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International Court of Justice

LA HAYE

Cour internationale de Justice

THE HAGUE

YEAR 2013

Public sitting

held on Tuesday 2 July 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 mardi 2 juillet 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))**

COMPTE RENDU

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

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

M. Couvreur, greffier

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The PRESIDENT: Please be seated. Good afternoon. The sitting is now open. This afternoon the Court will hear Japan begin its first round of oral argument.

I give the floor to Mr. Koji Tsuruoka, Deputy Minister for Foreign Affairs and Agent of Japan. You have the floor, Sir.

Mr. TSURUOKA: Thank you, Mr. President.

1. Mr. President, Members of the Court, this is the first time that Japan appears before the Court, the principal judicial organ of the United Nations. I am honoured to be the first ever Agent representing my Government before this august body. Please allow me to be a bit personal before proceeding. My late father, Senjin Tsuruoka, devoted much of his life to international law, serving as a Member of the International Law Commission for 20 years. He would have been terrified to see me standing in front of the Court. I must humbly admit that I may not satisfy all the requirements of an Agent, but I am determined to do my best.

2. Mr. President, Members of the Court, I cannot but be struck by an irony of history. It was this very subject, whaling, that forced Japan to open itself to the world after 300 years of isolation. Major maritime powers engaged in a massive scale whaling in the nineteenth century demanded that Japan open up its ports to supply their whalers. And now whaling is testing whether we are indeed a good global citizen, complying with international law, or whether we have manipulated the law to circumvent our international obligations.

3. Although we strongly question the jurisdictional basis for Australia's claim, if the Court is to rule on the merits of the case, we wish to emphasize that the case concerns the legality of Japan's activities under international law and not ethical values or the evaluation of good or bad science. The question put to the Court is the interpretation of Article VIII of the International Convention for the Regulation of Whaling (ICRW) regarding special permit whaling.

4. Japan is fully committed to upholding international law and we take Australia's allegations very seriously. When a sovereign State is accused of breaching international law, the accusation must be supported with convincing legal evidence. Australia failed to prove such an allegation last week. We intend to present our case clearly so that there will be no room to doubt our faithful observation of our international obligations.

5. Mr. President, Members of the Court, Japan has lived in harmony with nature throughout her long history. Surrounded by sea, Japan would be the last to misuse whales as resources because we know we benefit from the fruits of the sea. Sustainable use of living resources is indeed at the very heart of the Japanese ethos precisely because Japan has scarce resources and has always relied for her survival on what nature can provide. Japan is deeply aware of the duty to pass on to future generations a clean environment and rich biological diversity. Japan regards the environment as one of the important global issues that requires the whole international community to work co-operatively and inclusively. Japan has a long history of participation in wildlife conservation treaties.

6. It was in this spirit that Japan joined the ICRW in 1951. As stated in its preamble, the ICRW is a régime that provides "for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry", which is fully consistent with the Japanese understanding of natural resource utilization.

7. Mr. President, Members of the Court, we have witnessed substantial development of international environmental law on the management of living resources arising out of serious reflection on the effect of human activities on the unmanaged fishing and hunting on the species. Japan has embraced such development including the conservation and management of all living species. And it welcomes the tangible progress of implementation of such multilateral management mechanisms.

8. We agree that animal protection, including the prohibition of unnecessary killing and the preservation of biodiversity, is an essentially good cause. The ICRW was established to remedy the whaling practice prevalent before 1946 with a view to ensuring conservation and management based on science.

9. We are conducting the scientific research in a manner such that no harm to stocks will occur in full application of the precautionary approach. Australia's own expert confirmed last week that the catch of 850 minke whales a year does not endanger this population. Little is known of the ecosystem in the Antarctic Ocean. It is required by the ICRW that management of whales as marine living resources be conducted based on the best scientific advice. It is precisely to supply the Scientific Committee with necessary scientific data that Japan is

pursuing research whaling and, combined with other nations' contribution, conservation and management based on science under the IWC has been making progress.

10. Australia was engaged in commercial whaling until 1979 and used the ICRW to conduct sustainable whaling[1]. In 1979, however, it drastically changed its position, when Prime Minister Malcom Fraser announced a total ban on Australia's whaling and vowed to work for the prohibition of whaling by other countries, saying,

> "The Government upholds . . . that Australia should pursue a policy of opposition to whaling and that this policy should be pursued both domestically and internationally through the International Whaling Commission and other organizations."[2]

Australia has the sovereign right to decide its position. But Australia cannot impose its will on other nations nor change the IWC into an organization opposed to whaling. Since 1979, Australia persistently continued its efforts to transform the ICRW and the IWC to a régime of total ban on whaling. As transformation requires entirely rewriting the ICRW, Australia to this day remains unsuccessful.

11. Why does Australia take such a position? Are all cetaceans sacred and endangered? I can understand the emotional background to this position, but fail to understand how it can be translated to a legal or scientific position. The basic objective of a multilateral convention is to bring States of widely differing social, economic and political systems with diverse interests to co-operate for agreed global interests under an agreed framework. Inclusiveness in any multilateral régime can only be ensured through encouraging harmony amongst States by concentrating upon agreed, basic principles and objectives. A unilateral attempt at changing the agreed rule seriously disrupts the effective operation of a multilateral convention.

12. Mr. President, Members of the Court, throughout the IWC process devoted to agreeing on methods of better management, Australia opposed any whaling and blocked consensus. When anti-whaling member States constituted three quarters of the IWC membership, the moratorium on commercial whaling, as embodied in the Schedule paragraph 10 *(e)*, was adopted. When that

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[1]The IWC Summary Catch Database, Version 5.3.

[2]Commonwealth, Parliamentary Debate, House, 4 April 1979, pp. 1481-1482, CMJ Ann. 163.

three-fourths majority could not be maintained, Australia pushed for resolutions reflecting its own policy which required a simple majority for adoption. These resolutions are not binding.

13. Failing to surmount the necessary threshold required to amend the Convention in the direction Australia wished to see, it came to the Court. After many years of hard negotiation, the IWC was at last at the culminating point of the "Future of the IWC" process; that is to say, normalization process undertaken with a view to saving the IWC from complete derailment. Since the increase in the membership in the 1980s of anti-whaling nations, the IWC suffered from polarization that stood in the way of constructive discussions. The situation could only be put to an end when a compromise was reached. Australia's intransigence aborted an agreement that was about to be reached. Australia took the lead in opposing the consensus that would have produced the rules acceptable to all member States of the IWC on the management of cetacean resources. Japan finds it disturbing that a State, while refusing to make sincere efforts and engage in co-operation in the most prominent multilateral framework in this field, brings disagreements to the Court.

14. Another aspect of the case pertains to confining the geographic coverage of Japan's special permit whaling in the area of Australia's self-proclaimed Exclusive Economic Zone (EEZ) in the Antarctic Ocean. As amply demonstrated by numerous actions, Australia attempts to exercise its jurisdiction in this area. Japan does not recognize the Australian position on the EEZ in relation to the Antarctic. By limiting the geographic coverage of the case to its claimed area in the Antarctic Ocean and adjacent areas, is Australia attempting to give legitimacy to its self-proclaimed position on the EEZ? Or is Australia trying to avoid putting its Antarctic claim to the test, as it would if it imposed a ban on whaling within its claimed Antarctic EEZ, which it has not done. We have serious doubts about the jurisdiction of the Court in light of Australia's reservation attached to its acceptance of the jurisdiction of the Court.

15. Japan, for its part, has acted in good faith and has achieved tangible scientific results by presenting its findings to the Scientific Committee. Japan has continued to contribute to the development of new management methods and painstakingly co-operated with a view to ensuring conservation and management of whales. Even when, as a sovereign country, Japan could have left

the ICRW and the IWC to resume commercial whaling outside this régime, Japan chose to work with other members within the given framework.

16. Although the moratorium on commercial whaling was adopted originally on a temporary basis up to 1990, we are faithfully implementing the moratorium despite its practically indefinite extension. Since Australia cannot argue scientific whaling is illegal, it claims Japanese special permit whaling is commercial. The drastic change of the whaling conducted by Japan after its acceptance of the moratorium on commercial whaling will be presented in detail by counsel and will amply demonstrate that such whaling is not commercial, but scientific.

17. Mr. President, Members of the Court, let me now address the fundamental question presented to the Court. The difference between Japan and Australia is whether sustainable use of marine resources may be permitted both in light of law and science.

18. Why is Japan engaged in research whaling? Is it because there is a moratorium on commercial whaling and Japan needs to continue commercial whaling in disguise as Australia alleges? Not at all. Japan is conducting a comprehensive scientific research program because Japan wishes to resume commercial whaling based on science in a sustainable manner.

19. The IWC needs scientific advice because Article V requires that regulations "shall be based on scientific findings" and because the language of the moratorium says that "this provision will be kept under review based upon the best scientific advice". This means that the lifting of the moratorium requires that convincing scientific data be presented to the Scientific Committee of the IWC to demonstrate that safe catch limits can be recommended for the resumption of sustainable commercial whaling. This position is not unique. For example, Norway stated recently, "[c]ontinued gathering of scientific data may also prove to be relevant in the context of the moratorium on commercial whaling . . . due to such moratorium essentially being a temporary suspension pending further decisions as to future management"[3].

20. Why was JARPA started when Japan accepted the moratorium? Because the justification for the moratorium was that data on whale stocks was inadequate to manage commercial whaling properly. In these circumstances it was best to start the research program as soon as possible.

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[3]Written question from Terje Aasland (A) to the Minister of Fisheries and Coastal Affairs, Answered: 20 June 2013 by the Minister of Fisheries and Coastal Affairs, Lisbeth Berg-Hansen; http://www.regjeringen.no/en/dep/fkd/Whats-new/News/2013/scientific-research-on-whales.html?id=731449.

21. Why is JARPA II conducted around the same waters as commercial whaling had been conducted? This is because we know from past experience and current scientific data on whale abundance that this is where whaling could be conducted in a commercially viable way, and unless it is established that whaling is sustainable in those waters, Japan cannot resume commercial whaling in those waters.

22. Should Japan be ashamed of trying to resume commercial whaling? As long as commercial whaling is conducted in a sustainable manner and in accordance with agreements about humane killing, it is legitimate use of marine living resources and this is precisely what the ICRW is about.

23. Mr. President, Members of the Court, we know only too well that there are countries that are opposed to whaling as a matter of principle. This makes it even more important that we present to the Scientific Committee evidence that resuming commercial whaling is possible so that the Commission's decisions can be based on science as required by the Convention. If Japan's scientific research whaling is terminated, there will be no data for the Scientific Committee that will demonstrate that the resumption of commercial whaling on a sustainable basis is possible, and a lack of data will extend the moratorium for commercial whaling indefinitely. That is why we scrupulously abide by the rules of ICRW. Had there been doubt concerning our observance of the ICRW, we would have jeopardized our most important goal of resuming sustainable commercial whaling.

24. Australia, however, bases its arguments on its policy of absolutely no killing of whales. This is demonstrated by the statement of the Australian Commissioner, stating that "Australia's view is that we are opposed to *any research that involves the killing of whales*..."[4] (emphasis added). By contrast, Japan is committed to science. We rest our case not on an opinion of one scientist but on requirements of the ICRW and Annex P, which was agreed by the Scientific Committee of the IWC. The scientific achievements of our special permit whaling are recognized, appreciated and used by the Scientific Committee of the IWC, composed of over 150 experts in whale studies.

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[4]Verbatim Records of the IWC, 1998, p. 131.

