolution 1994-9) [MA, Ann. 24]; Resolution on Special Permit Catches by Japan in the Southern Hemisphere, Resolution 1994-10, App. 15, Chairman's Report of the Forty-Sixth Annual Meeting, *Rep. Int. Whal. Commn* 45, 1995, 47 (Resolution 1994-10) [MA, Ann. 25]; Resolution on Special Permit Catches by Japan, Resolution 1996-7, App. 7, Chairman's Report of the Forty-Eighth Meeting, *Rep. int. Whal. Commn* 47, 1997, 51-52 (Resolution 1996-7) [MA, Ann. 28]; Resolution on Special Permit Catches in the Southern Ocean by Japan, Resolution 1997-5, App. 5, Chairman's Report of the Forty-Ninth Meeting, *Rep. int. Whal. Commn* 48, 1998, 47 (Resolution 1997-5) [MA, Ann. 29]; Resolution on Special Permit Catches in the North Pacific by Japan, Resolution 1997-6, App. 6, Chairman's Report of the Forty-Ninth Annual Meeting, *Rep. int. Whal. Commn* 48, 1998, 48 (Resolution 1997-6) [MA, Ann. 30]; Resolution on Whaling under Special Permit, Resolution 1998-4, App. 4, Chairman's Report of the Fiftieth Annual Meeting, *Annual Report of the International Whaling Commission 1998*, 43 (Resolution 1998-4) [MA, Ann. 31]; Resolution on Whaling under Special Permit, Resolution 1999-3, App. 4, Chairman's Report of the Fifty-First Annual Meeting, *Annual Report of the International Whaling Commission 1999*, 52-53 (Resolution 1999-3) [MA, Ann. 32]; Resolution on Whaling under Special Permit in the Southern Ocean Sanctuary, Resolution 2000-4, App. 1, Chairman's Report of the Fifty-Second Annual Meeting, *Annual Report of the International Whaling Commission 2000*, 56 (Resolution 2000-4) [MA, Ann. 33]; Resolution on Whaling under Special Permit in the North Pacific Ocean, Resolution 2000-5, App. 1, Chairman's Report of the Fifty-Second Annual Meeting, *Annual Report of the International Whaling Commission 2000*, 56 (Resolution 2000-5) [MA, Ann. 34]; Resolution on Southern Hemisphere Minke Whales and Special Permit Whaling, Resolution 2001-7, Ann. C, Chair's Report of the Fifty-Third Annual Meeting, *Annual Report of the International Whaling Commission 2001*, 57 (Resolution 2001-7) [MA, Ann. 35]; Resolution on Expansion of JARPN II Whaling in North Pacific, Resolution 2001-8, Ann. C, Chair's Report of the Fifty-Third Annual Meeting, *Annual Report of the International Whaling Commission 2001*, 57 (Resolution 2001-8) [MA, Ann. 36]; Whaling under Special Permit, Resolution 2003-2, Ann. F, Chair's Report of the Fifty-Fifth Meeting, *Annual Report of the International Whaling Commission 2003*, 102 (Resolution 2003-2) [MA, Ann. 38]; Resolution on Southern Hemisphere Minke Whales and Special Permit Whaling, Resolution 2003-3, Ann. G, Chair's Report of the Fifty-Fifth Annual Meeting, *Annual Report of the International Whaling Commission 2003*, 103 (Resolution 2003-3) [MA, Ann. 39]; Resolution on JARPA II, Resolution 2005-1, Ann. C, Chair's Report of the Fifty-Seventh Annual Meeting, *Annual Report of the International Whaling Commission 2005*, 1 (Resolution 2005-1) [MA, Ann. 40]; Resolution on JARPA, Resolution 2007-1, Ann. E, Chair's Report of the Fifty-Fifth Annual Meeting, *Annual Report of the International Whaling Commission 2007*, 90 (Resolution 2007-1) [MA, Ann. 41].

consistent, and establishes [the parties'] understanding regarding the meaning of the provisions of the treaty"⁶⁶ (emphasis added).

36. In his Hague Academy lectures, Sir Elihu Lauterpacht described the relevance of the practice of international organizations in the following terms:

“reference to usage and practice of this nature has formed an important feature of the judicial approach to international constitutional interpretation; . . . [you notice that the word ‘constitutional’ is not heard only in the mouths of the young] the flexibility and potentiality for development which recourse to this mode of interpretation brings into the life of international organizations are features of considerable value . . .”⁶⁷.

Sir Elihu goes on to identify a “massive amount of judicial support” for reference to institutional practice in treaty interpretation⁶⁸. This includes a number of cases in which institutional practice was deemed relevant in the interpretation of substantive provisions imposing obligations on States; that is, where the words in question established substantive rights and duties⁶⁹. For example, in the *Conditions of Admission* Advisory Opinion, you made reference to the practice of the Security Council in interpreting the scope of the discretion accorded to Members in voting under Article 4 (1) of the Charter⁷⁰.

⁶⁶“Draft Articles on the Law of Treaties with Commentaries”, Commentary to Article 38, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 236.

⁶⁷E. Lauterpacht, “The Development of the Law of International Organization by the Decisions of International Tribunals”, 152 *Recueil des Cours* (1976-IV), pp. 377, 447.

⁶⁸*Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, Advisory Opinion of 12 August 1922, *P.C.I.J., Series B, No. 2*, pp. 39-41; *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer*, Advisory Opinion of 23 July 1926, *P.C.I.J., Series B, No. 13*, pp. 19-20; *Jurisdiction of the European Commission of the Danube*, Advisory Opinion of 8 December 1927, *P.C.I.J., Series B, No. 14*, pp. 57-58; *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion of 28 May 1948, *I.C.J. Reports 1948*, p. 63 (*Conditions of Admission*); *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, *I.C.J. Reports 1949*, p. 179; *The UNESCO Constitution case, Annual Digest and Reports of Public International Law Cases* (1949), p. 335; *Competence of Assembly regarding admission to the United Nations*, Advisory Opinion of 3 March 1950, *I.C.J. Reports 1950*, p. 9; *South West Africa — Voting Procedure*, Advisory Opinion of 7 June 1955, *I.C.J. Reports 1955*; separate opinion of Judge Lauterpacht, pp. 105 and 106; *Judgments of the Administrative Tribunal of the ILO upon Complaints made against the UNESCO*, Advisory Opinion of 23 October 1956, *I.C.J. Reports 1956*, p. 91 (*ILO Administrative Tribunal*); *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, Advisory Opinion of 1 June 1956, *I.C.J. Reports 1956*; separate opinion of Judge Lauterpacht, p. 43; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion of 8 June 1960, *I.C.J. Reports 1960*, p. 168; *Certain Expenses of United Nations (Article 17, paragraph 2 of the Charter)*, Advisory Opinion of 20 July 1962, *I.C.J. Reports 1962*, pp. 160-178 (*Certain Expenses*); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *I.C.J. Reports 1971*, pp. 22, 36; cited in E Lauterpacht, “The Development of the Law of International Organization by the Decisions of International Tribunals”, 152 *Recueil des Cours* (1976-IV) pp. 377, 448-452.

⁶⁹For example, *Conditions of Admission*, *I.C.J. Reports 1948*, p. 63; *ILO Administrative Tribunal*, *I.C.J. Reports 1956*, p. 91; *Certain Expenses*, *I.C.J. Reports 1962*, pp. 159-177.

⁷⁰*Conditions of Admission*, *I.C.J. Reports 1948*, p. 63.

37. This judicial support also includes the separate opinion of Sir Hersch Lauterpacht in the *Voting Procedure* Opinion — from one Lauterpacht to another — where he said:

“A proper interpretation of a constitutional instrument must take into account not only the formal letter of the original instrument, but also its operation in actual practice and in the light of *the revealed tendencies in the life of the Organization*.”⁷¹ (Emphasis added.) [A very “Lauterpachtian” phrase.]

38. The Guidelines are a textbook illustration of such institutional practice. An express motivation of Contracting Governments in adopting the Guidelines was to develop a common understanding amongst the parties as to the proper scope of Article VIII⁷².

39. Although the specificity of the criteria laid down in the successive instruments evolved between 1985 and 2008, the criteria themselves — and the underlying concerns that they seek to address — have remained substantively consistent.

40. Other resolutions on special permit whaling adopted by the IWC, including those criticizing the Japanese programs, have also been substantively consistent. They have particularly repeated three common concerns: first, that special permit whaling should not undermine conservation measures, in particular, the moratorium and designated whale sanctuaries⁷³; secondly, that special permit whaling should not assume the characteristics of commercial whaling⁷⁴; and thirdly, that research should be conducted using non-lethal techniques where possible⁷⁵.

⁷¹*South West Africa – Voting Procedure*, separate opinion of Judge Lauterpacht, *I.C.J. Reports 1955*, p. 106. On the question of resolutions of organs of international organisations adopted as subsequent practice see also P. Sands and P. Klein, *Bowett’s Law of International Institutions*, (London, Sett & Maxwell, 2001), 11-047, p. 290; M Virally, “Sources of International Law: Unilateral Acts of International Organisations” in Bedjaoui (Ed.), *International Law: Achievements and Prospects* (UNESCO, Paris; Nijhoff, Dordrecht, 1991), pp. 241, 259; J A Frowein, “The Internal and External Effects of Resolutions by International Organizations”, *Max Planck Institut für ausländisches öffentliches Recht und Völkerrecht*, 1989, p. 790.

⁷²Intervention by the United States Delegation, IWC39, Verbatim Record of Second Plenary Session, 24 June 1987, IWC/39/VR, 40.