25. In spite of the literal interpretation of Article VIII of the Convention "[n]otwithstanding anything contained in this Convention . . .", we are not advocating an "absolute discretion". Our position is clearly based on efforts to respect the highest precautionary approach. We have fully complied with the procedural requirements[5]. It is scientifically demonstrated that there is no harm to stock of the targeted species under JARPA/JARPA II. Japan has always been present in the negotiations through the IWC, has accepted what was agreed and faithfully complied with it. It is solely on these solid bases that Japan wishes to resume sustainable whaling based on the best scientific advice as clearly stipulated in the ICRW.

26. In our pleadings to follow my speech, we will deal with both the jurisdictional question as well as the merits. Our counsel will explain that our special permit whaling for purposes of scientific research is founded in law and based on science, as recognized by the Scientific Committee of the IWC. In doing so, we will explain why Australia's arguments of last week are without merit and cannot substantiate such a serious allegation as a breach of the international convention.

27. Monsieur le président, Mesdames et Messieurs les juges, le droit évolue. Mais seulement par voie d'accord entre les Etats. On ne peut juger de la portée de ce qui a fait l'objet d'un accord — ou non — qu'en recourant aux règles bien établies de l'interprétation des traités. Le Japon a respecté le principe fondamental *pacta sunt servanda*, en respectant en toute bonne foi ce qui était convenu et nous nous présentons aujourd'hui devant vous dans l'espoir que votre arrêt contribuera au renforcement de la stabilité des relations internationales. Il va de soi que si la Cour devait introduire une révolution dans le droit des traités, cela serait lourd de conséquences à long terme pour le droit international. Mais nous sommes convaincus que la Cour, principal organe judiciaire des Nations Unies, fera respecter le principe fondamental du respect de la parole donnée dans les termes où elle l'a été.

28. Il appartient à la Cour de se prononcer sur la licéité des actes des Etats ; pas sur leur moralité ou leur valeur éthique. Pour certains, les baleines sont des animaux sacrés, comme les vaches le sont pour les Hindous. Les religions et les cultures perçoivent les animaux

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[5]Article VIII, Schedule, para. 30, Ann. P.

de manière différente. Nous vivons dans un monde où vivent plus de sept milliards d'êtres humains répartis entre les cinq continents ; et la seule manière de leur permettre de coexister pacifiquement est de respecter leurs différences, et de ne pas imposer les vues de certains aux autres.

29. Après avoir lu et écouté avec attention les arguments de l'Australie, je suis convaincu qu'il s'agit d'une tentative unilatérale de ce pays pour imposer l'interdiction de toute chasse baleinière en se fondant sur ses propres valeurs plutôt que sur une argumentation juridique relative à la chasse scientifique autorisée par le Japon. Certes, dans ce cadre, le Japon capture et tue des baleines. Devons-nous en être honteux ? Même si cela peut être l'avis de certains, cela ne veut pas dire que nous violons le droit international. Si l'on parle en termes de culture, le Japon est fier de son histoire, qui remonte très loin dans le temps, et de sa tradition de proximité avec la nature et de préservation de l'environnement pour les générations à venir. Nous ne critiquons pas les autres cultures. Monsieur le président, je le dis clairement : s'il fallait établir la supériorité de telle culture sur telle autre, le monde ne pourrait pas être en paix.

30. *Pacta sunt servanda*, j'y reviens ... Tel est le fondement du droit qui a permis la coexistence entre les nations durant des siècles et il serait fort regrettable d'écarter ce principe de sagesse pour la mauvaise raison que les actes de certains Etats semblent moralement répréhensibles à d'autres.

31. Monsieur le président, Mesdames et Messieurs les juges, je vous remercie de votre attention et je vous prie, Monsieur le président, de bien vouloir appeler à cette barre M. le professeur Pellet. Merci beaucoup.

Le PRESIDENT : Merci beaucoup, Monsieur l'agent, et je donne la parole au professeur Pellet. Vous avez la parole, Monsieur.

M. PELLET :

L'incompétence de la Cour

1. Monsieur le président, Mesdames et Messieurs les juges, l'agent de l'Australie l'a dit sans fard : l'affaire que ce pays vous a soumise fait partie de sa campagne en faveur de l'interdiction générale et définitive de toute chasse commerciale à la baleine[6]. Faisant mine d'emprunter à la Nouvelle-Zélande[7] le concept de «réglementation collective»[8], l'Australie lui substitue sa vision unilatérale et relaie le slogan de ses activistes en se faisant la championne de la «tolérance-zéro» à l'égard de toute recherche baleinière utilisant des méthodes létales. Pour cela,

1) elle modifie l'objet et le but de la convention de 1946 «sur la *réglementation*» — pas l'interdiction, Monsieur le président, la *réglementation* — «de la chasse à la baleine» que l'Australie transforme en un instrument de pures «conservation et reconstitution»[9] — c'est sa nouvelle formulation, alors que l'objectif de cet instrument, clairement défini dans le préambule, est la sauvegarde de la ressource naturelle que constituent les baleines en vue de «donner à l'industrie baleinière la possibilité de se développer d'une manière méthodique» ;

2) L'Australie interprète l'article VIII de cette convention d'une façon incompatible avec son texte, son contexte, ses travaux préparatoires et la pratique dont cette disposition a fait l'objet ; en particulier, elle entend soumettre le recours à certaines méthodes de recherche à des conditions telles qu'elles deviennent complétement inutilisables — alors même qu'elles sont expressément prévues par cette disposition clef. Ce faisant, l'Australie entend réduire à néant la portée de cet article VIII qui laisse expressément une très large marge d'appréciation aux gouvernements contractants, et ceci alors qu'aucun texte juridiquement contraignant, limitant

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[6] CR 2013/7, p. 19, par. 4 (Campbell).

[7] Voir OEN, par. 6, 7, 14-32.

[8] CR 2013/7, p. 20, par. 7, p. 22, par. 12 (Campbell).

[9] CR 2013/7, p. 29, par. 20 (Gleeson) ; p. 40, par. 1-2, p. 41, par. 6-7, p. 43, par. 13, p. 45, par. 20, p. 46, par. 22, p. 49, par. 33-34, p. 51, par. 35 (Boisson de Chazournes).

ou, *a fortiori*, excluant le recours à de telles méthodes, n'a jamais été adopté au sein de la commission baleinière internationale (la «CBI»).

3) Tout ceci au nom de «La Science», présentée comme une religion révélée, qui correspondrait à une vérité indiscutable et dont l'Australie se fait le zélateur ; le propre de toute attitude scientifique me paraît pourtant être la conscience de la relativité des approches, la modestie, la confrontation des points de vue ; on est loin du compte, Monsieur le président : «Moi, Australie» ou «Moi, professeur Mangel, je *sais* : il n'est qu'une science et j'en détiens seul(e) la vérité. «La vraie science», disait Montaigne, «est une ignorance qui se sait»[10] ; on ne peut pas dire que l'Australie et ses experts aient la science modeste.

4) Et pourtant, Monsieur le président, les réactions de la communauté scientifique — y compris au sein du comité scientifique de la CBI — sont loin de conforter le mépris dans lequel l'Australie semble tenir le programme JARPA II : certes, il a fait l'objet de critiques — parfois vives — dans certains cercles liés aux Etats hostiles par principe à la chasse baleinière ; mais, si l'on veut bien ne pas s'en tenir à quelques citations sorties de leur contexte et émanant de ces milieux, le tableau est nettement moins sombre que nos amis australiens veulent le dépeindre ; il existe une grande diversité de points de vue à cet égard, et cette diversité témoigne de l'absence de toute certitude en ce domaine ; il paraît difficile, pour dire le moins, qu'une juridiction internationale, pour éminente qu'elle soit, puisse trancher entre ces vues divergentes et fasse prévaloir ~~«une»~~ une « » vérité scientifique controversée sur une autre.

5) Enfin, il est certainement vrai que les Etats doivent agir de bonne foi et ne pas abuser des droits que leur reconnaît le droit international ; mais, outre que «la mauvaise foi ne se présume pas»[11], où est l'abus ?

— dans le fait que le Japon, après avoir accepté le moratoire, ait, dans l'esprit de l'article VIII, paragraphe 4, de la convention, pris des mesures pour compenser (en partie) la perte des données scientifiques que fournissaient traditionnellement la chasse commerciale ? Ou qu'en

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[10] Michel de Montaigne, *Pensées*, 1580.

[11] Affaire du lac Lanoux (Espagne, France), sentence arbitrale du 16 novembre 1957, *Recueil des sentences arbitrales*, vol. XII, p. 305. Voir également l'affaire Tacna Arica (Chili/Pérou), sentence arbitrale du 4 mars 1925, *Recueil des sentences arbitrales*, vol. II, p. 929-930 et *Concessions Mavrommatis à Jérusalem, arrêt n° 5, 1925, C.P.J.I. série A n° 5*, p. 43 ; *Certains intérêts allemands en Haute-Silésie polonaise, fond, arrêt n° 7, 1926, C.P.J.I. série A n° 7*, p. 30.

vertu du moratoire lui-même, le Japon ait cherché à obtenir l'information scientifique qui donne à la CBI l'assurance qu'elle peut, sans risque, reviser le moratoire ? Assurément pas : JARPA et JARPA II ne sont pas des moyens de contourner le moratoire[12] ; la montée en puissance des méthodes de recherche létales est la *conséquence* du moratoire et de l'assèchement des données en résultant ;

— l'abus serait-il alors dans le simple fait de recourir à ces méthodes ? Mais, je l'ai dit, elles sont expressément envisagées par l'article VIII, et même les experts de l'Australie ont dû concéder qu'il n'existait pas de méthodes alternatives raisonnablement utilisables et susceptibles de fournir des informations équivalentes[13] ; comme l'a également reconnu M. Gales en réponse à une question de Mme la juge Donoghue, la connaissance de l'âge des baleines, qui, on peut le regretter, ne peut être obtenue que par ce moyen, est indispensable pour évaluer leur mortalité et établir un modèle de distribution des âges[14] — ce qui est l'un des buts de JARPA II[15] ; cela explique aussi le nombre relativement élevé de petits rorquals capturés à cette fin, car l'établissement de ce modèle suppose des statistiques portant sur un assez grand nombre d'animaux ; qu'il y ait, entre les experts, des divergences d'appréciation sur des problèmes de ce genre, c'est certain (et naturel) — mais que la Cour puisse trancher ces querelles de spécialistes, voilà qui est beaucoup moins évident ;

— l'abus serait-il dans le fait que les produits obtenus à partir des baleines capturées sont, conformément aux directives du Gouvernement japonais, dans la mesure du possible, mis en vente sur le marché afin de couvrir les frais entraînés par la recherche ? Mais ceci est conforme aux dispositions du paragraphe 2 de l'article VIII et aux bonnes pratiques actuelles communément suivies en matière de financement de la recherche ;

— ou y aurait-il abus parce que le Japon ne respecterait pas certaines résolutions adoptées par la CBI — souvent à d'étroites majorités ? Mais ces textes ne sont pas juridiquement obligatoires et, en revanche, le Japon s'est toujours scrupuleusement conformé à toutes les obligations

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[12] CR 2013/7, p. 25, par. 4, p. 27, par. 11, p. 30, par. 25 ; CR 2013/11, p. 30-31, par. 21 (Gleeson).

[13] Voir CR 2013/9, p. 65 (Mangel).

[14] CR 2013/10, p. 31 (Gales).

[15] Voir Government of Japan, «Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) — Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources», SC/57/O1(2005), p. 2, 6-7 [CMJ, annexe 150].

procédurales lui incombant en vertu de la convention ou du paragraphe 30 du règlement qui lui est annexé ; et il est même allé très au-delà en coopérant de bonne foi avec les organes de la convention dont il a toujours considéré les points de vue avec attention — il n'est pas sûr que l'on puisse en dire autant de l'Australie qui s'est, pour sa part, servie de ces organes pour tenter d'obtenir une interprétation de la convention de 1946 contraire à sa lettre et à son esprit.

2. Mes collègues et moi-même développeront ces points — et d'autres — plus tard cette après-midi et dans les deux jours qui viennent. Mais nous ne le feront que par précaution ou, comme l'on dit, pour surplus de droit, car nous avons la ferme conviction que la Cour n'est pas compétente pour se prononcer sur la requête dont l'Australie a cru pouvoir vous saisir.

3. En effet, bien que le Japon n'ait pas exercé son droit de soulever des exceptions préliminaires, il n'en objecte pas moins à la compétence de la Cour. C'est cette exception d'incompétence — dont l'Australie ne conteste pas la recevabilité et qu'elle a dit prendre très au sérieux[16] — qu'il m'appartient de vous présenter aujourd'hui.

4. Toutefois, Monsieur le président, le Japon se trouve dans une position assez particulière et, à vrai dire, fort inconfortable. L'Australie n'a pas cru devoir demander un second tour de plaidoiries écrites et la Cour ne l'a pas ordonné. Du coup, jusqu'à vendredi dernier — l'Australie a pris soin d'attendre la toute dernière minute pour plaider ce point liminaire... — nous étions dans l'ignorance complète de la position du demandeur sur cet aspect, à nos yeux essentiel, de l'affaire.

5. Tout ce que nous savions concernait un point annexe relatif à la portée de sa requête — qui a son importance, il est vrai. En effet, durant les réunions de procédure menées avec le président de la Cour, l'agent du demandeur a pris l'engagement formel de ne pas étendre la portée de ses réclamations, ni *ratione materiae* (à d'autres conventions), ni *ratione loci* (au Pacifique Nord en particulier). Dans sa lettre au greffier de la Cour en date du 22 mai 2012, M. William Campbell, agent de l'Australie, écrivait en effet :

> «I confirm, as I did at the meeting of the President of the Court with the Agents of the Parties on 23 April 2012, that Australia's claim in these proceedings concerns Japan's JARPA II programme in the Southern Ocean (see Australia's Application Instituting Proceedings, paragraph 2)».

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[16] CR 2013/7, p. 38, par. 60 (Gleeson) et CR 2013/11, p. 41, par. 2 (Burmester).

Ce dernier détail est significatif, dans la mesure où il établit que l'Australie ne saisit pas la Cour d'un programme similaire à JARPA II[17], mais qui se déploie dans une zone maritime sur laquelle l'Australie n'a pas de prétentions.

6. La Cour est donc saisie de la compatibilité avec la convention de 1946 du programme JARPA II, qui se déroule dans l'océan Austral, à l'exclusion de toute autre question. Et, je le rappelle, c'est la requête, telle qu'interprétée par les Parties qui fixe et limite la compétence de la Cour[18]. Or il se trouve, Monsieur le président, que la requête ainsi définie n'entre pas dans sa juridiction telle que l'établissent les déclarations facultatives d'acceptation de la juridiction obligatoire de la CIJ en vertu de l'article 36, paragraphe 2, du Statut, faites respectivement par l'Australie et le Japon. Ces déclarations figurent sous l'onglet n° 16 du dossier des juges. L'une et l'autre comportent un certain nombre de réserves.

7. La prétendue coïncidence de ces déclarations constitue en l'espèce la seule base sur laquelle l'Australie entend fonder la compétence de la Cour[19]. Aucune autre n'est invoquée. Je note en particulier que la convention de 1946 dont l'Australie invoque la violation — à l'exclusion de tout autre traité — ne contient pas de clause de règlement des différends.

8. Conformément à l'article 36, paragraphe 2, du Statut, la déclaration du Japon précise qu'elle est faite «à l'égard de tout autre Etat acceptant la même obligation». Au nom du principe de réciprocité, que vous avez rappelé, par exemple, dans votre arrêt du 11 juin 1998 relatif aux exceptions préliminaires dans l'affaire *Cameroun c. Nigéria*[20] et que la Cour a mis en œuvre à

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[17] CR 2013/8, p. 57, par. 7 (Sands).

[18] Voir l'article 40, paragraphe 1 du Statut et l'article 38, paragraphe 2, du Règlement ; voir aussi *Administration du prince von Pless, ordonnance du 4 février 1933, C.P.J.I. série A/B n° 52*, p. 14 ; *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 267, par. 69 ; *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II)*, p. 695, par. 108 ; *Certaines questions concernant l'entraide judiciaire en matière pénale (Djibouti c. France), arrêt, C.I.J. Recueil 2008*, p. 205-206, par. 66-70 ; *Immunités juridictionnelles de l'Etat (Allemagne c. Italie ; Grèce (intervenant)*, arrêt du 3 février 2012, C.I.J., par. 37-39.

[19] Requête, par. 4 ; MA, par. 1.10 ; CR 2013/11, p. 41, par. 5 (Burmester).

[20] *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 298-299, par. 43. Voir aussi la jurisprudence citée et *Phosphates du Maroc, arrêt, 1938, C.P.J.I. série A/B n° 74*, p. 22 ; *Licéité de l'emploi de la force (Yougoslavie c. Espagne), mesures conservatoires, ordonnance du 2 juin 1999, C.I.J. Recueil 1999 (II)*, p. 23, par. 25 et *Licéité de l'emploi de la force (Yougoslavie c. Belgique), mesures conservatoires, ordonnance du 2 juin 1999, C.I.J. Recueil 1999 (I)*, p. 135, par. 30.

plusieurs reprises, le Japon peut invoquer les réserves de l'Australie — en tout cas l'une d'elles — pour s'opposer à ce que la Cour exerce sa juridiction. L'Etat requérant ne le conteste pas[21].

[Projection n° 1 : La deuxième réserve australienne.]

9. Permettez-moi, Monsieur le président, de lire cette réserve, incluse dans la déclaration australienne du 22 mars 2002, et qui exclut la compétence de la Cour en la présente espèce ; je le ferai dans le texte original anglais car la traduction française est étrange à certains points de vue. Telle qu'on la trouve dans le *Recueil des Traités*, elle est assez bizarre.

> «This declaration does not apply to :
>
> . . . . . .
>
> *(b)* any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation;
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> . . . . . .»

10. Interprétée conformément aux intentions de l'Australie, cette réserve couvre l'objet de la requête et prive la Cour de compétence pour se prononcer.

I. La portée de la réserve *b*) de l'Australie

11. Lorsqu'elle doit interpréter une déclaration facultative de juridiction obligatoire, la Cour met l'accent sur la volonté de l'Etat déclarant, telle qu'elle ressort des termes de la déclaration. Ainsi, dans l'affaire de la *Compétence en matière de pêcheries (Espagne c. Canada)*, elle a estimé qu'

> «étant donné qu'une déclaration en vertu du paragraphe 2 de l'article 36 du Statut est un acte rédigé unilatéralement, la Cour n'a pas manqué de mettre l'accent sur l'intention de l'Etat qui dépose une telle déclaration. Aussi bien, dans l'affaire de l'*Anglo-Iranian Oil Co.*, la Cour a-t-elle jugé que les termes restrictifs choisis dans la déclaration de l'Iran étaient «une confirmation décisive de l'intention du Gouvernement de l'Iran, lorsqu'il a accepté la juridiction obligatoire de la Cour» (*ibid.*, p. 107).
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> 49. La Cour interprète donc *les termes pertinents d'une déclaration*, y compris les réserves qui y figurent, d'une manière naturelle et raisonnable, *en tenant dûment*

[21] Voir CR 2013/11, p. 41, par. 6 (Burmester).

compte de l'intention de l'Etat concerné à l'époque où ce dernier a accepté la juridiction obligatoire de la Cour»[22].

Mon vieil ami Henry Burmester, que je suis heureux de retrouver ici, même si nous ne sommes pas cette fois du même côté de la barre, admet que ces principes sont ceux qu'il convient d'appliquer dans notre espèce[23].

12. Pour répondre à la question de savoir si le présent différend relève ou non de la compétence de la Cour, il convient donc de se placer du point de vue de l'Australie et de se demander si celle-ci pourrait s'opposer avec succès au règlement du différend par la Cour dans l'hypothèse où elle serait défenderesse dans une affaire du même type que celle qu'elle vous a soumise.

13. Les termes de la seconde réserve australienne sont très larges et, visiblement, ils ont été rédigés délibérément de façon à couvrir tout différend lié aux zones maritimes qu'elle vise. Malgré les dénégations de nos amis australiens[24], la réserve *b)* de l'Australie ne se limite pas à exclure les différends relatifs à la seule délimitation d'un territoire maritime. Elle y ajoute ceux qui sont «en rapport» avec une telle délimitation et, surtout pour ce qui nous concerne, ceux «découlant de l'exploitation de toute zone faisant l'objet d'un différend adjacente à une telle zone maritime en attente de délimitation ou en faisant partie» ou encore, «concernant une telle exploitation ou en rapport avec celle-ci». Je note au passage que, dans son arrêt du 28 mai dernier dans l'affaire du *Louisa* invoqué par M. Burmester[25], le Tribunal international du droit de la mer s'est fondé sur «l'emploi du terme «relatifs» dans la déclaration» de Saint-Vincent-et-les Grenadines en vertu de l'article 287 de la convention de Montego Bay pour conclure que «l'interprétation étroite de [cette] déclaration ... ne peut être retenue»[26].

14. La formule adoptée par l'Australie dans la réserve *b*) n'est pas sans rappeler celle dont le Canada avait assorti son acceptation de la compétence obligatoire de la Cour, qui a fait l'objet

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[22] *Compétence de la Cour, arrêt, C.I.J. Recueil 1998*, p. 454, par. 48-49 ; les italiques sont de nous ; voir aussi *Plateau continental de la mer Egée (Grèce c. Turquie), arrêt, C.I.J. Recueil 1978*, p. 32, par. 77.

[23] CR 2013/11, p. 43, par. 12 (Burmester).

[24] CR 2013/7, p. 38-39, par. 62 (Gleeson) et CR 2013/11, p. 42, par. 10, p. 44, par. 18, 21 (Burmester).

[25] CR 2013/11, p. 49-50, par. 38.

[26] T.I.D.M., arrêt du 28 mai 2013, *Affaire du navire «Louisa» (Saint-Vincent-et-les Grenadines c. Royaume d'Espagne)*, par. 83.

d'une interprétation par la CIJ dans l'affaire de la *Compétence en matière de pêcheries*. Dans son arrêt du 4 décembre 1998, la Haute Juridiction a commencé :

> «par relever qu'en excluant de sa juridiction les *«différends auxquels pourraient donner lieu»* les mesures de gestion et de conservation qu'elle mentionne et leur exécution, la réserve ne réduit pas le critère d'exclusion au seul «objet» du différend»[27].