⁷³*Berlin Initiative*, Annex II, IWC Conservation Work (An Annotated Compilation, 1976-2001), pp. 28-29, para. 10 (*Berlin Initiative*) [MA, Ann. 37]; Resolution on Whaling under Special Permit in Sanctuaries, Resolution 1995-8, Chairman’s Report of the Forty-Seventh Annual Meeting, *Rep. int. Whal. Commn* 46, 46 (Resolution 1995-8) [MA, Ann. 27]; Resolution 1996-7 [MA, Ann. 28]; Resolution 1997-5 [MA, Ann. 29]; Resolution 1998-4 [MA, Ann. 31]; Resolution 1999-3 [MA, Ann. 32]; Resolution 2000-4 [MA, Ann. 33]; Resolution 2001-7 [MA, Ann. 35]; Resolution 2007-1 [MA, Ann. 41].

⁷⁴Resolution on Scientific Permits, Appendix 2, Chairman’s Report of the Thirty-Seventh Annual Meeting, *Rep. int. Whal. Commn* 36, 1986, 26 (Resolution 1985-2) [MA, Ann. 7]; Resolution on Special Permits for Scientific Research, Appendix 2, Chairman’s Report of the Thirty-Eighth Annual Meeting, *Rep. int. Whal. Commn* 37, 1987, 25 (Resolution 1986-2) [MA, Ann. 43]; Resolution 2003-2 [MA, Ann. 38].

⁷⁵Resolution 1992-5; Resolution 1993-7 [MA, Ann. 21]; Resolution 1994-9 [MA, Ann. 24]; Resolution 1994-10 [MA, Ann. 25]; Resolution 1994-11 [MA, Ann. 26]; Resolution 1995-9 [MA, Ann. 46]; Resolution 1996-7 [MA, Ann. 28]; Resolution 1997-5 [MA, Ann. 29]; Resolution 1997-6 [MA, Ann. 30]; Resolution 1998-4 [MA, Ann. 31]; Resolution 2000-5 [MA, Ann. 34]; Resolution 2001-8 [MM, Ann. 36]; Resolution 2003-2 [MA, Ann. 38]; Resolution 2003-3 [MA, Ann. 39]; Resolution 2005-1 [MA, Ann. 40]; Resolution 2007-1 [MA, Ann. 41].

41. The concern not to undermine IWC conservation measures counters Japan's contention that Article VIII is "self-contained" or "free-standing"⁷⁶. The collective view of Contracting Governments is that Article VIII may only be invoked in a manner consistent with the object and purpose of the Convention as a whole, and should not undermine the moratorium or the Southern Ocean Sanctuary⁷⁷ — which I shall call, for short, "the Sanctuary". This puts paid to any notion that Japan's view of Article VIII as self-contained is shared by other Contracting Parties. As you will see from the table in tab 57, most of the resolutions concerning the conduct of special permit whaling operations, including the Guidelines, were adopted either by consensus or by substantial majorities⁷⁸.

42. For example Resolution 1986-2 was adopted by consensus. It set out the Commission's first iteration of the minimum criteria to be met before whales were killed for research⁷⁹. All Contracting Governments, including Japan, accepted the principles embodied in this Resolution; likewise the IWC role in setting out the criteria under which special permits would be issued. Japan devotes several pages of its Counter-Memorial to its purported compliance with these criteria⁸⁰.

43. The most recent iteration of the Guidelines — Annex P of 2008 — was also agreed by consensus. In discussions concerning the adoption of Annex P, Japan noted (tab 58) that it "was actively involved in achieving this success and we like to express our commitment to follow this process in reviewing the scientific research activities"⁸¹.

44. Japan now contends that Australia's reliance on subsequent practice constitutes "an unacceptable revision of Article VIII under the guise of interpretation"⁸². But we do not invoke the subsequent practice of the IWC for the purpose of modifying the terms of Article VIII. To the

⁷⁶CMJ, paras. III.6, 7.8.

⁷⁷See, e.g., Resolution 1986-2 [MA, Ann. 43]; Resolution 1995-9 [MA, Ann. 46]; *Berlin Initiative*, pp. 28-29, para. 10 [MA, Ann. 37].

⁷⁸E.g., Resolution 1995-8, adopted 23/7, with 1 abstention [MA, Ann. 27]; Resolution 1995-9, adopted 21/7, with 1 abstention [MA, Ann. 46]; Resolution 1996-7, adopted 21/7, with 1 abstention [MA, Ann. 28]; Resolution 2007-1, adopted 40/2, with 1 abstention [MA, Ann. 41].

⁷⁹Resolution 1986-2 [MA, Ann. 43].

⁸⁰CMJ, para. 8.68.

⁸¹Intervention by Japan, IWC60, Verbatim Record of Agenda Item 9 — Scientific Permits [0:07:42].

⁸²CMJ, paras. III.13-14, 8.1.

contrary, the resolutions serve to clarify the IWC's views as to the proper conduct of special permit whaling, and hence its views on the proper interpretation and application of Article VIII.

45. This view is shared by the Contracting Governments which proposed the Guidelines.

For example, the United States, the proponents of Resolution 1987-1, stated (tab 59):

“[T]his resolution does not diminish the rights of Contracting Governments to authorise their citizens to conduct scientific research in accordance with Article VIII. Rather, the resolution is intended to ensure that the exercise of such rights is consistent with the objectives and purposes of the Convention, of which Article VIII is a part, and to develop a common understanding among the Parties to the Convention as to the scope of Article VIII.”⁸³

46. In its commentary to Article 31 (3) (b), the ILC was explicit that it was not necessary to show that all parties to a treaty have engaged in a practice in order for it to qualify as subsequent practice; they only need to have accepted it⁸⁴. Having accepted the application of paragraph 30 and the 1986 Resolution as in conformity with Article VIII, it is difficult to fathom how Japan can now object to other IWC resolutions which give content to the requirements of Article VIII in the same manner.

47. As noted in a legal opinion by Professor Birnie, a decision of the IWC “taken through the normal voting procedures laid down in Article V is determinative, and must ^{also} be regarded as having taken account of all the relevant factors, guidelines and its own relevant practice in this field”⁸⁵. ~~This expresses a more general principle.~~

48. Consistent with your Advisory Opinion in the *Certain Expenses* case, there is a presumption that these institutional acts are not *ultra vires*⁸⁶. Resolutions adopted under Article VI, “on any matters which relate to whales or whaling and to the objectives and purposes of this Convention”, are presumed to be valid. Japan has singularly failed to rebut that presumption.

⁸³Intervention by the United States, IWC39, Verbatim Record of Second Plenary Session, 24 June 1987, IWC/39/VR, 40.

⁸⁴“Draft Articles on the Law of Treaties with Commentaries”, Commentary to Article 27, *Yearbook of the International Law Commission, 1966*, Vol. II, p. 222.

⁸⁵Chairman’s Report of the Forty-Seventh Annual Meeting, *Rep. int. Whal. Commn* 46, 1996, p. 28; P Birnie, “Opinion on the Legality of the Southern Ocean Sanctuary by the International Whaling Commission” [MA, Ann. 155].

⁸⁶*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion of 20 July 1962*, I.C.J. Reports 1962, p. 168.

(iv) The role of the IWC in the implementation of Article VIII

49. By Japan's account, the IWC is a political body with no legitimate place in judging the scientific attributes of proposed special permits⁸⁷. But the IWC is the body tasked with ensuring the proper and effective conservation of whales, and it has a perfect right to express its views under Article VI.

50. As stated by the United Kingdom delegation in 1988, speaking on behalf of nine other Contracting Governments (tab 60):

“We believe that the IWC is the body responsible for effective and appropriate action relevant to all management and conservation aspects of all whale stocks. It is therefore . . . incumbent on the IWC in discharging this very important responsibility to ensure that all proposed research, no matter who undertakes it, is appropriately designed; that it clearly meets defined and accepted criteria which have been laid down by the IWC; that the proposed research has an acceptable chance of producing useful results; and in particular, if lethal methods are required, then the results of the research are considered essential and the killing unavoidable.”⁸⁸

51. In the exercise of this role, the IWC has adopted more than 25 resolutions since 1987, which, on the basis of advice from the Scientific Committee, confirm the view that certain scientific permit programs proposed and implemented by Contracting Governments do not satisfy

⁸⁷See, e.g. CMJ, paras. 4.31, 4.60, 8.24 and 8.87.

⁸⁸IWC40, Verbatim Record of Fourth Plenary Session, 3 June 1988, IWC/40/VR, 81.

the criteria laid down in the Guidelines⁸⁹. No less than 15 of these resolutions specifically address the Japanese programs⁹⁰.

52. Japan attempts to dismiss the practice of the IWC as irrelevant to the interpretation of Article VIII⁹¹. However, the practice of an organization is the reflection of the collective acts of its members⁹². The Guidelines and other relevant resolutions represent collective acts of the Contracting Governments, establishing their common understanding as to the scope of Article VIII as contemplated by Article 31 (3) (b) of the Vienna Convention; they are authoritative evidence as to its proper interpretation⁹³.