Il en va de même dans la présente espèce : du fait de la formulation de la réserve australienne, la Cour ne doit pas avoir égard seulement à l'objet du différend strictement entendu. La formule large de la réserve l'autorise et lui impose même d'aller au-delà. Comme la Cour le remarque dans ce même arrêt de 1998 :

> «La version anglaise *«disputes arising out of or concerning»* laisse plus clairement apparaître le caractère large et englobant de la formule. Aux termes de la réserve sont exclus non seulement les différends qui auraient directement pour «objet» les mesures envisagées et leur exécution, mais aussi ceux qui y auraient «trait» *(«concerning»)* et, plus généralement, tous ceux qui y trouveraient leur «origine» *(«arising out of»)*, c'est-à-dire les différends qui, en l'absence de telles mesures, ne seraient pas nés.»[28]

15. Or, si l'on compare les deux déclarations — celle de l'Australie, d'une part, et celle du Canada qui était applicable dans l'affaire de 1998, d'autre part, on constate que la première - celle de l'Australie - est plus large encore, puisqu'aux expressions «différend ... découlant de l'exploitation» *(dispute ... arising out of the exploitation)* de l'une des zones concernées ou «concernant une telle exploitation» *(concerning [such] exploitation)*, l'Australie a ajouté les différends «en rapport avec celle-ci» *(relating to [such] exploitation)*. «[L]e caractère large et englobant de la formule» est encore plus frappant donc : aux termes de la réserve *b)* sont exclus non seulement les différends qui auraient directement pour «objet» l'exploitation d'une zone contestée, mais aussi, pour paraphraser votre arrêt de 1998, non seulement ceux qui auraient «trait à» *(concerning)* une telle exploitation ; non seulement, plus généralement, tous ceux qui trouveraient leur «origine dans» *(arising out of)* une telle exploitation ; mais aussi tous ceux qui, d'une manière ou d'une autre, seraient «en rapport avec» *(would relate to)* une telle exploitation.

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[27] *Compétence en matière de pêcheries (Espagne c. Canada), compétence de la Cour, arrêt, C.I.J. Recueil 1998*, p. 458, par. 62.

[28] *Compétence en matière de pêcheries (Espagne c. Canada), compétence de la Cour, arrêt, C.I.J. Recueil 1998*, p. 458, par. 62. Voir aussi *Plateau continental de la mer Egée (Grèce c. Turquie), arrêt, C.I.J. Recueil 1978*, p. 36, par. 86 ; *Certains biens (Liechtenstein c. Allemagne), exceptions préliminaires, arrêt, C.I.J. Recueil 2005*, p. 25, par. 46.

Sur ce point, nous sommes tout à fait d'accord avec M. Burmester même si, curieusement, il nous fait dire le contraire[29].

16. La présence cumulative d'expressions comme «ayant leur origine dans» *(arising out of)* ou «ayant trait à» *(concerning)* fait d'ailleurs observer à la Cour, dans l'affaire des *Pêcheries*, que :

> «[L]a portée de la réserve canadienne semble même plus large que celle de la réserve dont la Grèce avait assorti son adhésion à l'Acte général d'arbitrage de 1928 («différends ayant trait au statut territorial de la Grèce») et que la Cour avait été amenée à interpréter dans l'affaire du *Plateau continental de la mer Egée*[30]»[31].

Dans cette dernière affaire d'ailleurs, *mer Egée*, l'expression «*relates to*» est systématiquement traduite en français par «a trait à»[32].

17. Au surplus — et là, par contre, je ne suis plus d'accord avec mon contradicteur, l'utilisation répétitive de la conjonction «ou» (employée pas moins de quatre fois dans la seule réserve *b)*) établit l'intention australienne d'exclure largement la compétence de la Cour : les cinq hypothèses visées ne sont pas cumulatives, mais bien alternatives: "ou, "ou, "ou, "ou." En aucune manière, la réserve ne porte exclusivement sur les différends relatifs à la délimitation de l'une des zones qui y sont mentionnées *et* qui serait «en rapport» avec celle-ci, pas davantage qu'elle ne porte exclusivement sur un différend «découlant» de son exploitation *et* la concernant, *et* en rapport avec celle-ci (ce qui serait d'ailleurs assez absurde) : il n'y a que des «ou» *(or)* ; il suffit donc que l'on se trouve dans *l'un* de ces cas de figure pour que la Cour doive décliner sa compétence. Et comme M. Burmester[33] s'en est aperçu *in extremis* durant sa plaidoirie, le «ou» primordial est le deuxième, celui qui sépare la séquence «délimitation» de *la séquence* «exploitation». Il ne ferait d'ailleurs aucun sens de répéter deux fois dans le texte original anglais : «*concerning or relating to*» la délimitation d'une part et l'exploitation d'autre part, si l'on devait lire les deux «blocs» d'exclusion de la compétence de la Cour comme identiques et ne concernant que la délimitation.

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[29] CR 2013/11, p. 47-48, par. 32 (Burmester).

[30] «(*C.I.J. Recueil 1978*, p. 34, par. 81 et p. 36, par. 86)».

[31] *Compétence en matière de pêcheries (Espagne c. Canada), compétence de la Cour, arrêt, C.I.J. Recueil 1998*, p. 458, par. 62.

[32] Voir *Plateau continental de la mer Egée (Grèce c. Turquie), arrêt, C.I.J. Recueil 1978*, p. 34, par. 81 et p. 36, par. 86 *in fine* et p. 37, par. 90. Voir aussi l'article 102, paragraphe 2 du Règlement de la Cour ; *Juridiction territoriale de la Commission internationale de l'Oder, arrêt n° 16, 1929, C.P.J.I. série A n° 23*, p. 16.

[33] CR 2013/11, p. 46, par. 28 (Burmester).

18. J'admets volontiers qu'il ne s'agit pas de délimitation[34]. Mais rien dans le texte de la reserve *b*) n'implique qu'elle vise exclusivement un différend de délimitation maritime. Au contraire et plusieurs observations peuvent être faites à cet égard :

1) Il n'est pas inintéressant de noter que la déclaration australienne de 1954 contenait une réserve concernant les droits sur les eaux et les zones marines revendiquées par l'Australie[35] ; cette réserve était nettement moins large que celle figurant dans la déclaration actuelle ; elle avait, au surplus, été abandonnée en 1975[36]. C'est donc tout à fait délibérément que le Gouvernement australien a modifié à nouveau sa déclaration en 2002 en l'assortissant d'une réserve largissime en ce qui concerne les différends en rapport avec une délimitation maritime *ou* (et j'insiste sur le «ou», Monsieur le président !) — ou avec l'exploitation d'une zone maritime faisant l'objet d'un différend ou d'une zone adjacente à une telle zone dans l'attente de la délimitation. Je note au passage que l'Australie ne conteste pas en l'espèce l'applicabilité *ratione loci* de cette large réserve[37] — dont acte.

2) La séquence des «ou» dont je viens de parler est parfaitement claire : elle exclut la compétence de la Cour, d'une part en matière de délimitation des espaces maritimes contestés, de l'autre au sujet leur exploitation ; et l'expression «en attente de délimitation» *(pending delimitation)* ne change rien à l'affaire : elle décrit un moment, un état de fait, mais pas, ici, l'objet du différend exclu ; la Cour ne peut se prononcer ni sur la délimitation ni, tant que la délimitation n'a pas eu lieu, sur l'exploitation des zones contestées ou des zones adjacentes. [Je fais une pause pour les interprètes. J'ai dû rajouter *in extremis* un petit passage puisque nous n'avons reçu que ce matin un document fort intéressant et important.] Du reste, telle est très exactement la présentation qu'a donnée *l'Attorney-General* de l'Australie, dans un document officiel, analysant au moment de son adoption la nouvelle déclaration australienne, que M. Burmester avait mentionné au paragraphe 32 de sa plaidoirie, et ~~donc, comme je l'ai dit~~ dont nous avons reçu le texte à 11 heures ce matin. Je cite ce texte :

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[34] Sur la distinction, voir, par exemple, *Plateau continental (Jamahiriya arabe libyenne/Malte), arrêt, C.I.J. Recueil 1985*, p. 41, par. 50.

[35] Nations Unies, *Recueil des traités*, 6 février 1954, I- 2484, vol. 186, p. 82-83.

[36] Nations Unies, *Recueil des traités*, 17 mars 1975, I-13809, vol. 961, p. 183.

[37] Voir CR 2013/11, p. 41-51, *passim* (Burmester).

«The new declaration limits Australia's acceptance of the compulsory jurisdiction of the I.C.J.. This means that an action cannot be commenced against Australia in the following circumstances:

. . . . . .

[and you have it on your screens]

(b) where disputes involve maritime boundary delimitation, *or disputes concerning the exploitation of an area in dispute, or adjacent to an area in dispute*.» (Les italiques sont de nous.)

C'est limpide.

3) L'interprétation contraire avancée par l'Australie conduit à un résultat parfaitement absurde et prive de signification toute la seconde partie de la réserve : elle signifierait que la Cour ne peut trancher un différend relatif à la délimitation mais qu'une fois celui-ci résolu, elle pourrait se prononcer sur l'exploitation... Si telle était la signification de la seconde partie de la phrase, elle la rend totalement superflue et l'Australie aurait dû se contenter d'exclure la compétence de la Cour en matière de délimitation — «point-barre» ! Pour que la référence à l'exploitation ait un sens utile, il faut admettre que, dans l'attente de la délimitation *(pending limitation)*, la Cour ne peut se prononcer *ni* sur la délimitation des zones visées, *ni* sur leur exploitation.

4) Les discussions au sein du Parlement australien (qui sont relatées dans un document produit par le Japon — il s'agit de l'annexe 167 à notre contre-mémoire) et dont M. Burmester s'est efforcé de tirer le moins mauvais parti possible, confirment cette interprétation et montrent que la réserve *b*) concerne non seulement la délimitation des frontières maritimes, mais plus largement les différends ayant «une connotation maritime»[38]. L'expression a été employée par M. Campbell durant ces débats, à propos de l'affaire des *Essais nucléaires*, dont je suis prêt à admettre qu'elle peut être présentée comme étant «partiellement maritime» *(a «semi-maritime matter», he said)* mais dont l'aspect «délimitation» ne m'avait, je dois dire, jamais frappé. Un autre exemple d'affaires ayant un aspect maritime donné par M. Campbell lors de cette discussion avec les parlementaires est celle du *Timor Oriental*, à propos de laquelle M. Burmester a très justement fait remarquer qu'elle ne concernait pas une délimitation maritime mais qu'elle «put at risk existing resource exploitation by Australia», because

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[38] Voir *Parliamentary Debates*, Joint Standing Committee on Treaties, 12 July 2002 (William Campbell), TR 49, CMJ. [annexe 167], p. 217.

«American oil companies, with interest in exploiting areas off Timor-Leste, were telling anyone who would listen that they had legal advice that Timor-Leste could properly claim not just a share of the resources within the former joint zone but also in areas which lay outside its boundaries, including areas already being exploited by Australia»[39]. C'est bien ce que nous disons, Monsieur le président : en rédigeant sa déclaration, l'Australie a voulu échapper à la compétence de la Cour en matière d'exploitation des ressources naturelles de zones maritimes contestées ou adjacentes à celles sur lesquelles elle a des revendications. Pourquoi pourrait-elle se prévaloir de cette exclusion lorsque le pétrole qu'elle convoite est en cause et en refuserait-elle le bénéfice au Japon à propos de l'exploitation d'une autre ressource naturelle ?

5) Et pour en finir avec la fable de la réserve exclusivement relative à la délimitation maritime, un mot sur l'analogie esquissée par M. Burmester avec la déclaration, faite au même moment par l'Australie en vertu de l'article 298, paragraphe 1, de la convention des Nations Unies sur le droit de la mer. Mon contradicteur laisse entendre que cette «réserve» (je lui laisse la responsabilité du mot...) aurait la même portée que celle figurant dans la déclaration facultative australienne[40]. Il est intéressant de lire cette déclaration et de la confronter au texte de la réserve *b*). Vous avez la réserve *b)* sur l'écran, je lis en anglais la déclaration australienne en vertu de l'article 298 :

> «The Government of Australia further declares, under paragraph 1 (a) of article 298 of the United Nations Convention on the Law of the Sea (...), that it does not accept any of the procedures provided for in section 2 of Part XV (including the procedures referred to in paragraphs (a) and (b) of this declaration) with respect of disputes concerning the interpretation or application of articles 15, 74 and 83 relating — *relating*, c'est çà qui nous intéresse — to sea boundary delimitations as well as those involving historic bays or titles.»[41]

Si réserve il y a, Monsieur le président, elle porte, en effet dans cette déclaration, exclusivement, sur la délimitation (de la mer territoriale, de la zone économique exclusive et du plateau continental) mais il n'y est pas question d'exploitation des ressources naturelles de ces zones ; moins encore de l'exploitation des ressources naturelles de zones adjacentes dans l'attente de la

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[39] CR 2013/11, p. 45, par. 23-24 (Burmester).