Conclusion

53. Mr. President, Members of the Court, I have outlined the development of Article VIII from its origins in the 1937 Agreement to its subsequent development in practice. From paragraph 30 and the resolutions adopted within the IWC — by consensus or by a substantial

⁸⁹MA, Ann. 8, Resolution on Republic of Korea's Proposal for Special Permits, Appendix 2, Chairman's Report of the Thirty-Ninth Annual Meeting, *Report of the International Whaling Commission* 38, 1988, 28; MA, Ann. 9, Resolution on Icelandic Proposal for Scientific Catches, Appendix 3, Chairman's Report of the Thirty-Ninth Annual Meeting, *Report of the International Whaling Commission* 38, 1988, 28; MA, Ann. 10, Resolution 1987-4; MA, Ann. 11, Resolution on Norwegian Proposal for Special Permits, Appendix 1, Chairman's Report of the Fortieth Annual Meeting, *Report of the International Whaling Commission* 39, 1989, 30 (Resolution 1988-1); MA, Ann. 12, Resolution on the Icelandic Proposal for Scientific Catches, Appendix 2, Chairman's Report of the Fortieth Annual Meeting, *Rep. int. Whal. Commn* 39, 1989, 30-31; MA, Ann. 14, Resolution on the Icelandic Proposal for Scientific Catches, Appendix 1, Chairman's Report of the Forty-First Annual Meeting, *Report of the International Whaling Commission* 40, 1990, 35; MA, Ann. 15, Resolution on Norwegian Proposal for Special Permits, Appendix 2, Chairman's Report of the Forty-First Annual Meeting, *Report of the International Whaling Commission* 40, 1990, 36 (Resolution 1989-2); MA, Ann. 16, Resolution 1989-3; MA, Ann. 17, Resolution on Norwegian Proposal for Special Permits, Appendix 1, Chairman's Report of the Forty-Second Meeting, *Report of the International Whaling Commission* 41, 1991, 47 (Resolution 1990-1); MA, Ann. 18, Resolution 1990-2; MA, Ann. 19, Resolution 1991-2; MA, Ann. 20, Resolution on USSR Proposal for Special Permit Catches in the North Pacific, Appendix 3, Chairman's Report of the Forty-Third Meeting, *Report of the International Whaling Commission* 42, 1992, 47 (Resolution 1991-3); MA, Ann. 21, Resolution 1992-5; Resolution on Norwegian Proposal for Special Permits, Appendix 6, Chairman's Report of the Forty-Fourth Meeting, *Report of the International Whaling Commission* 43, 1993, 49 (Resolution 1992-6); Resolution 1993-7; MA, Ann. 22, Resolution on Norwegian Proposal for Special Permits, Appendix 8, Chairman's Report of the Forty-Fifth Annual Meeting, *Report of the International Whaling Commission* 44, 1994, 33; MA, Ann. 24, Resolution 1994-9; MA, Ann. 25, Resolution 1994-10; MA, Ann. 26, Resolution on Special Permit Catches by Norway, Appendix 15, Chairman's Report of the Forty-Sixth Annual Meeting, *Report of the International Whaling Commission* 45, 1995, 48; MA, Ann. 28, Resolution 1996-7; MA, Ann. 29, Resolution 1997-5; MA, Ann. 30, Resolution 1997-6; MA, Ann. 31, Resolution 1998-4; MA, Ann. 34, Resolution 2000-5; MA, Ann. 36, Resolution 2001-8; MA, Ann. 41, Resolution 2007-1.

⁹⁰MA, Ann. 10, Resolution 1987-4; MA, Ann. 16, Resolution 1989-3; MA, Ann. 18, Resolution 1990-2; MA, Ann. 19, Resolution 1991-2; Resolution 1992-5; MA, Ann. 21, Resolution 1993-7; MA, Ann. 24, Resolution 1994-9; MA, Ann. 25, Resolution 1994-10; MA, Ann. 28, Resolution 1996-7; MA, Ann. 29, Resolution 1997-5; MA, Ann. 30, Resolution 1997-6; MA, Ann. 31, Resolution 1998-4; MA, Ann. 34, Resolution 2000-5; MA, Ann. 36, Resolution 2001-8; MA, Ann. 41, Resolution 2007-1.

⁹¹WOJ, para. 14.

⁹²E Lauterpacht, "The Development of the Law of International Organization by the Decisions of International Tribunals", 152 *Recueil des Cours* (1976-IV), p. 459.

⁹³"Draft Articles on the Law of Treaties with Commentaries", Commentary to article 27, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 236.

majority — and in particular from the Guidelines, emerge the minimum requirements that must be met by a special permit under Article VIII. These requirements reflect generally accepted scientific practice. They are not optional extras, a code for the virtuous abstainer. They are requirements under the Convention.

The PRESIDENT: Professor Crawford, unless you advise otherwise, this might be a good moment I think for you to pause so that the Court could enjoy teatime.

Mr. CRAWFORD: I was going to suggest the words “requirement” and “caffeine” seem to be closely related.

The PRESIDENT: Thank you. So, the hearing is suspended for 15 minutes.

The Court adjourned from 4.10 p.m. to 4.35 p.m.

The PRESIDENT: Please be seated. The hearing is resumed and the floor is yours, Professor Crawford.

Mr. CRAWFORD: Thank you, Sir.

2. Article VIII as a Limited Exception to the 1946 Convention

(a) *The 1946 Convention as a régime*

54. Mr. President, Members of the Court, I turn to the second part of my presentation. By its terms, Article VIII operates as a limited exception to the general regulatory régime established under the Convention — far from a “free-standing provision”⁹⁴, it is part of a coherent regulatory régime.

55. The ordinary meaning of the opening phrase of Article VIII — “[n]otwithstanding anything contained in this Convention . . .” — creates an exception to the general rules and regulations governing the conduct of commercial whaling. But Article VIII remains part of the Convention, to be interpreted in the light of its object and purpose.

⁹⁴CMJ, para. 7.8.

56. Japan's arguments as to this opening phrase are contradictory. On the one hand, it is said to mean "[s]pecial permit whaling under Article VIII is entirely outside the scope of the ICRW. It is not regulated by or under the ICRW, except by Article VIII itself."⁹⁵ On the other hand, Japan accepts that Contracting Governments must act in furtherance of the Convention's object and purpose in implementing a special permit program⁹⁶. These propositions cannot both hold. Having conceded that the object and purpose of the Convention are relevant to the implementation of a special permit whaling program, Japan cannot maintain that special permit whaling is not affected by the rest of the Convention: that Article VIII is a floating world, all to itself, like a wood block by Utamaro or Hiroshige.

57. The characterization of Article VIII as an exception to the Convention régime has evident implications for interpretation. Exceptions are to be construed narrowly and in accordance with their terms⁹⁷. Reliance on Article VIII must be limited so as not to undermine the operation of the primary obligations that reflect the object and purpose of the Convention. In this case, the principal conservation measures adopted by the IWC in giving effect to its mandate — including the Moratorium and the Sanctuary — are of obvious relevance.

58. Securing the effectiveness of the Convention, these primary obligations and its object and purpose, calls for a narrow interpretation of Article VIII. As you stated in *Libya/Chad*: [a]ny other construction would be contrary to one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness"⁹⁸.

59. Japan's argument that the provisions of Article VIII are "free-standing"⁹⁹ would represent a return to unilateral whaling. An indeterminately broad "scientific research" exception

⁹⁵CMJ, para. 7.8.

⁹⁶CMJ, para. 8.13.

⁹⁷See, e.g., GATT: Report of the Panel on "Canada — Import Restrictions on Ice Cream and Yoghurt", L/6568-36S/68, para. 59; Report of the Panel on "US — Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada", DS7/R — 38S/30, para. 4.4; Report of the Panel on "Norway — Procurement of Toll Collection Equipment", GPR.DS2/R, para. 4.5. WTO: Report of the Panel on "Indonesia — Certain Measures Affecting the Automobile Industry", WT/DS54/R, para. 5.238; Report of the Appellate Body on "United States-Import Prohibition of Certain Shrimp and Shrimp Products", WT/DS58/AB/R, paras. 156-157. ECtHR: *Guzzardi v. Italy* (App. No. 7367/76), ECHR (1990) Series A. No. 39, 36, para. 98, citing *Winterwerp v. The Netherlands* (App. No. 6301/73), ECHR (1979) Series A. No. 33, 16, para. 37. See also *Vogt v. Germany* (App. No. 17851/91), Judgment of 26 September 1995, para. 52; *The Observer and the Guardian v. The United Kingdom* (App. No. 13585/88), ECHR (1991) Series A, No. 216, para. 59.

⁹⁸*Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 25, para. 51.

⁹⁹CMJ, para. 7.8.

that could be invoked and defined at the discretion of one or indeed all of the 89 Parties would entirely defeat the Convention régime.

(b) Japan's originalist thesis

60. Japan contends that a number of key conservation measures that now form an integral part of the Convention régime in its present form cannot serve as context in interpreting Article VIII¹⁰⁰. According to Japan, Article VIII (4) is the only relevant context in determining the proper scope of Article VIII¹⁰¹. But the Moratorium and Sanctuary are an integral part of the Convention¹⁰². The “context” for interpretation under Article 31 (1) of the Vienna Convention includes the treaty as a whole¹⁰³. Article VIII must be interpreted by reference to the Convention régime as it has developed to the present day, including these central conservation measures. There is not an archaic convention including Article VIII and a modern convention excluding it.

(c) Japan's reliance on a “margin of appreciation”

61. Japan enthusiastically invokes the notion of “margin of appreciation” to broaden the already broad discretion it accords itself under Article VIII. It admits that a special permit whaling operation may be challenged on the ground that its authorization is “arbitrary or capricious”, a phrase for which it offers no authority¹⁰⁴. But it questions whether the Court has any further power to decide whether “JARPA II has been designed in a manner that is completely consistent with Article VIII . . .”¹⁰⁵. Japan contends that Contracting Governments are accorded a large margin of discretion under Article VIII, a broad power of appreciation with respect both to the need for

¹⁰⁰CMJ, paras. 8.54-8.56.

¹⁰¹CMJ, paras. 7.17-7.22.

¹⁰²Article I (1), 1946 Convention.

¹⁰³“Draft Articles on the Law of Treaties with Commentaries”, Commentary to article 27, *Yearbook of the International Law Commission, 1966*, Vol. II, 221. See also R Jennings & A Watts (Eds), *Oppenheim's International Law (9th Edn)*, Volume 1: Peace (The Bath Press, Avon 1992), 1273; I Sinclair, *The Vienna Convention on the Law of Treaties (2nd Edn)* (Manchester University Press, 1984), 127; A Aust, *Modern Treaty Law and Practice (2nd Edn)* (CUP, 2007), 235. *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, Advisory Opinion of 12 August 1922, *P.C.I.J., Series. B*, No. 2, 23; *Case of the Free Zones of Upper Savoy and the District of Gex*, *P.C.I.J., Series. A/B*, No. 46, 140; *Air Transport Services Agreement Arbitration (USA v. France)* (1963) 38 ILR 182, 228-9.

¹⁰⁴CMJ para. 9.7.

¹⁰⁵CMJ para. 9.7.

research and the conditions attached to permits, including limits on the number of whales to be taken¹⁰⁶.

62. In response, I would make two points. First, Australia's claims concern the interpretation and application of the Convention — in particular, Article VIII. You have confirmed in numerous cases that it is your function to interpret and apply the provisions of the treaty to determine whether a State has complied with its obligations¹⁰⁷. It is ultimately for this Court to decide whether a whaling program does or does not fall within Article VIII¹⁰⁸.

63. Secondly, the margin of appreciation is not, as Japan suggests, an “axiom of international law and relations”¹⁰⁹. Its suggestion that this notion is a “sensible safeguard against unwarranted accusations of bad faith” is entirely unfounded¹¹⁰. There is no case where the Court has expressly accepted or applied a general “margin of appreciation” test. In *Oil Platforms*, you explicitly rejected this latitudinarian idea¹¹¹.

64. Japan's assertion of a wide “margin of appreciation” would undermine the operation of the regulations adopted by the IWC to ensure the effective conservation and management of whale populations.

65. To conclude on this point, the meaning of the phrase “for purposes of scientific research” and the question as to whether a special permit whaling operation is authorized and conducted for that purpose is not left to the discretion of Japan or any other individual Contracting Government. Nor is this question one to which a “margin of appreciation” test may properly be applied.

(d) Relevant rules of international law

66. I mention~~ed~~ briefly relevant rules of international law. In accordance with Article 31 (3) (c) of the Vienna Convention, a number of rules of international law are relevant to

¹⁰⁶CMJ, paras. 61, 9.7 and 9.21; WOJ, para. 37.

¹⁰⁷See, e.g., *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213; *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 466; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 161.

¹⁰⁸To the contrary, see, e.g., CMJ, para. 9.7; WOJ, paras. 54, 66 and 70.

¹⁰⁹CMJ, para. 9.16.

¹¹⁰CMJ, para. 9.16.

¹¹¹*Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 196, para. 73.

the interpretation of Article VIII. The relevance of these rules to questions of treaty interpretation, including developments in them since the treaty was concluded, is well recognized¹¹². For example, in *Oil Platforms*, you confirmed that “[t]he application of the relevant rules of international law relating to this question . . . forms an integral part of the task of interpretation”, and thus you had regard to “relevant rules of international law on the use of force” in interpreting the bilateral Friendship Treaty between Iran and the United States¹¹³. Professor Boisson de Chazournes has already reviewed the relevant rules and principles of international law, and I will not repeat what she has said.

(e) Conclusion

67. Mr. President, Members of the Court, to summarize on this second point, Article VIII is not a “free-standing” or “self-contained” provision left to the discretion of Contracting Governments. It is not for a Contracting Government to decide that it is free to issue special permits according to its own asserted view that the whaling operation so authorized is “for purposes of scientific research”. It is ultimately for this Court to decide whether a whaling program satisfies Article VIII, in light of relevant principles of international law and the essential characteristics of scientific research.

3. The three requirements of Article VIII

68. I turn then to the third part of my presentation. The express terms of Article VIII (1) require that special permits may only be issued for the conduct of whaling operations “for purposes of scientific research”. A plain reading of this phrase reveals two separate but related requirements. The “scientific research requirement” means that the activity authorized by the permit must properly be characterized as “scientific research”. The “purpose requirement” requires that a special permit authorize whaling “for purposes of scientific research”, and not for other purposes. I will deal with these in turn.

¹¹²*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, 31, para. 53; Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, pp. 67-68, para. 112.*

¹¹³*Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003, p. 182, para. 41.*

(a) The “scientific research requirement” ~~issues~~

69. The Guidelines lay down the minimum criteria for special permits. Consistent with these criteria and with generally accepted scientific practice, a research program “for purposes of scientific research” in the context of the Convention must possess four essential characteristics¹¹⁴. These are cumulative¹¹⁵.

70. First, it must possess defined and achievable objectives that aim to contribute new knowledge important to the conservation and management of whale stocks. The research proponents should set out testable hypotheses, defined with sufficient precision to make it possible to obtain answers using available methods¹¹⁶. A program that lacks a testable hypothesis may collect considerable amounts of data, but it is not a program “for purposes of scientific research”¹¹⁷.

71. The Guidelines emphasize the need for special permit whaling under Article VIII to contribute knowledge that is important to the conservation and management of whales¹¹⁸. It is not sufficient that information gathered under Article VIII permits is of potential utility in some general sense. We all like to know more about the universe, but in wanting that we do not necessarily act as scientists. The Guidelines confirm that the research must be “required” or “necessary” for management of relevant whale stocks¹¹⁹. In his Expert Statement, Professor Walløe contends that it is a “fundamental misunderstanding” to suggest that lethal research under Article VIII must be motivated by its importance to the conservation and management of whale stocks¹²⁰. He asserts that the 1986 Resolution included the following criterion for assessment of the proposed research: “the research addresses a question or questions that should be answered in order to conduct the

¹¹⁴Mangel, *An Assessment of Japanese Whale Research Programs Under Special Permit in the Antarctic (JARPA, JARPA II) as Programs for Purposes of Scientific Research in the Context of Conservation and Management of Whales (Original Expert Opinion)*, paras. 1.3, 4.38 – 4.39 [MA, App. 2]; Mangel, *Supplement to An Assessment of Japanese Whale Research Programs Under Special Permit in the Antarctic (JARPA, JARPA II) as Programs for Purposes of Scientific Research in the Context of Conservation and Management of Whales (Supplementary Expert Opinion)*, paras. 1.2-1.4.

¹¹⁵Mangel, *Supplementary Expert Opinion*, para. 1.3.

¹¹⁶Mangel, *Original Expert Opinion*, paras. 4.9 – 4.13 [MA, App. 2]. Mangel, *Supplementary Expert Opinion*, paras. 3.1-3.10; Mangel, *Response to “Scientific review of issues raised by the Memorial of Australia including its two Appendices” by Professor Lars Walløe*, paras. 2.1-2.7.

¹¹⁷Mangel, *Supplementary Expert Opinion*, para. 3.10.

¹¹⁸MA, Ann. 43, Resolution 1986-2; MA, Ann. 46, Resolution 1995-9; MA, Ann. 47, Resolution on Special Permits for Scientific Research, IWC Resolution 1999-2, App. 3, Chairman’s Report of the Fifty-First Annual Meeting, *Annual Report of the International Whaling Commission 1999*, 52 (Resolution 1999-2); MA, Ann. 49, Ann. P.

¹¹⁹MA, Ann. 43, Resolution 1986-2; MA, Ann. 47, Resolution 1999-2.

¹²⁰Walløe, *Scientific Review of Issues Raised by the Memorial of Australia including its two Appendices*, 9 April 2013 (Walløe, *Expert Statement*), 13.

comprehensive assessment or to meet other critically important research needs”¹²¹. But the relevant criterion in the 1986 Resolution, adopted by consensus, actually requires an assessment as to whether: “the proposed research is intended, and structured accordingly to contribute information *essential for the rational management of the stock*”¹²² (emphasis added).

72. That Resolution was supplemented by Resolution 1987-1, ~~which~~ ^{which} is the correct citation for the criterion quoted by Professor Walløe. What he does not tell you is that the criteria in the 1987 Resolution ^{were} supplemental to those specified in 1986 — Resolution 1987-1 ~~✗~~ expressly states that a special permit still ^{had} ~~has~~ to satisfy the criteria specified in the 1986 Resolution. This is confirmed by the IWC’s approach in resolutions regarding special permit whaling programs, which expressly note that the proposed research does not satisfy *all* of the criteria specified in *both* the 1986 Resolution *and* the 1987 Resolution¹²³.

73. The relevant text is now contained in Resolution 1995-9¹²⁴, as supplemented by Resolution 1999-2. It is required that the Scientific Committee should consider whether the information is: “required for the purposes of management of the species or stock being researched”¹²⁵.

74. The IWC’s records confirm that it was a deliberate decision to set a high threshold — Article VIII research must be “required” or “essential” for management¹²⁶.

75. The IWC resolutions addressed to specific programs confirm this high threshold. In particular, the 1990¹²⁷, 1991¹²⁸, 1992¹²⁹, 1993¹³⁰ and 1994¹³¹ Resolutions in respect of JARPA,

¹²¹Walløe, *Expert Statement*, 13.

¹²²MA, Ann. 43, Resolution 1986-2.

¹²³See, e.g., MA, Ann. 11, Resolution 1988-1; MA, Ann. 12, Resolution 1988-2; MA, Ann. 15, Resolution 1989-2; MA, Ann. 16, Resolution 1989-3; MA, Ann. 17, Resolution 1990-1; MA, Ann. 18, Resolution 1990-2; MA, Ann. 19, Resolution 1991-2; MA, Ann. 20, Resolution 1991-3; MA, Ann. 21, Resolutions 1992-5, 1992-6 and 1993-7; MA, Ann. 22, Resolution 1993-8; MA, Ann. 24, Resolution 1994-9; MA, Ann. 25, Resolution 1994-10; MA, Ann. 26, Resolution 1994-11.

¹²⁴MA, Ann. 46, Resolution 1995-9.

¹²⁵MA, Ann. 47, Resolution 1999-2.

¹²⁶See, e.g., Intervention by the United States, IWC49, Plenary Day 4, 23 October 1997, 133.

¹²⁷MA, Ann. 18, Resolution 1990-2.

¹²⁸MA, Ann. 19, Resolution 1991-2.

¹²⁹Resolution 1992-5.

¹³⁰MA, Ann. 21, Resolution 1993-7.

¹³¹MA, Ann. 25, Resolution 1994-10.

expressly noted that, although the proposed research addressed “general” or “certain” research needs, JARPA did not satisfy the criteria specified in the Guidelines in that the proposed research was not structured so as to contribute information “essential” or “required” for management of relevant whale stocks. The 1997 Resolution emphasized: “the JARPA programme does not address critically important research needs *for the management of whaling in the Southern Ocean*”¹³² (emphasis added).