[40] *Ibid.*, p. 43-44, par. 17.

[41] Declarations of States Parties Relating to Settlement on Disputes in Accordance with Article 298 (Optional Exceptions to the Applicability of Part XV, Section 2, of the Convention), disponible en ligne: http://www.itlos.org/fileadmin/itlos/documents/basic_texts/298_declarations_June_2011_english.pdf.

délimitation. Et pour une raison bien simple : cela eût été contraire à l'article 309 de la convention, qui prohibe toute réserve et exception non prévues expressément — en matière de règlement des différends : celles qui ne sont pas autorisées par l'article 287, paragraphe 1, disposition qui ne concerne que le règlement des différends relatifs à la *délimitation* des zones maritimes. Dans *cette* déclaration-là, l'Australie ne pouvait pas ajouter à l'exclusion de la délimitation celle de l'exploitation des ressources naturelles. En revanche, elle le pouvait dans sa déclaration facultative de l'article 36 — et elle l'a fait : cette exclusion est exprimée par la réserve *b)*.

19. Exploitation — le mot est sans grand mystère. Il inclut l'ensemble des utilisations des ressources de la mer et, du reste, le mot «*exploitation*», qui figure dans le texte anglais de l'article 65 de la convention des Nations Unies sur le droit de la mer consacré aux mammifères marins, est traduit en français par «utilisation optimale». Et l'article 120, qui renvoie à l'article 65, montre qu'il faut intégrer dans cette notion «la conservation et ... la gestion des mammifères marins».

20. Comme on l'a écrit, le mot «exploitation» — «*exploitation*» :

> «is *a broad term* which covers the utilization of animals for reasons such as pure commercial gain, subsistence or *in the interests of conservation* or control. The means by which it is carried out can be consumptive, either permanently removing animals from the population by hunting or live-trapping or harvesting products from wild individuals *under management regimes*.»[42]

21. Clairement, Monsieur le président, les activités que l'Australie reproche au Japon de mener concernent l'exploitation des ressources d'une zone maritime. *Ratione materiae*, elles relèvent de la réserve *b)* de la déclaration australienne de 2002 ; elles sont au centre du différend ; elles en constituent l'objet même.

22. Voici, Monsieur le président, pour l'interprétation de la deuxième réserve australienne ; la Cour ne peut se reconnaître compétente si la requête porte sur un différend découlant de l'exploitation d'une zone maritime en attente de délimitation ou d'une zone adjacente à une telle zone — *arising out of, concerning, or relating to the exploitation, of any disputed area or adjacent*

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[42] Victoria J. Taylor and Nigel Dunstone, «The exploitation, sustainable use and welfare of wild mammals», *in* V. J. Taylor and N. Dunstone (eds.), *The Exploitation of Mammal Populations*, Chapman & Hall, Bury St Edmunds, Suffolk, 1996, p. 3-4 — les italiques sont de nous.

to any such maritime zone pending its delimitation. Il en va sans aucun doute ainsi en la présente espèce.

[Fin de la projection n° 1.]

II. La réserve *b)* s'applique en l'espèce

23. Il me semble que, d'une certaine manière, on peut dire, Monsieur le président, que le différend qui nous occupe «découle de l'exploitation» *(arises out of the exploitation)* puisqu'il porte sur les activités menées par le Japon en vue d'assurer l'exploitation durable d'une ressource naturelle d'une zone maritime. En tout cas, il n'y a aucun doute qu'il la «concerne» et est «en rapport avec elle».

24. Comme l'a indiqué l'Australie dans sa requête[43], comme elle l'a répété dans son mémoire[44], comme son agent l'a redit durant la réunion de concertation du 23 avril 2012 avec le président de la Cour et confirmé dans sa lettre du 22 mai suivant que j'ai citée tout à l'heure[45], et comme le conseil de l'Australie l'a dit à nouveau la semaine dernière[46], «Australia's claim in these proceedings concerns Japan's JARPA II programme in the Southern Ocean» — «la demande australienne dans la procédure en cours concerne le programme JARPA II dans l'océan Austral»[47]. Le programme JARPA II dans l'océan Austral, pas donc, le programme, pourtant jumeau, JARPN, mais qui, lui, se déroule dans le Pacifique Nord, dans lequel l'Australie n'a pas d'intérêts particuliers à préserver[48]. Voici qui confirme, Monsieur le président, que, tout en donnant des gages à son opinion publique, l'Australie n'agit pas en défenseur altruiste de la légalité internationale mais bien plutôt pour préserver ses revendications maritimes.

25. Quelle que soit la perspective que l'on adopte — que l'on interprète à la lettre la définition que le Japon lui-même en donne ou que l'on se réfère aux allégations de l'Australie, JARPA II, qui constitue de l'aveu insistant du demandeur l'unique objet du différend, est,

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[43] Requête, par. 40-41.

[44] MA, par. 1.3-1.7.

[45] Voir *supra*, par. 5.

[46] CR 2013/7, p. 22, par. 13 (Campbell).

[47] Voir *supra*, par. 5.

[48] Voir *ibid.*

indiscutablement, un programme concernant l'exploitation d'une ressource marine et en rapport avec elle.

26. Le Japon a toujours fait savoir que JARPA était destiné à collecter de l'information qui permette la reprise de la chasse commerciale à certaines espèces de baleines. Le but du programme est d'établir si cette chasse est durable — *sustainable*. Il s'agit de recherche scientifique appliquée, liée à l'exploitation des ressources naturelles de la mer.

27. Ainsi, la mise en place du programme JARPA I partait de la volonté du Japon de participer à «l'examen régulier» de la limite de chasse zéro prévue par le paragraphe 10 *e)* du règlement annexé à la convention, examen fondé sur «les meilleurs avis scientifiques», qui devait permettre à la CBI de procéder, au plus tard en 1990, à une «évaluation exhaustive des effets» du moratoire[49]. Les objectifs de ce premier programme étaient ainsi tournés vers une meilleure gestion des stocks baleiniers dans l'océan Austral[50] afin d'établir la possibilité de leur exploitation. L'objectif numéro 1 visait une «estimation of the biological parameters required for stock management of the Southern Hemisphere minke whale»[51]. Pour sa part l'objectif 4 portait sur «the elucidation of the stock structure of Southern Hemisphere minke whales to improve stock management»[52]. JARPA II, initié en 2005, s'inscrit dans la lignée de JARPA I. Ses objectifs sont étroitement associés à la «procédure de gestion revisée» («RMP» selon le sigle anglais), méthode que la CBI a définie en vue de calculer le niveau raisonnable des prises[53], et que le professeur Hamamoto présentera de manière plus précise demain matin. L'ambition de JARPA II est de «ultimately lead to the improvement of the whale stock management procedures»[54]. «Looking to the future, the IWC will need to consider a multi-species management approach in the

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[49] Voir CMJ, par. 4.1-4.2, 4.40.

[50] Voir CMJ, par. 4.18, 4.25-4.37.

[51] Gouvernement du Japon, «The Program for Research on the Southern Hemisphere Minke Whale and for Preliminary Research on the Marine Ecosystem in the Antarctic», SC/39/O4 (1987) p. 3-4 [CMJ, annexe 135].

[52] Gouvernement du Japon, «The 1996/97 Research Plan for the Japanese Whale Research Program under Special Permit in the Antarctic», SC/48/SH3 (1996), p. 2 [CMJ, annexe 146].

[53] CMJ, p. 50, par. 5.20.

[54] Gouvernement du Japon, «Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) — Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources», SC/57/O1 (2005), p. 12 [CMJ, annexe 150].

Antarctic Ocean, which has the world's largest whale resources, for the conservation and sustainable use of these resources»[55].

28. Certes, le programme JARPA II est un programme scientifique, il n'en fait pas moins partie d'un processus dont la finalité est l'exploitation durable de certains stocks de baleines dans l'océan Austral. Ayant comme objectif ultime d'établir si et dans quelle mesure les conditions d'une reprise de la chasse à la baleine sont réunies et quelles précautions doivent être prises pour que cette activité soit durable grâce à une gestion raisonnable des stocks, JARPA II est, à l'évidence, «en rapport» avec l'exploitation des ressources marines. Il la concerne même très directement.

29. Pour le montrer, je me suis fondé, Monsieur le président, sur ce que j'appellerais «la vérité sur JARPA II». Mais, pour les besoins de la discussion, je peux aussi bien me référer aux allégations — erronées — de la Partie australienne, qui veut voir dans le programme japonais des actes de chasse commerciale à la baleine. Elle prétend que : «the whales are killed for commercial exploitation of the whale meat and to sustain the Japanese whaling industry»[56], ou encore que : «the Convention contemplates three types of whaling. The only one that fits JARPA II is commercial whaling that is exploitation»[57]. Je relève d'ailleurs qu'en soutenant que «la conservation des baleines même à des fins économiques requiert un système collectif, prévisible et contraignant de supervision»[58], l'Australie caractérise les activités de chasse à la baleine sous le régime de la convention comme relevant de l'exploitation (ou parfois de la surexploitation) du stock[59].

30. Monsieur le président, je ne concède en aucune manière que JARPA II serait un programme déguisé de chasse commerciale à la baleine[60]. Ce que je dis simplement est que, *s'il l'était* comme le prétend l'Australie, il s'agirait à l'évidence de l'exploitation des ressources des

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[55] Gouvernment du Japon, «Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II)-Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources», SC/57/O1 (2005), p. 6 [CMJ, annexe 150].

[56] CR 2013/7, p. 26, par. 6 (Gleeson).

[57] CR 2013/11, p. 15, par. 45 (Crawford).

[58] CR 2013/7, p. 43, par. 11 (Boisson de Chazournes) ; voir aussi, par exemple, *ibid.*, p. 26, par. 6 (Gleeson).

[59] Voir aussi MA, chap. 2, sect. IV, *passim*. Voir aussi MA, par. 1.2 ou par. 2.125 et *Expert Opinion*, p. 294, par. 2.15, ou p. 318, par. 6.12. Parmi les auteurs qui font la même assimilation, voir Elle Hey, *The Regime for the Exploitation of Transboundary Marine Fisheries Resources*, Martinus Nijhoff Publishers, Dordrecht, 1989, p. 237-244.

[60] Voir CR 2013/11, p. 48, par. 33 (Burmester).

zones maritimes dans lesquelles il se déroule. En d'autres termes, que l'on retienne la description — exacte — qu'en donne le Japon ou celle — erronée — qu'avance l'Australie, le résultat est le même : JARPA II, qui est l'objet même du différend que celle-ci a soumis à la Cour, est «en rapport» étroit avec l'exploitation de la zone maritime dans laquelle il se déroule et «concerne» cette exploitation très directement.

31. De toute manière, l'Australie ne peut avoir raison à la fois sur la compétence et sur le fond. En effet, de deux choses l'une : soit elle a raison sur le fond — JARPA II est de la chasse commerciale — mais alors le différend est évidemment exclu de votre compétence car il s'agit clairement ~~évidemment~~ d'exploitation ; soit la raison sur la compétence — l'affaire ne concernerait pas l'exploitation *stricto sensu* des baleines — mais alors elle a nécessairement tort sur le fond.