76. The second essential characteristic is that the program must use appropriate methods which are likely to achieve the stated objectives, which are capable of doing so.

77. The fundamental principle worthy of emphasis here is that, when conducting scientific research, the killing of animals is only permissible where it is unavoidable¹³³. A program of science should embrace new non-lethal technologies, rather than summarily dismissing them so as to continue lethal business as usual¹³⁴. If the use of lethal methods is unavoidable, the number of animals killed should be limited to those necessary to conduct the research¹³⁵.

78. The Guidelines confirm that this principle, that lethal means may only be used where the information sought could not be obtained using existing data, or by non-lethal means¹³⁶. Japan’s attempts to adopt a lower threshold for use of lethal methods were explicitly rejected by the IWC. In particular, Japan attempted to suggest that the appropriate test should be whether a research question cannot “practically” be answered using non-lethal means. I quote — this is from Japan (tab 61):

¹³²MA, Ann. 29, Resolution 1997-5.

¹³³MA, App. 2, Mangel, *Original Expert Opinion*, para. 4.35; *Statement by Dr Nick Gales*, para. 3.11. See also, e.g., *Guidelines for the treatment of marine mammals in field research*, Society for Marine Mammalogy, 25 (3) *Marine Mammal Science* 725 (July 2009), 736; *Annex II to the Protocol on Environmental Protection to the Antarctic Treaty: Conservation of Antarctic Flora and Fauna*, Madrid, 4 October 1991, 30 *ILM* 1476 (entered into force 14 January 1998), Art. 3; *Agreement on the Conservation of Seals in the Wadden Sea*, 16 October 1990, UN Reg. No. 48123 (entered into force 1 October 1991), Art. VI (2); *Convention on the Conservation of European Wildlife & Natural Habitats*, 19 September 1979, CETS No. 104 (entered into force 1 June 1982), Art. 9; ACCOBAMS, Art. 2 (2); *Convention for the Conservation of Antarctic Seals*, 1 June 1972, Cmnd. 7209 Treaty Series 45 (1978) (entered into force 11 March 1978), as clarified by the parties to the Convention in 1988, *Report of the 1988 Meeting to Review the Operation of the Convention for the Conservation of Antarctic Seals*, London, 12-16 September 1988, para. 17.

¹³⁴Mangel, *Supplementary Expert Opinion*, para. 5.14.

¹³⁵As to the internationally accepted tenet governing the conduct of research on animals, widely known in scientific circles as the “Three Rs” (replacement, reduction and refinement) see W. Russell and R. Burch, *The Principles of Humane Experimental Technique* (Allen & Unwin, 1959); World Organisation for Animal Health (OIE), *Terrestrial Animal Health Code*, 19th edition, May 2010, Chap. 7.8, Use of Animals in Research and Education, esp. Art. 7.8.3.

¹³⁶MA, Ann. 43, Resolution 1986-2; MA, Ann. 44, Resolution 1987-1; MA, Ann. 46, Resolution 1995-9; MA, Ann. 47, Resolution 1999-2.

“In determining whether or not non-lethal research techniques could achieve the objectives of the research, economic feasibility of the non-lethal techniques as well as the reasonableness of the time required to collect relevant data using the techniques must also be considered.”¹³⁷

That suggestion was resoundingly dismissed by the IWC¹³⁸.

79. The substantial majority of the Contracting Governments — including Australia¹³⁹, New Zealand¹⁴⁰, South Africa¹⁴¹, the ~~EU~~^{EC}¹⁴², the United States¹⁴³ and the Buenos Aires Group¹⁴⁴ — share the view that the conduct of lethal research is unnecessary, on the basis that the information currently needed to improve conservation and management of whale populations can be collected through non-lethal means.

80. The third essential characteristic for the purposes of the “scientific research requirements” is that there must be periodic independent peer review of proposals and results and adjustment in response to such review¹⁴⁵.

81. The necessity for an independent and impartial process of peer review would seem to be uncontroversial. In the words of the United States Supreme Court, “submission to the scrutiny of the scientific community is a component of ‘good science’”¹⁴⁶. Participation in this process also implies an acceptance by the research proponents that the outcome of the peer review, and any criticisms or concerns expressed will be given due consideration.

¹³⁷Comment by the Japanese Government to the Working Group on Special Permits for Scientific Research, TC/38/SPI C, p. 3.

¹³⁸Japanese amendments proposed to the 1987 Resolution: Japanese Amendment to the Proposed Resolution on Scientific Research Programs contained in the Document IWC/39/24 Rev.2. The relevant amendment was rejected by the Commission 6 votes in favour, 21 against, with 5 abstentions: IWC39, Verbatim Record of Second Plenary Session, 24 June 1987, IWC/39/VR, pp. 59 and 72.

¹³⁹See, e.g., IWC51, Verbatim Record of Plenary Session of 26 May 1999, 153.

¹⁴⁰See, e.g., IWC52, Plenary Session of 5 July 2000, 146-7.

¹⁴¹IWC64, Verbatim Record of Agenda Item 14 – Scientific Permits, Wednesday, 4 July 2012, Morning Session [02:47:56].

¹⁴²Intervention by Slovenia (on behalf of the ~~EU~~^{EC}), IWC60, Verbatim Record of Agenda Item 9 – Scientific Permits [0:15:38].

¹⁴³Intervention by the United States, IWC61, Verbatim Record of Agenda Item 9. 2b – Scientific permits – Commission discussions and action arising, United States [0:11:38].

¹⁴⁴Members of the ‘Buenos Aires Group’ protest against Japan’s new whaling campaign in the Southern Ocean Sanctuary and urge the Japanese government to end the so-called “scientific whaling”, Press Release No. 022/13, 4 February 2013.

¹⁴⁵Mangel, *Original Expert Opinion*, paras. 4.17-4.26 [MA, App. 2]; Mangel, *Supplementary Expert Opinion*, paras. 3.29-3.32.

¹⁴⁶*Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 US 579 (1992), p. 593.

82. The importance of peer review and periodic review of results has been recognized by the IWC, in particular in Annex P which creates a process of independent review, under which scientists independent of the Scientific Committee conduct an initial review of scientific permit proposals, thus removing the research proponents, such as Japan, from these initial deliberations¹⁴⁷.

83. The Guidelines confirm that Contracting Governments should take account of the comments and criticisms of the Scientific Committee¹⁴⁸.

84. I turn to the fourth essential characteristic — the research must be designed to avoid adverse effects on the stocks being studied¹⁴⁹.

85. Consistent with the precautionary approach, this requires the proponents to show that the proposed research will not adversely affect the relevant whale stocks. Again, this requirement has consistently been recognized by the Scientific Committee and the IWC¹⁵⁰.

86. In its Counter-Memorial, Japan does not even attempt to address these characteristics or to propose any alternative to them. Instead, it is disdainful. The best it could come up with having had Professor Mangel's report for up to 10 months is the contention that Australia has merely hired one expert, putting forward his report as evidence of a general "scientific truth"¹⁵¹.

87. But the characteristics I have mentioned are reflected in contemporary international standards governing the conduct of scientific research¹⁵². They are not idiosyncratic; they are not an invention of Professor Mangel. Japan concedes that these sources support "uncontroversial propositions" concerning the conduct of scientific research¹⁵³. It has recognized the importance of establishing common standards governing the conduct of scientific research, "to avoid that Contracting Parties would establish such thresholds, individually, which could undermine the

¹⁴⁷Ann. P [MA, Ann. 49].

¹⁴⁸Resolution 1985-2 [MA, Ann. 7]; Resolution 1986-2 [MA, Ann. 43].

¹⁴⁹Mangel, *Original Expert Opinion*, paras. 4.27-4.29 [MA, App. 2].

¹⁵⁰Schedule, para. 30; Ann. L [MA, Ann. 42]; Resolution 1987-1 [MA, Ann. 44]; Ann. P [MA, Ann. 49].

¹⁵¹CMJ, paras. 9.9-9.12.

¹⁵²See, e.g., "Assessment Framework for Scientific Research Involving Ocean Fertilisation", adopted at the 32nd Consultative Meeting of Contracting Parties to the London Convention and 5th Meeting of Contracting Parties to the London Protocol under Resolution LC-LP.2(2010), 14 Oct. 2010; *Resolution 4.18* "Guidelines on the granting of exceptions to Article II, paragraph 1, for the purpose of non-lethal in situ research in the Agreement area", adopted by the Fourth Meeting of the Contracting Parties to ACCOBAMS, Monaco, 9-12 Nov. 2010, ACCOBAMS-MOP4/2010/Res4.18.

¹⁵³CMJ, para. 9.12.

efficacy of [these standards]”¹⁵⁴. For example, Japan was an active participant in the Drafting Group for the Assessment Framework for Scientific Research involving Ocean Fertilization, adopted by the Contracting Parties to the London Convention and Protocol in October 2010. How our international law is ramified these days. The Assessment Framework identifies four threshold criteria that a proposed activity should have to meet “proper scientific attributes”¹⁵⁵.

88. Japan denies that these “essential characteristics” are mandated by law¹⁵⁶. But as with any undefined term in a treaty, the term “scientific research” must be given its ordinary meaning. Constituting, as they do, “uncontroversial” or “generally accepted” principles of scientific practice, the essential characteristics of a programme for purposes of scientific research give content to the ordinary meaning of the term in Article VIII.

(b) *The “purpose requirement”*

89. I now turn to the second requirement — the “purpose requirement”. This may be simply stated as follows. A good faith interpretation and application of Article VIII, requires that any special permit which authorizes whaling “for purposes of scientific research” do so for that purpose *and not for any other purpose or purposes*. That is, special permit whaling must be genuinely motivated by the purpose of conducting scientific research, and not by any other purposes. It is not there simply as a front.

90. It is not sufficient that the conduct of scientific research is a secondary or incidental goal. Rather, in accordance with your reasoning in *Costa Rica v. Nicaragua*, the express statement of the purpose for which permission in Article VIII is accorded — the conduct of “scientific research” — implies the exclusion of other purposes¹⁵⁷. And you rightly rejected my argument in that case that it did not.

¹⁵⁴Report of the Thirty-Second Consultative Meeting of Contracting Parties to the London Convention and the Fifth Meeting of Contracting Parties to the London Protocol, LC/32/15, para. 4.2.2.

¹⁵⁵“Assessment Framework for Scientific Research Involving Ocean Fertilisation”, adopted at the 32nd Consultative Meeting of Contracting Parties to the London and 5th Meeting of Contracting Parties to the London Protocol under Resolution LC-LP.2 (2010), 14 Oct. 2010, para 2.2.

¹⁵⁶CMJ, para. 9.12.

¹⁵⁷*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 241, para. 61.

91. The “scientific research requirement” and the “purpose requirement” are cumulative. Even if the “scientific research requirement” is satisfied, a permit does not fall within Article VIII unless the real reason and basis for the activity so authorized is “scientific research”.

92. Moreover, these requirements are intrinsically linked. In assessing the actual purpose of a Contracting Government in issuing a special permit it is instructive to have regard to the design and implementation of the whaling programme, as well as any results obtained.

93. For example, if the relevant proposal is structured in such a way that it is highly unlikely that it will generate any new information required for the proper conservation and management of whales, it cannot be said that the reason for conducting the whaling programme is “scientific research”.

94. It is also relevant to have regard to any results obtained. For example, if a research programme is conducted over a period of years, killing thousands of whales in the process, and the results are inconclusive, unreliable or not important to the conservation or management of whales, this would suggest that the real motivation in authorizing the programme was not the conduct of “scientific research”, but something else.

(c) *The requirement of good faith*

95. Mr. President, Members of the Court, there is a third requirement, the requirement of good faith. The good faith application of Article VIII requires that Contracting Governments have due regard to the views of the IWC regarding the proper conduct of special permit whaling. This obligation flows from the duty of Contracting Governments to co-operate in good faith to promote the objects and purposes of the Convention, in particular through the IWC.

96. In the *WHO Agreement* Advisory Opinion, you recognized that the obligation to co-operate in good faith is “the very basis of the legal relations” between an international organization and its member States¹⁵⁸, emphasizing that the obligation to co-operate in good faith must be the “paramount consideration” for the organization and its member States¹⁵⁹.

¹⁵⁸*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 95, para. 48.*

¹⁵⁹*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 96, para. 49.*

97. The paramount consideration of Contracting Governments, including Japan, must be to co-operate in good faith to further the IWC's primary object and purpose of ensuring the conservation and recovery of whale populations. The Solicitor-General will deal in some detail with this paramount consideration on Friday. I leave you to await his words with all due anticipation.

4. Conclusion

98. Mr. President, Members of the Court, I conclude. It is true that the text of Article VIII is the same today as it was in 1946. But this does not signify that its ordinary meaning has remained static through that 60-year period. Its proper interpretation in accordance with Articles 31 and 32 of the Vienna Convention must be informed by its current content and context.

99. In particular, five key propositions must inform the interpretation and application of Article VIII:

- first, lethal research permits under Article VIII are “special”. They are only to be issued in special circumstances, and in a manner that does not undermine the effectiveness of the Convention;
- secondly, Article VIII is not self-judging. Its scope and application are a matter for your determination;
- thirdly, any special permit whaling operation conducted under Article VIII (1) must satisfy the four essential characteristics of the “scientific research requirement”;
- fourthly, a programme “for purposes of scientific research” must be conducted with the genuine motivation of conducting scientific research, and not for other purposes entirely; and
- fifthly, Contracting Governments must apply Article VIII in good faith, having due regard to the views of the IWC.

Mr. President, Members of the Court, that finishes this exposition of Article VIII. Thank you for your attention.

The PRESIDENT: Thank you, Professor Crawford. I give the floor to Professor Sands to continue. You have the floor, Sir.

Mr. SANDS:

JAPAN'S "SCIENTIFIC" WHALING IN THE SOUTHERN OCEAN (FIRST PART)

1. Mr. President, Members of the Court, it is an honour to appear before the Court on behalf of Australia in a case that raises issues of such significance and interest. It is not every case, after all, that allows a court, and counsel who appear before it, the privilege of involvement in so significant a matter as the meaning of "scientific research", and its application to so iconic a species as the whale.

2. My colleagues have addressed you on the international rules that are set forth in the 1946 Convention. My task is to assist the Court, by taking its Members more closely to what Japan is actually doing and seeking to justify as being "for purposes of scientific research". This requires, in our submission, a careful assessment of the facts and of the evidence. I apologize in advance that I am going to invite you to familiarize yourselves and to roll up your sleeves in so doing with various body parts of whales, including the ear plug, stomach contents and blubber thickness.

3. My presentation over the course of this afternoon and tomorrow morning will be in six parts. It is, in effect, an introduction to the expert evidence of Professor Mangel and Dr. Gales, from whom you will hear tomorrow and to whom you will be able to address questions if you wish. These submissions that I am making today and tomorrow morning are contextual: they provide a framework against which the Court will be able to see the real differences that exist between the Parties on these issues of fact and evidence.

4. I will begin today with Part 1, a summary of what JARPA II program actually involves, so that you may understand the location and scale of the program, the species that are taken, the means by which the whales are killed, and the storage and subsequent use of body parts that Japan invites you to treat as "scientific" activity. I will then turn to a second part, addressing the question of how others have characterized Japan's activities and, in our submission, this demonstrates clearly the manifest absence of support for Japan's case as put by the IWC and its Scientific Committee. I will then break, with your permission, and resume tomorrow morning, moving on to a third part of this presentation, setting out the essential characteristics which Australia says must be met for activity to be characterized as "scientific research". The fourth part will then address the

purported objectives of the JARPA II program: I will take you to those objectives and I will show you that they are so vague and so general that they are unachievable. I will also show you that they are not founded on any testable hypothesis and do not permit of measurable assessment. For these reasons alone, we say, it is plain that they are incapable of being characterized as “scientific research”. The fifth part of this presentation will hone in on three key elements, not exclusive, of the JARPA II program which confirm that the activity I am going to describe to you today is not “scientific research”. Firstly, I will take you to Japan’s arbitrary and unprincipled approach to the setting of sample sizes, that is to say, the number of whales it seeks to kill and does kill each year; secondly, Japan’s commitment to killing, a prerequisite of its activity, irrespective of whether it is necessary to contribute to scientific knowledge; and thirdly, the complete absence of peer review of JARPA II. I will then set out some brief conclusions.

Part 1: The JARPA II program

5. Let me begin with the JARPA II program. Mr. President, Members of the Court, like its predecessor, JARPA II takes place in an area of the Southern Ocean that is entirely within the Southern Ocean Sanctuary, of which you have already heard. That Sanctuary was created in 1994, and it produced an immediate objection by Japan in respect of minke whales. Within the Sanctuary *all* commercial whaling activity is prohibited¹⁶⁰. (Tab 62) [Screen on]. On your screens you can see the area of the Sanctuary in a slightly darker blue. (Tab 63) [Show sub area] Now, in red at the bottom, areas marked A, B and C, you can see the areas within which the JARPA II program operates. The totality of this area A, B and C, spans a breadth of some 4,560 nautical miles — so it is a very extensive area — of ocean at a latitude of around 65 degrees south¹⁶¹. That area has not been chosen by accident: it overlaps almost exactly with the whaling grounds within which Japan conducted commercial whaling until 1988. You can now see these grounds on the screen (tab 64) [show that area on same map], with points of commercial capture marked by a dot. That, I think, makes the point rather clearly. And, to be clear, the global moratorium on commercial whaling — adopted in 1982 — also applies to whaling activities in this area. [Map off].

¹⁶⁰MA, paras. 2.81-2.88.

¹⁶¹MA, para. 3.53 and Fig.5.

6. JARPA II is a program that is dedicated to the killing of three species of baleen whales: the Antarctic minke whale (tab 65) [image on screen] — which you can see on your screen with the outline image to give you a sense of size with a human image of someone swimming alongside it; the humpback whale (for which permits are issued but none have been taken) [next image] and the fin whale, which is the largest of the three [next image]. Each of these three species is highly migratory. They spend a part of each year in temperate and sub-tropical waters, and that is where they breed and calve. They then migrate thousands of kilometres to the Southern Ocean for the Southern Hemisphere summer, and this is where they feed almost exclusively on Antarctic krill. Japan conducts its killing activity whilst the whales are in these polar feeding grounds, generally between December and April of each year¹⁶². [Screen off]

7. The scale of the JARPA II program, like its predecessor JARPA, is striking by any standard. Together with Japan's equivalent programs in the North Pacific, JARPN and JARPN II, JARPA II dwarfs any other special permit whaling program ever devised: under these programs Japan has killed more whales for "scientific purposes" than the totality of all other whaling conducted under special permits since the Convention was adopted in 1946. In short, the Japanese programs are responsible for about 95 per cent of all "scientific" killing since the 1985 moratorium; 95 per cent. With respect to JARPA and JARPA II, this amounts to the killing of some 10,400 whales¹⁶³. That just one country, in what is in effect a single program, should have killed so many whales in the name of science would normally set alarm bells ringing¹⁶⁴. It is true that Japan also conducts a little non-lethal research, by way of sighting surveys and biopsy samples. I will say more about that tomorrow. But, the simple point is, the central focus of JARPA II is, what is euphemistically called "lethal sampling": Mr. President, that means killing, and JARPA II is a killing program, like its predecessor.

8. The predecessor, JARPA, was launched in 1988. It ran for 18 years. It had a "sample size" — that is to say, the number of whales to be killed each season — that was initially set at 300 minke whales. The number was later increased to 400, plus or minus 10 per cent. On average,

¹⁶²See MA, Chap. 3 para. 3.52.

¹⁶³That is, 6,777 under JARPA and 3,651 under JARPA II.

¹⁶⁴MA, para. 2.69.

between the 1987/1988 season and the 2004/2005 season, 377 whales were killed each year; over the 18 year period, that is 6,777 whales.