32. Dès lors, il importe peu que le Japon n'ait pas de différend de délimitation avec l'Australie[61], au sens étroit défini vendredi par le conseil de l'Etat requérant comme portant sur des «prétentions maritimes concurrentes»[62]. Les deux pays ont un différend relatif à l'exploitation d'une zone maritime que l'Australie considère comme relevant de *sa* zone économique exclusive, ce que le Japon conteste, et de la zone adjacente à cette zone en litige.

33. En résumé, Monsieur le président, Mesdames et Messieurs de la Cour, le différend que l'Australie a cru pouvoir vous soumettre est couvert par la réserve *b)* de sa propre déclaration facultative — dont le Japon peut se prévaloir au titre du principe de réciprocité. La réserve australienne couvre les différends

— *découlant* de l'exploitation de toute zone (maritime) objet d'un différend, qui est en attente de délimitation, ou d'une zone qui lui est adjacente ;

— *concernant* une telle exploitation ; ou

— *en rapport* avec elle.

Le différend soumis à la Cour, à propos du programme JARPA II, qui vise à permettre l'exploitation durable des baleines dans l'océan Austral, peut rentrer dans chacune de ces catégories. A tous ces points de vue, vous ne pouvez, Mesdames et Messieurs les juges, que décliner l'exercice de votre compétence et il serait fort injuste que l'Australie puisse se prévaloir de

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[61] CR 2013/11, p. 48, par. 34 (Burmester).

[62] *Ibid*, p. 47, par. 30 (Burmester).

sa déclaration facultative après avoir fait en sorte de se mettre à l'abri de requêtes comparables à celle qu'elle a elle-même formée pour complaire à son opinion publique.

34. Un dernier mot relatif à l'intervention de la Nouvelle-Zélande : si, comme nous le croyons, vous vous déclarez incompétents pour connaître de l'affaire que l'Australie vous a soumise, il va de soi que la demande en intervention de ce pays sera sans objet. En effet, nous nous trouverons dans une situation comparable à celle créée par la demande d'intervention d'El Salvador dans l'affaire des *Activités militaires* entre le Nicaragua et les Etats-Unis à la suite de laquelle la Cour a relevé :

> «que la déclaration d'intervention de la République d'El Salvador ... porte en fait aussi sur des questions, y compris l'interprétation de conventions, *qui présupposent que la Cour a compétence pour connaître du différend* entre le Nicaragua et les Etats-Unis d'Amérique et que la requête du Nicaragua contre les Etats-Unis d'Amérique concernant ce différend est recevable»[63].

De même, dans les affaires des *Essais nucléaires*, la Cour a considéré, suite à l'adoption de ses arrêts constatant que les demandes de l'Australie et de la Nouvelle-Zélande étaient «désormais sans objet», «qu'en conséquence il n'exist[ait] désormais plus d'instance sur laquelle la requête à fin d'intervention [de Fidji] puisse se greffer». Et la Cour a conclu : «que la requête par laquelle le Gouvernement fidjien demande à intervenir dans l'instance introduite par l'Australie [ou la Nouvelle-Zélande] contre la France tombe et que la Cour n'a plus aucune suite à lui donner»[64]. Il doit en aller de même de la demande en intervention de la Nouvelle-Zélande dans l'affaire qui nous occupe.

Mesdames et Messieurs les juges, je vous remercie de votre écoute. Mon successeur à cette barre sera le professeur Payam Akhavan — si, bien sûr, vous voulez bien lui donner la parole, Monsieur le président — mais peut-être considérerez-vous que c'est le moment approprié pour notre sacro-sainte (et toujours bienvenue !) pause-café surtout après une plaidoirie fort technique ?

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[63] *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), déclaration d'intervention, ordonnance du 4 octobre 1984, C.I.J. Recueil 1984,* p.216, par. 2 (les italiques sont de nous). Voir aussi : *Essais nucléaires (Nouvelle-Zélande c. France), requête à fin d'intervention, ordonnance du 12 juillet 1973, C.I.J. Recueil 1973,* p. 325, par. 1-3 ; *Essais nucléaires (Nouvelle-Zélande c. France), requête à fin d'intervention, ordonnance du 20 décembre 1974, C.I.J. Recueil 1974,* p. 535-536.

[64] *Essais nucléaires (Australie c. France), requête à fin d'intervention, ordonnance du 20 décembre 1974, C.I.J. Recueil 1974,* p. 530-531 ; *Essais nucléaires (Nouvelle-Zélande c. France), requête à fin d'intervention, ordonnance du 20 décembre 1974, C.I.J. Recueil 1974,* p. 535-536.

Le PRESIDENT : Merci, Professeur Pellet, je crains qu'il n'y ait plus rien de sacro-saint dans ce monde d'aujourd'hui mais il faut respecter quand même les traditions et, avant de déclarer la pause, quand même, j'ai une petite demande à la délégation japonaise. Vous avez cité un document que vous avez reçu, comme vous l'avez déclaré, ce matin à 11 heures. Ce document — si je me souviens bien — s'appelle National Interest Analyses. Ce document ne fait pas partie du dossier de l'affaire ni du dossier des juges de ce matin, est-ce que vous pourrez transmettre au Greffe le texte avec l'indication des sources. Merci beaucoup.

M. PELLET : Je le fais immédiatement.

Le PRESIDENT : Et maintenant, je déclare une pause de 15 minutes.

The Court adjourned from 4.30 p.m. to 4.55 p.m.

The PRESIDENT: Please be seated. The hearing is resumed and I give the floor to Professor Payam Akhavan. You have the floor, Sir.

Mr. AKHAVAN:

SCIENCE VERSUS POLITICS AT THE IWC

I. Introduction

1. Mr. President, distinguished Members of the Court, it is a great honour to appear before you today on behalf of Japan.

2. I will be addressing the factual background of this dispute. In particular, I will focus on the characteristics of Australia's anti-whaling policy, how it has shaped the relationship between science and politics at the IWC, and what this context says about the merits of this case.

3. Australia's allegations are serious and far-reaching. Japan stands accused of 30 years of deception and defiance against the IWC. Its programme of scientific research is disparaged as "commercial whaling" in disguise, in violation of Article VIII of the Convention. But prior to this case, Australia expressly admitted before the IWC that despite its opposition, "Japan's programme

is strictly legal under Article VIII of the Convention"[65]. So, what is this case really about? Why has Australia now come before this Court?

4. The question is best answered by considering what Australia insists the case is *not* about. The Agent's opening speech emphasized that while "Australia is totally opposed to any form of commercial whaling" this "is *not* relevant to the resolution of the case before the Court"[66]. This is a rather curious remark given the subject of this dispute. Why would Australia say that its opposition to commercial whaling is irrelevant? Mr. Campbell insisted that this case is only about Japan's "unlawful misuse of the scientific exception under Article VIII". But what if that exception is used to gather scientific data for the resumption of sustainable commercial whaling? That, after all, is exactly the programme of scientific research contemplated by the 1982 moratorium. If Australia is "totally opposed" to lifting the moratorium, then is it not also totally opposed to the scientific purpose of JARPA II?

5. But what the Agent's speech left unsaid goes much further. Moments after the conclusion of his opening speech, Mr. Campbell told journalists, outside this very courtroom, that: "You don't even need to kill one whale to conduct scientific research."[67] The following day, Australia's own expert witness, Professor Mangel, admitted that "lethal take" may indeed be "appropriate" for scientific research[68]. So what is the Australian position on whether lethal sampling may ever be justified? The answer may be gleaned from the statement of another Mr. Campbell, the former Environment Minister of Australia, who stated categorically that Australia opposes — "all forms" — "all forms of scientific and commercial whaling"[69]. Minister Campbell clarified that, for Australia, Article VIII is merely a "loophole" that must be closed[70].

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[65]Counter-Memorial [CMJ], para. 7, referring to Chairman's Report of the Forty-Ninth Annual Meeting, *Rep. Int. Whal. Commn* 48, 1998, p. 39, CMJ, Ann. 57; emphasis added.

[66]CR 2013/7, p. 24, para. 18 (Campbell); emphasis added.

[67]Associated Press, "Australia to World Court: Ban Japanese Whaling", 26 June 2013, available at: http://bigstory.ap.org/article/australia-world-court-ban-japanese-whaling (last checked on 1 July 2013).

[68]CR 2013/9, p. 61.

[69]Australian Antarctic Division, "Australia taking strong action to protect whales," Press Release, 16 Feb. 2006, available at: http://www.antarctica.gov.au/media/news/2006/australia-taking-strong-action-to-protect-whales (last checked on 1 July 2013).

[70]Australian Antarctic Division, "Australia Appeals to Japan to Reconsider its 'Scientific' Whale Slaughter," Press Release, 8 Nov. 2005, available at: http://www.antarctica.gov.au/media/news/2005/australia-appeals-to-japan-to-reconsider-its-scientific-whale-slaughter (last checked on 1 July 2013).

6. As I will show, for Australia, the scientific purpose of lethal sampling is largely irrelevant. It is a mere afterthought to what the Agent called a "strongly-held" anti-whaling policy. This policy is based on the fundamental belief in Australian public opinion that, unlike other inferior members of the animal kingdom, whales are unique, sacred, charismatic mammals that should never be killed. Since 1979, Australia has pursued an express policy of using the IWC, against its stated purpose, to ban all whaling. It has politicized science in order to impose Australian values on Japan, in disregard of international law. Having failed to achieve its objective, it now comes before this Court and makes arguments that manifestly contradict its earlier positions on the legality of JARPA. To borrow a phrase from the Agent's speech, Australia seeks to cloak its political and cultural preferences "in the lab-coat of science"[71]. Having put an end to commercial whaling for the past 30 years through the moratorium, it now also seeks to end scientific whaling. It seeks to apply the Whaling Convention as if it were the anti-Whaling Convention.

7. Mr. President, Members of the Court, my presentation will be divided into five parts. First, I will briefly situate Japan's scientific research in the global context of contemporary whaling. Second, I will examine the origins and assumptions of Australia's anti-whaling policy. Third, I will show how this "no compromise", "zero tolerance" policy has politicized science at the IWC and brought the organization to the brink of collapse. Fourth, I will discuss the evidentiary significance for this case of the Scientific Committee's findings on JARPA. I will then conclude with some observations about the circumstances surrounding Australia's decision to initiate this proceeding, circumstances that shed light on what this case is really about.

II. The IWC and Global Whaling in Context

8. Turning first to the global context of whaling, the IWC was established in 1946 because of over-exploitation of whale species, mainly for oil rather than food. The International Convention for the Regulation of Whaling was adopted — to quote its preamble — in order "to establish a system of international regulation for the whale fisheries"[72]. Its fundamental object and purpose was and remains sustainable whaling.

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[71]CR 2013/7, p. 24, para. 18 (Campbell).

[72]CMJ, Ann. 6, Preamble, The International Convention for the Regulation of Whaling (entered into force 10 Nov. 1948) 161 *UNTS* 72, amended by Protocol of 19 Nov. 1956, 338 *UNTS* 336 (Whaling Convention).

9. By the 1970s, the combination of IWC regulation and the collapse of the whale-oil market had significantly reduced commercial whaling. According to the IWC Secretariat, because of "the improved management of whaling that began in the mid-1970s" many species "are now in the process of recovering". There are now at least three "highly precautionary scientific '*management procedure*' approaches developed by the IWC's Scientific Committee for commercial and aboriginal subsistence whaling in order to ensure that past mistakes will not be repeated"[73].