JARPA II was launched in 2005. The “sample size” for minke whales was more than doubled, to a maximum of 935 minke whales — that is 850 plus or minus 10 per cent. No compelling reason, no compelling scientific reason has ever been offered by Japan for that sudden and significant increase: indeed, it appears that the number was influenced entirely by non-scientific factors, namely, the killing and processing capacity of the vessels, market forces, and other political factors. These factors, it goes without saying, are totally unrelated to any element of a scientific program, a point to which I will return. Now, JARPA II is not limited to minke whales: it is premised also on the killing of 50 fin whales and 50 humpback whales each year. These “sample sizes” have not been met: 18 fin whales have been killed under the whole of the JARPA II program, but no humpbacks have been taken in the face of widespread protest around the world, including at the IWC¹⁶⁵. So, the reality is, we have a so-called “scientific” program which is premised on the killing of a specified number of whales, but that number is not met. That failure also should set alarm bells ringing about what the real aims of the program are.

9. JARPA II has a number of problematic features. First, and the point has already been made, it is entirely *open-ended* in time: anyone who has ever been involved in a research project — and that includes those amongst you on the Bench who have had occasion to be connected with a university or other research program — knows that the basic norm for any specified research program is that it is limited in time. The reason for that is that it allows progress in meeting objectives to be assessed. Yet, Japan’s program runs literally forever, irrespective of what it actually achieves¹⁶⁶. There is a second problem with JARPA II, it is entirely a *stand-alone* program: it purports to address general eco-systemic concerns in that part of the Antarctic, but strangely it has not been integrated with other research that is going on on the Southern Ocean ecosystem, whether carried out by Japan under its ~~national polar research institute~~ ^{national institute of polar research} or under some of the international programs that have been already described to you. An example of such research is the multi-national Southern Ocean Research ~~Program~~ ^{Partnership} — SORP — which is described by Dr. Gales

¹⁶⁵MA, 3.57, Japan refers to “diplomatic reasons”.

¹⁶⁶N. Gales, “Statement by Dr. Nick Gales”, 15 April 2013 (Gales, Expert Statement), paras. 3.25-26.

in his statement¹⁶⁷. Now, if JARPA II was a genuine program of scientific research, dealing with the issues it purports to address, you would expect it to have some association with scientific research programs in the Antarctic, such as the SORP, or Japan's own national programs, but it has *none*. There is a third problem with JARPA II. When it was proposed and developed, it was not subject to any meaningful peer review before it was launched. I am going to return to this point, because it is an extremely important point. These three aspects of JARPA II raise immediate concerns about its true purpose and character as a scientific research program. They contribute to the raising of the eyebrow of any informed observer and of a great number of reasonable members of the public.

10. Let us turn now to another aspect, and that is the manner in which JARPA II operates. How is it actually done? JARPA II is undertaken by a fleet that currently consists of four vessels and, in the 2012/13 season, a crew of 156. The largest of the four vessels is a factory ship, the *Nisshin-Maru*. This vessel is used to store and process body parts taken from dead whales. We understand that the refrigerated cargo capacity of the *Nisshin-Maru* is 3,200 cubic metres¹⁶⁸; and that translates to a carrying capacity of approximately 3,200 tonnes of “edible product” taken from whales. Now, given that an Antarctic minke whale produces a little over four-and-a-quarter tonnes of edible meat¹⁶⁹ — you do not need to be a mathematical genius to work out the total from 850 whales roughly approximates the *Nisshin-Maru's* capacity. That may of course be entirely coincidental — we think that is unlikely. The *Nisshin-Maru* is accompanied by three smaller vessels: they are used for chasing and harpooning whales — these are called “whale catcher boats” — and they are also used for conducting sighting surveys¹⁷⁰.

11. When the fleet arrives in the so-called “research” area — which you saw on your screens — the whale catcher boats engage in an activity which is euphemistically referred to as “sampling”. What sampling means is the finding and then killing of one or two whales from each

¹⁶⁷NG Expert Statement, paras. 6.1-17.

¹⁶⁸Nippon Kaiji Kyoku [class NK — Japanese Ship Classification Society]. *Nisshin Maru* — Classification No. 871811. <http://www.classnk.or.jp/register/regships>, accessed 29 April 2013.

¹⁶⁹S. Ward, *Biological Samples and Balance Sheets* (1990), Institute of Cetacean Research, Tokyo, 36pp.

¹⁷⁰MA, para 3.58.

school that is sighted¹⁷¹. To kill a whale targeted for “sampling”, the catcher boat pursues it and then harpoons it with an explosive grenade — you can see one of those on the screen (tab 66) [show photo 1 on screen]. If the whale is struck, the grenade detonates inside the body — unless it passes through the body (tab 67) [show photo 2 on screen]. Most of the whales do not die immediately, and a period of half an hour or more can pass before death occurs. Some targeted whales are struck by harpoons, but then not caught by the catcher boat¹⁷².

12. (tab 68) [show photo 3 on screen] Whales that remain alive are either killed by a second harpoon, or shot in the brain with a rifle — in the photograph on your screen, you can see the gentleman at the top, with the rifle, leaning over the side of the vessel. (tab 69) [show photo 6 on screen] Caught whales are then secured to the side of the catcher boat by rope. Some whales drown as they are being hauled to the bow of the ship, their restraint leaving them with tails above the water and blowholes below. (tab 70) [show photo 7 on screen] The dead whales are then hauled onto the factory ship, by means of the slipway which is at the rear of the vessel. (tab 71) [show photo 8 on screen] As the *Nisshin-Maru* cannot handle whales more than 18 m in length, Japan is only able to target smaller-sized fin whales. This creates an immediate and obvious bias in the sampling of fin whales, further undermining the so-called “scientific” nature of the program. [photo off]

13. After the dead whale is landed on the deck of the *Nisshin-Maru*, basic data is recorded, it includes: gender, length, weight, blubber thickness and place of capture. The blubber is removed from the whale — this is a process that is known as “flensing”. Certain internal organs and body parts are extracted. Foetuses are removed. Samples are taken of other tissues. Earplugs are collected, stomach contents gathered. It is *this* act — the collection of body parts — that is said by Japan to be so central to its scientific research program. So the question is, does the collection of these body parts contribute to scientific knowledge and understanding? Does it contribute to the conservation and management of whales? These are the central factual questions in this case and they turn in part on the evidence before you.

¹⁷¹MA, para 3.59.

¹⁷²MA, para 3.59.

14. You will have noted, from the account that I have given you, that the so-called “scientific” research program makes use of only a tiny part of each whale. So one might ask, what happens to the rest of the whale? The carcass is processed: edible parts are frozen, for human consumption. Not, however, all of the carcass: crew members from the *Kyodo Senpaku* vessel have reported that, since Japan doubled the annual catch of minke whales from the 2005/2006 season for JARPA II, large quantities of whale meat have been routinely discarded — that means, thrown overboard — because of the limited freezer storage capacity. What remains is stored on the *Nisshin-Maru* and then transported to Japan. In this way, several thousand tonnes of whale meat are produced annually¹⁷³. Professor Crawford will in due course explain to you how the meat is then commercially traded in Japan.

15. So, this is the “scientific” activity. It is basically the collection of body parts, and of data. It takes place in the same waters where Japan’s commercial killing of minke whales occurred¹⁷⁴. It is not connected to any dedicated earlier scientific research program of analogous scale and scope, because there was none before the mid-1980s¹⁷⁵. Again, as Professor Crawford and others have noted, this supposed “scientific” research emerged as a happy coincidence when the moratorium came into view in 1985. So, the question is, is it science?

Part 2: JARPA II is not “science”: the views of third parties

16. I turn to the second part of my presentation and I begin by inviting you to reflect on the views of third parties. In addressing the question of whether ~~is it~~ ^{it is} science, the Court is bound to address issues of fact as well as issues of law. The law is being addressed by my colleagues. As regards the facts, this Court made it clear recently, in the *Pulp Mills* case, that it will “make its own determination of the facts, on the basis of the evidence presented to it”¹⁷⁶. The Court has, on occasion, drawn on findings of fact made by third bodies, independent third bodies, third parties with no direct interest in the case.

¹⁷³MA, Fig. 7.

¹⁷⁴MA, para 3.53.

¹⁷⁵Japan’s largest pre-moratorium take was its 3-year SPW program on Southern Hemisphere Bryde’s whales between 1976/77 and 1978/79 — it took a total of 459 whales.

¹⁷⁶*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), pp. 72-73, para. 68.

17. In *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (2005), for example, the Court took evidence from the Report of the Porter Commission — an independent judicial inquiry — to assist in resolving certain factual issues¹⁷⁷. In *Bosnia and Herzegovina v. Serbia and Montenegro* in 2007, the Court relied on certain factual findings of the ICTY, and gained “substantial assistance” from a report prepared at the request of the General Assembly¹⁷⁸. In the *Pulp Mills* case in 2010, the Court derived some assistance from reports prepared at the instance of the International Finance Corporation, the IFC¹⁷⁹. This case is different. Unlike the parties in those cases, Japan is not able to invoke the assistance of any independent body to support its submission that the activity in which it is engaged purportedly “for purposes of scientific research”, is indeed scientific research. Put simply, there is no independent body that supports Japan’s claim to be engaged in science.

18. The two most relevant bodies are the IWC and its Scientific Committee, of course and they have expressed views — as you have just heard from Professor Crawford — and criticisms that are plainly very unhelpful to Japan, and rather supportive of Australia’s case. The Scientific Committee has declined to characterize Japan’s activity as being “for purposes of scientific research”. It is notable that the solitary expert tendered by Japan, Professor Walloe, has not referred to any such support by the Scientific Committee and, of course, he is in a position to know because he has been there for many years. That silence stands in very sharp contrast to situations where the Scientific Committee *has* endorsed “scientific” programs, in particular those which offer a multilateral approach and make use of non-lethal means: Mr. Henry Burmester mentioned the International Decade of Cetacean Research (IDCR) and the Southern Ocean Whale and Ecosystem Research, SOWER, and the SORP research programs. Earlier this month, at the 2013 meeting of the Scientific Committee, the sub-committee on in-depth assessments warmly welcomed Dr. Gales’s non-lethal research in tagging and collecting biopsy samples from Antarctic minke whales, and concluded that continuing such research would contribute substantially to the work of

¹⁷⁷*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 201, para. 61.