10. Today, most whale species are no longer endangered. For example, the IWC notes that "humpback whales have shown evidence of strong recovery . . . with annual increase rates of about 10 per cent"[74]. The graph at tab 19-1 of your folders demonstrates the dramatic drop in global whaling beginning in the early 1970s, at least a decade prior to the 1982 moratorium. Fortunately, the days of over-exploitation and unsustainable whaling are long over.

11. The Antarctic minke whale is the smallest and most abundant of the "great whales". The IWC's most recent "best estimate" of this population in the Southern Ocean is 515,000[75]. The next largest abundance in the Antarctic is the humpback whale estimated by the IWC at 42,000[76]. Thus, the Antarctic minke whale exceeds the next largest population by a magnitude of 12.

12. As indicated in tab 19-2, the IWC observes that: "there are several hundred thousand Antarctic minke whales and thus *they are clearly not endangered*"[77]. "Clearly not endangered". This stands in stark contrast to the alarmist assertions of impending catastrophe in Australia's pleadings.

13. To further put matters in perspective, the sample size of Antarctic minke whales under JARPA II is less than 0.3 per cent — or three tenths of 1 per cent — of the relevant population. Even Australia's own expert witness, Professor Mangel, readily admitted that what he called a "very small take of whales" will not "in any way endanger this stock"[78].

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[73]International Whaling Commission, "A Brief Overview of the 'Status' of Whale Populations," available at: http://iwc.int/status#overview (last checked on 1 July 2013).

[74]International Whaling Commission, "The Status of Whales", http://archive.iwcoffice.org/conservation/status.htm (last checked on 1 July 2013).

[75]International Whaling Commission, "Whale Population Estimates," available at: http://iwc.int/estimate (last checked on 1 July 2013).

[76]*Ibid.*

[77]*Ibid.*, emphasis added.

[78]CR 2013/9, p. 63 (Mangel).

14. Japanese scientific research may further be situated in the broader context of global whaling. The IWC recognizes three categories of whaling: commercial, aboriginal subsistence, and special permit whaling. The illustrative map in tab 19-3 demonstrates in dark blue Norway and Iceland, both of which engage in commercial whaling in the North Atlantic.

15. The IWC Contracting States engaging in aboriginal subsistence whaling are indicated in purple. These are Denmark in Greenland, the Russian Federation, St. Vincent and the Grenadines, and the United States of America.

16. The map also indicates in red whaling nations that are not members of the IWC. This includes Canada, which withdrew from the IWC in the 1980s when the moratorium was adopted, as well as Indonesia. Such whaling activity is outside the scope of the Convention.

17. Finally, the map indicates in green, Japan, as the only country committing resources to special permit whaling. Japan withdrew its objection to the moratorium on commercial whaling in 1986.

18. Japan has complied with the moratorium despite a 2,000 year tradition of subsistence whaling. It has done so although the IWC anti-whaling block has opposed even small-type community-based whaling in Japan's own waters. These coastal communities have been anguished because they can no longer practise their ancestral traditions. The Australian Environment Minister once remarked in this regard that "many cultures and traditions . . . don't belong in a modern world"[79]. IWC resolutions, and even United Nations human rights declarations however, recognize an inextricable link between sustainable "customary resource use" and cultural survival[80]. For the anti-whaling moral crusaders, saving whales that are clearly not endangered outweighs saving foreign cultures and communities.

III. Australia's anti-whaling policy and the 1982 moratorium

19. I will now turn to the origins and characteristics of Australia's anti-whaling policy and the adoption of the 1982 moratorium. At its inception in 1946, the IWC consisted of a cartel of 15 whaling nations. Japan joined in 1951, at a time when, amidst the devastation of the war, whale

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[79]ECO, St. Kitts Vol. LVIII, No. 1 (16 June 2006), p. 4, available at: http://www.earthisland.org/immp/ECO2006/2006EcoNo1.pdf (last checked on 1 July 2013).

[80]IWC Resolution 2000-1.

meat helped prevent starvation. Despite the Convention's purpose, and despite improved management procedures in the 1970s, from the 1980s onwards, anti-whaling nations would take over the IWC, intent on banning all whaling, irrespective of science-based sustainability.

20. Article V (2) of the Convention specifically provides that Schedule catch quotas *"shall be based on scientific findings"*[81]. The right of Contracting Governments under Article VIII (1) to issue special whaling permits clearly contemplated the necessity of such "scientific findings" for sustainable commercial whaling[82].

21. In this regard, the Scientific Committee plays a pivotal role. It was established to provide independent scientific advice to the Commission. State representatives may participate in the Committee's deliberations. But unlike the Commission, the Committee is not a political organ. It is composed of some 150 of the world's leading scientists in the fields of ecology, marine biology, population dynamics, statistics, genetics, modelling, and other relevant disciplines. It is an independent expert body.

22. Given the politicization of science in the Commission, it should come as no surprise that the Commission and the Scientific Committee may express different views on scientific matters. A useful illustration, which may be found at tab 19-4 in your folders, is Professor Sands's considerable emphasis on IWC resolution 2003-2 calling for scientific research to be limited to "non-lethal methods only"[83]. The contrary view of the Scientific Committee is that despite the availability of non-lethal methods, "logistics and abundance of minke populations . . . precluded their successful application"[84]. The contrast between these two views is the contrast between science and politics.

23. Japan has been a leader in cetacean research since the establishment in 1941 of the Nakabe Foundation for Whale Science[85]. It has played a crucial role in the International Decade of Cetacean Research (IDCR) and the Southern Ocean Whale and Ecosystem Research (SOWER),

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[81]Article V (2), The International Convention for the Regulation of Whaling.

[82]Article VIII (1), The International Convention for the Regulation of Whaling.

[83]CR 2013/9, p. 29, para. 50 (Sands).

[84]SC/49/Rep. 1, Rep. Int. Whal. Commn. 48, 1998, p. 386.

[85]The Institute of Cetacean Research, "Overview and Purpose", available at: http://www.icrwhale.org/abouticr.html (last checked on 1 July 2013).

recognized as the largest whale research program in the Southern Ocean[86]. Survey cruises were conducted under IWC auspices for more than 30 years, covering 216,000 miles and 43,000 sightings. The Scientific Committee noted in 2009 that "[w]ithout the generous provision of vessels by the Government of Japan . . . the success of this programme would never have been possible"[87].

24. Australia's politicization of science at the IWC can best be understood through examining the origins of its anti-whaling policy. In the 1970s, the protest group Project Jonah led a highly publicized anti-whaling campaign against Australia's last whaling company, Cheynes Beach. In the 1977 federal elections, whaling became an important political issue, and in 1978, the Australian Government appointed Sir Sydney Frost to conduct an inquiry into whales and whaling. The resulting report was submitted to Parliament in February 1979 and Prime Minister Malcolm Fraser endorsed its recommendations on 4 April 1979. This report would have a fundamental and lasting impact on Australia's policy towards the IWC.

25. The Frost Report's findings were based on Australian "community attitudes to whaling"[88]. This included numerous petitions and opinion polls, demonstrating that "the killing of whales is wrong in the eyes of the Australian community" and that its continuation "would outrage a significant proportion of the population"[89].

26. One "ethical" argument was avoidance of "pain and suffering . . . irrespective of whether the being is a human or nonhuman animal"[90]. But Australia was the world's largest exporter of beef, much of it to Japan. A more appealing argument was that whales were unique. The Frost Report thus emphasized that whales are unlike other animals "such as cattle, sheep and pigs that are traditionally bred for slaughter" in abattoirs or "kangaroo species" and wild camels that are killed in the millions because they are "a nuisance to farmers"[91].

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[86]Elwen S. H., *et al* 2011. "Cetacean research in the southern African subregion: a review of previous studies and current knowledge", *African Journal of Marine Science 2011*, 33(3): pp. 469-493.

[87]http://iwc.int/sower (last checked on 1 July 2013).

[88]Whales and Whaling, Vol. 1: Report of the Independent Inquiry conducted by The Hon. Sir Sydney Frost, (Australian Government Publishing Service, Canberra 1978) [Frost Report], p. 183.

[89]*Id.*, p. 193.

[90]*Id.*

[91]*Id.*, p. 186.

27. In brief, the Frost Report was based on the premise that whaling was of no economic or cultural significance for Australians. In contrast to other animals sacrificed to Australia's giant meat industry, Australians had a special, emotional attachment to whales. As the Report explained, "reasonable Australian citizens would conclude that . . . it is wrong to kill an animal of such special significance as the whale"[92]. The Report even referred to whales as "sacred animals"[93].

28. It should thus come as no surprise that Australia is categorically opposed to lethal sampling. The Frost Report explicitly recognized that a whaling ban would result in the loss of scientific data. It concluded however that, "the loss of data for research . . . is not a consideration which can outweigh the matters of principle upon which the Inquiry's views are based"[94]. Opposition to lethal sampling was based on belief in the uniqueness of the whale. It had nothing to do with scientific merit.

29. In this light, the Frost Report recommended that "Australia should remain a member of the [IWC] which is the forum where its anti-whaling policy can best be pursued"[95]. In other words, Australia would remain in the IWC for the purpose of defeating its purpose.

30. The Frost Report's conclusions and recommendations were adopted unconditionally and became Government policy. On 4 April 1979, in his statement to the Australian House of Representatives, Prime Minister Fraser referred to whales as a "special and intelligent" species and indicated that: "The Government is to prohibit all whaling within the impending 200 mile Australian Fishing Zone, including . . . the Australian Antarctic Territory."[96] He further emphasized that "Australia should pursue a policy of opposition to whaling . . . both domestically and internationally through the International Whaling Convention"[97].

31. In July 1979, the Australian IWC Commissioner announced a policy shift from "the conservative utilisation of whale stocks to . . . banning [all] whaling". Pointing to the Frost Report,

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[92] *Id.*, p. 204.

[93] *Id.*, p. 189.

[94] *Id.*, p. 205.

[95] *Id.*

[96] "Ministerial Statement on Whales and Whaling, Australia, House of Representatives, 4 April 1979, available at: http://www.unimelb.edu.au/malcolmfraser/speeches/parliamentary/whaling.html (last checked on 1 July 2013).

[97] *Id.*

he explained that this new policy was based on the belief that "whales have the potential of high intelligence"[98].

32. It was obvious that Australia could not force whaling nations to adopt a new Anti-Whaling Convention. Thus, the most expedient strategy was to ban whaling by hijacking the IWC. This could be achieved by imposing a permanent ban disguised as a temporary moratorium. The Scientific Committee was of the view that some stocks could be sustainably harvested based on improved management procedures. But the anti-whaling nations pushed for a blanket moratorium. The Schedule amendment procedure could be used to achieve this because it was legally binding. But this required a three-quarters majority of those Contracting States voting.

33. Having failed to get sufficient votes between 1972 and 1974, some of the anti-whaling nations and non-governmental organizations initiated a takeover of the IWC through a sudden expansion of its membership. Greenpeace explains that from 1979 "more and more countries joined the IWC which had never been involved in whaling" and that "[t]his influx of membership allowed the IWC to adopt a series of conservation measures"[99]. One scholar observes that Greenpeace "added at least six new anti-whaling members from 1978 to 1982 through the paying of annual dues . . . [and] naming of commissioners to represent these countries, at an annual cost of more than $150,000"[100].

34. The illustration at tab 19-5 shows the progression of this takeover by anti-whaling nations. The first pie-chart shows IWC membership in 1970. It may be recalled that the 1970s coincided with both a significant decrease in commercial whaling and increased IWC regulation. Nations in favour of sustainable whaling are indicated in green and anti-whaling nations of course in red, together with numbers and percentages of each relative to the total membership. The second pie-chart shows the membership in 1979, when anti-whaling nations had a slight majority but not the three-quarters required for Schedule amendments. And finally, the third pie-chart shows the

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[98]Opening statement by the Australian Commissioner, 31st Annual Meeting of the IWC, London, July 1979; CMJ, Ann. 164.