¹⁷⁸*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), p. 137, para. 230. The report was “The Fall of Srebrenica”.

¹⁷⁹*Pulp Mills*, see in particular paras. 167, 210 and 252.

the Scientific Committee. Look in vain for an equivalent endorsement of the Scientific Committee in relation to the work of JARPA, or of JARPA II — it does not exist.

19. To the contrary, the Scientific Committee has expressed serious concerns about JARPA and JARPA II. It has never — never — offered any positive assessment of either program's contribution to the conservation and management of whales, or to the IWC's Revised Management Plan. Japan asserts that data obtained by its collection of body parts is "primarily for assessment and use by the Scientific Committee"¹⁸⁰, yet the Scientific Committee has not requested it and the Scientific Committee has offered no endorsement of the purported scientific purpose or value of JARPA or JARPA II. Indeed, in 2006 the Panel of the Scientific Committee responsible for the Final Review of JARPA concluded that JARPA did not provide data required for the RMP (and this concurred with the view taken nine years earlier by the Scientific Committee in its Interim Review of JARPA), a copy of that conclusion is in your folders at tab 72¹⁸¹. You will be able to hear more on this tomorrow from Dr. Gales¹⁸².

20. Dr. Gales's report sets out the Committee's longstanding and repeated criticisms of JARPA II, and, in particular, the fixation with lethal methods, with killing. Japan has offered no expert evidence which counters his view. It stands rebutted. As Dr. Gales indicates, the high point of the Scientific Committee's views — from a Japanese perspective — is the occasional reference to the program's "potential" scientific utility. I place the word "potential" in quotation marks and I emphasize the word "potential". There is a world of difference between "potential" and "actual" scientific value. Over a period of more than a decade — over a period of more than a quarter of a century if you also take into account JARPA — the Scientific Committee has not found any actual scientific value from Japan's killing of whales and collection of body parts: over a quarter of century, no "potential" has ever been realized¹⁸³.

21. Japan derives no more assistance from the International Whaling Commission itself. The Commission has adopted numerous resolutions on special permit whaling, on JARPA and on

¹⁸⁰CMJ, para 4.15

¹⁸¹"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, *J. Cetacean Res. Manage.* 10 (Suppl.), 2008, pp.411–445 (IWC JARPA Final Review Report), p.433.

¹⁸²Gales, Expert Statement, paras 4.1-4.7.

¹⁸³Gales, Expert Statement, paras 4.4-4.5.

JARPA II. They offer no endorsement whatsoever of Japan's claim that its whaling activity is to be characterized as being "for purposes of scientific research". In fact, Japan has not argued otherwise in its Counter-Memorial. Since 1985, as Professor Crawford has explained, the Commission has adopted 40 Resolutions on special permit whaling: 21 of these urge Japan to reconsider its program of lethal research, and to refrain from issuing permits or halt the lethal aspects of its special permit programs. At least fifteen Resolutions state that Japan's programs do not meet the requirements of the IWC Guidelines¹⁸⁴. There is no resolution — not one resolution — that characterizes the whaling activity that I have described for you as being "for purposes of scientific research". Nearly twenty years ago, IWC Resolution 1995-9 recommended — you will see on your screen — that Contracting Governments [on screen]

"in the exercise of their sovereign rights, refrain from issuing . . . permits to its nationals that the Commission, taking into account the comments of its Scientific Committee, considers do not satisfy the criteria specified [in the Guidelines] and therefore are not consistent with the Commission's conservation policy".

(Tab 73) Mr. President, Members of the Court, Mr. Burmester and Professor Crawford have taken you to these Guidelines, which include Annex L and Annex P, which are in your folders and which, no doubt, you will have cause to look at very carefully.

22. This paragraph that is on the screen appears in almost identical terms in the second of the IWC Resolutions comprising the Guidelines — Resolution 1987-1. [Screen off] Since 1995 there has been nothing from the IWC to support Japan's claim that it is engaged in activity that has a "scientific purpose". Japan is now asking this Court to step into that void. We say the Court cannot do that and the Court should not do that.

23. Where else can Japan look for support? [On screen] More than a decade ago, in May 2002, 21 eminent scientists, including three Nobel laureates, completely unconnected to the world of whaling, wrote an Open Letter to the Government of Japan: it is on the screen and it is at tab 74 of your folders. It was published in the *New York Times*. The letter expressed the view of these eminent individuals that Japan's whale research program failed to meet minimum standards

¹⁸⁴MA, Ann. 10, Resolution 1987-4; MA, Ann. 16, Resolution 1989-3; MA, Ann. 18, Resolution 1990-2; MA, Ann. 19, Resolution 1991-2; Resolution 1992-5; MA, Ann. 21, Resolution 1993-7; Resolution 1994-9; MA, Ann. 25, Resolution 1994-10; MA, Ann. 28, Resolution 1996-7; MA, Ann. 29, Resolution 1997-5; MA, Ann. 30, Resolution 1997-6; Resolution 1998-4; MA, Ann. 34, Resolution 2000-5; MA, Ann. 36, Resolution 2001-8; MA, Ann. 41, Resolution 2007-1.

for credible science. (Tab 75) [Next slide] They expressed their concern that “Japan’s whaling program is not designed to answer scientific questions relevant to the management of whales”. The 21 stated that Japan has “refused to make the information it collects available for independent review”, and that “its research program lacks a testable hypothesis or other performance indicators consistent with accepted scientific standards”¹⁸⁵.

24. Now, Japan can raise questions about IWC Guidelines and what Professor Mangel has to say, but here you have a wholly independent group, highly authoritative. Indeed, such a public demonstration really should have put Japan on notice that it faced a very serious problem, not only in the court of public opinion but in the court of informed expert scientific opinion. This group includes extraordinarily eminent scientists, like Sir Aron Klug, former President of the United Kingdom’s Royal Society; Sylvia Earle, former Chief Scientist of the United States National Oceanic and Atmospheric Administration; Professor Masakazu Konishi, winner of the International Prize for Biology offered by the Japan Society for the Promotion of Science; and Frederic Briand, Directeur General of *la Commission Internationale pour l’Exploration Scientifique de la Méditerranée*. These are hardly ecological extremists. They are not expressing a political opinion or a cultural opinion, these are serious scientists expressing a view on science. [Next extract] When such a group concludes that “Japan’s whale research program kills hundreds of whales each year in the absence of a compelling scientific need”¹⁸⁶, a serious response is called for, from independent minds and one would have expected that to have happened. Did it happen? No! Japan offered no independent science to counter that view. [Screen off] It is true that a response did come from Japan, from its own Institute of Cetacean Research, and it also came from three individuals, Messrs Aron, Burke and Freeman. And you will be able to see the exchanges at tab 76 and following. In a journal called *BioScience*, these three individuals complained about the 21 signatories’ views and cited errors of science and law¹⁸⁷. That letter of complaint produced a very strong rebuttal from the signatories to the original letter¹⁸⁸, which you can see at tab 77 of your

¹⁸⁵“An Open Letter to the Government of Japan on Scientific Whaling”, *The New York Times*, 20 May 2002.

¹⁸⁶*Ibid.*

¹⁸⁷W Aron, W Burke and M Freeman, “Scientists versus Whaling: Science, Advocacy and Errors of Judgment”, *BioScience*, Dec. 2002 Vol. 52, No 12, pp. 1138 et seq.

¹⁸⁸“Scientists versus Whaling: Whose Errors of Judgment?” *BioScience*, March 2003, Vol. 53 No 3 pp. 200-203.

folders, as well as from 20 members of the International Whaling Commission Scientific Committee, which you can see at tab 78 of your folders¹⁸⁹. But even more significantly, it elicited a further communication which pointed out that Messrs Aron, Burke and Freeman had failed to disclose their links with Japan's whaling program: a copy of that letter and a further response from the three is found at tab 79¹⁹⁰. In short, Japan has no independent, truly independent, support for its claim to be engaged in science. That is the evidence before you.

25. Over the past ten years Japan has not, in response to this expression, garnered any truly independent support for the claim that it is killing whales "for purposes of scientific research". In these proceedings, it has relied on a single expert opinion from Professor Walløe, from whom you will hear in due course. And he stands opposed by Professor Mangel and Dr. ~~Gale~~^{Gales}. These are the three experts in the case. The Court has, in its pre-hearing decisions communicated to the Parties, drawn a clear distinction between the expert evidence and certain other material, including ⁱⁿ ~~an~~ email form received as observations. Of course, these should not be addressed to or through the three experts.

26. Mr. President, that concludes that section of this presentation and, with your permission, this may be a convenient place for me to break, as I am about to move on to a new section of our argument. When I open tomorrow morning I will address specifically and in detail the criteria for determining whether a particular activity — the collection of body parts and data — is properly to be characterized as being "for purposes of scientific research". I thank you very much for your attention.

¹⁸⁹PJ Clapham and others, "Whaling as science", *BioScience*, March 2003, Vol. 53 No 3 pp. 210-212.

¹⁹⁰See the letter from Richard N Mott, Vice President of International Policy for WWF International, "Neutral Judges in the Debate on Scientific Merits", *BioScience*, March 2003 Vol. 53 No 3; and see the response to Mott from Aron, Burke and Freeman in a letter published in the same issue.

The PRESIDENT: Thank you, Professor Sands. The Court will meet again tomorrow from 10.00 a.m. to 1.00 p.m., first to listen to the continuation of your pleading and then to hear the examination of the first expert called by Australia. Thank you, the Court is adjourned.

The Court rose at 5.40 p.m.