[99]Greenpeace, "The International Whaling Commission considers reopening commercial whaling", available at: http://www.greenpeace.org/usa/en/campaigns/oceans/whale-defenders/iwc/ (last checked on 1 July 2013)

[100]Elizabeth de Sombre, "Distorting Global Governance: Membership, Voting, and the IWC", in Robert L. Friedheim (ed.), *Toward a sustainable whaling regime* (2001), p. 187.

membership in 1982, when anti-whaling nations had more than doubled, giving them the three-quarters majority required for imposing the moratorium.

35. In 1980, in view of this impending take-over, Canada protested that "a moratorium on all commercial whaling, not based on scientific grounds, is inconsistent with the express purposes and with Article V of the Convention"[101]. Canada withdrew its membership the following year, citing "the changing composition and operations of the IWC"[102].

36. In 1982, the commercial whaling moratorium was adopted by just one vote over the required majority as an amendment contained in paragraph 10 *(e)* of the Schedule. It provided that "catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero"[103]. It expressly stated however, that "[t]his provision will be kept under review, *based upon the best scientific advice*, and by 1990 at the latest the Commission will . . . consider modification of this provision and the establishment of other catch limits" (emphasis added). Some anti-whaling nations emphasized that this was not "a total ban" but just "a temporary interruption of the activity"[104]. But Australia had a different agenda.

37. Japan, Norway, Peru, and the Soviet Union, exercised their right to object against the moratorium under Article V (3) *(a)* of the Convention. Japan however, removed this objection, believing in good faith that the moratorium was a temporary measure that would be reviewed by 1990 "based upon the best scientific advice". Japan focused instead on contributing to scientific research, consistent with paragraph 10 *(e)* of the Schedule and the Scientific Committee's work. It resolved to collect scientific data for estimating biological parameters required for stock management of the Antarctic minke whale. Thus, scientific whaling in the context of the Schedule was for the specific purpose of resuming commercial whaling on a sustainable basis.

38. This however, would not come to pass for the 30 years that followed. Science-based sustainable whaling, the very purpose of the Convention, became increasingly politicized. For

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[101]Verbatim Record of the 32nd IWC Annual Meeting, pp. 59-61.

[102]Department of External Affairs Communique, "Canada withdraws from the International Whaling Convention and Commission" 26 June 1981.

[103]Schedule, The International Convention for the Regulation of Whaling, para. 10 *(e)*

[104]Verbatim Record, 34th IWC Annual Meeting, p. 82.

Australia, there was no room for compromise. The moratorium had to become a permanent ban. By extension, lethal sampling in support of sustainable whaling also had to stop. Both the purpose and the means of scientific whaling had to be defeated.

39. The former United States IWC Commissioner, Professor William Aron noted that the moratorium "marked a significant change: instead of trying to force the IWC to comply with the convention and support only sustainable whaling, the anti-whaling majority was trying to force the commission to flout it"[105].

IV. Australia's policy of defeating science-based sustainable whaling at the IWC

40. I will now turn to Australia's policy, post-moratorium, of defeating the resumption of science-based sustainable whaling. As I will explain, this policy of "no compromise" has brought the IWC to the brink of collapse.

41. Allow me first to address the claim in Australia's Memorial that: "[i]t was no coincidence that Japan only started to issue special permits . . . immediately after the moratorium on whaling for commercial purposes came into effect . . . in May 1987"[106]. Japan agrees with Australia that it was no coincidence. JARPA was necessary exactly because scientific data could no longer be acquired incidental to commercial whaling. The Scientific Committee had opposed a blanket moratorium in the 1970s because it would "bring about a reduction in the amount of research whereas there was a prime need for a substantial increase in research activity"[107]. It had called instead for "a decade of intensified research on cetaceans" in support of sustainable whaling. Even the Frost Report had noted that a ban on commercial whaling would result in "the loss of data for research"[108].

42. The Court may recall that on two occasions, Australia used this graph, at tab 19-6, in support of its case. But it only tells half the story. If it is contrasted with this graph, at tab 19-7, of

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[105]William Aron, William Burke, and Milton Freeman, "Flouting the Convention", *The Atlantic* (May 1999).

[106]MA, para. 1.4.

[107]Chairman's Report of the 24th IWC Annual Meeting in 1972, pp. 5-6.

[108]Frost Report, Vol. 1, p. 205.

the pre-moratorium catch, it starkly demonstrates the sequence and difference in scale, between commercial and scientific whaling. Australia's conspiracy theory is wholly without merit.

43. But what is a truly remarkable distortion of the facts is Australia's statement in these hearings that "Japan does not like the RMP" whereas Australia endorses it as "a robust and widely supported management procedure"[109]. Australia completely ignores its long-standing and explicit policy of blocking the RMP's adoption. Its implementation is tantamount to lifting the moratorium, which Australia totally opposes. Assuming it is not merely a litigation tactic, Japan welcomes Australia's new policy.

44. The RMP was developed over a decade from 1982 to its unanimous adoption by the Scientific Committee in 1992. The Chair of the Commission later described it as: "the most advanced method for the conservation and management of a natural resource", concluding that it would allow "catches of some stocks of minke whales"[110]. However, when it came before the IWC in 1992 and 1993, it was squarely rejected by the IWC anti-whaling majority, including Australia.

45. The whaling nations that had complied in good faith with the moratorium felt betrayed. In 1992, Iceland withdrew from the IWC. Its Fisheries Minister explained that while "the IWC was set up both to conserve and exploit whales . . . in recent years it has switched solely to conserving them. This change gives Iceland the right to leave"[111]. Iceland would re-join the IWC ten years later. But it would do so with a reservation to the moratorium on commercial whaling. Furthermore, having realized in 1992 that the anti-whaling majority would not allow the IWC to manage sustainable whaling, Iceland joined Norway, Greenland, and the Faroe Islands, to establish a parallel regional organization: the North Atlantic Marine Mammal Commission, or NAMMCO.

46. The fallout escalated further. A year after Iceland's withdrawal, in 1993, the Chair of the Scientific Committee, Professor Philip Hammond of the United Kingdom, resigned in protest. He bluntly asked: "what is the point of having a Scientific Committee if its unanimous

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[109]CR 2013/9, p. 22, para. 30 (Sands).

[110]Extract from the Chair's Proposals for a way forward on the RMS — Preface to Chair's Proposals: Why an RMS is needed. http://iwc.int/cache/downloads/tihtvmq9n6880gco0okssgsk/56-26%20Preface.pdf (last checked on 1 July 2013).

[111]"Iceland goes it alone on whaling", *New Scientist* (15 Feb. 1992): http://www.newscientist.com/article/mg13318081.300-iceland-goes-it-alone-on-whaling-.html (last checked on 1 July 2013).

recommendations on a matter of primary importance are treated with such contempt?"[112] His resignation symbolized the open confrontation between science and politics at the IWC.

47. In 1994, the anti-whaling nations finally relented and allowed the Commission to accept the RMP but with qualifications that made the seeming compromise an illusion. In 1992, Australia had co-sponsored a resolution calling for "additional steps" before the RMP's implementation[113]. This so-called Revised Management Scheme or RMS imposed onerous requirements[114]. The resolution demanded that until there is agreement on all its aspects, "the Catch Limit Algorithm should not be implemented". In 1997, Australia suddenly reversed course, stating that "its position is one of seeking an end to whaling, and [that] it will not support the RMS or engage in the debate"[115]. Between the adoption of the RMP in 1994 and 2006, the RMS was discussed at no less than 52 meetings. Although Australia was absent from most of this scientific work, it was active in deprecating it before the Commission.

48. Of course, Australia's withdrawal from the RMS deliberations in 1997 was not a coincidence. It was in May of that year that a National Task Force on Whaling established by the Government had issued its much publicized Report entitled: "A Universal Metaphor: Australia's Opposition to Commercial Whaling"[116]. Building on the Frost Report, its premise was that "there is no need for whales to be killed to provide food" based on the belief that "whaling is inherently cruel and inhumane"[117].

49. The Task Force had recommended that: "Australia should oppose and vote against any proposal to adopt the Revised Management Scheme (RMS) by resolution or to incorporate the RMS or Revised Management Procedure (RMP) into the Schedule."[118] It also called on Australia to seek a prohibition against "special permit (scientific) whaling"[119]. Like the 1979 Frost Report,

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[112]CMJ, para. 3.82.

[113]IWC Resolution 1996-6.

[114]IWC Resolution 1992-3.

[115]CMJ, Ann. 57; Chairman's Report of the 49th Annual Meeting, p. 36.

[116]A Universal Metaphor: Australia's Opposition to Commercial Whaling: Report of the National Task Force on Whaling, (Canberra: Environment Australia, 1997) http://155.187.3.82/coasts/publications/whaling/index.html (last checked on 1 July 2013).

[117]*Id.*, p. vii.

[118]*Ibid.*, p. xi.

[119]*Ibid.*, p. x.

the 1997 Task Force Report was adopted as policy by the Government. It was thus no surprise that Australia would undermine both the RMP and the RMS. Perhaps this brief history explains why Japan was astonished at Australia's sudden endorsement of the RMP at this hearing. If this reflects a genuine change in policy, it is certainly welcomed by Japan.

50. By 2004, ten years after the adoption of the RMP, and more than 20 years after the adoption of the moratorium, the IWC Chair, Henrik Fischer of Denmark, finally presented an RMS "package" to the Commission. He explained that its adoption "is essential for the credibility of the IWC"[120]. His plea for compromise fell on deaf ears. Having ignored the RMS deliberations since 1997, Australia suddenly reappeared in 2004, only to state categorically that it "will not endorse a Revised Management Scheme should one be agreed"[121]. Australian Environment Minister, Senator Ian Campbell, made it clear that even defeating the RMS was not enough. In 2005, just before the launching of JARPA II, he stated that Australia wanted to close the "*loophole* in the [Convention] which allows whales to be killed for 'science'"[122]. Thus, while admitting that Japan was allowed to pursue scientific whaling, Minister Campbell made clear Australia's strong objection to "all forms", "all forms of scientific and commercial whaling"[123].

51. Amidst this assault on Japan's scientific research, the Scientific Committee's exasperated Chair, Professor Judy Zeh of the United States, openly complained that "she was disturbed by the way the Scientific Committee's deliberations were misrepresented" by some IWC delegations[124].

Australian intransigence and IWC's possible collapse

52. Australia's intransigence and politicization of science has brought the IWC to the brink of collapse. Australia has made much of the IWC resolutions adopted by the anti-whaling

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[120]Extract from the Chair's Proposals for a way forward on the RMS — Preface to Chair's Proposals: Why an RMS is needed http://iwc.int/cache/downloads/tihtvmq9n6880gco0okssgsk/56-26%20Preface.pdf, last checked on 1 July 2013.

[121]"Responses to the questionnaire related to the 'call for comments/positions on key issues in relation to the Chair's proposals for a way forward on the RMS'", IWC/N04/RSWG4, p. 6.

[122]Australian Antarctic Division, "Australia Appeals to Japan to Reconsider its 'Scientific' Whale Slaughter," Press Release, 8 Nov. 2005, available at: http://www.antarctica.gov.au/media/news/2005/australia-appeals-to-japan-to-reconsider-its-scientific-whale-slaughter, last checked on 1 July 2013; emphasis added.

[123]Australian Antarctic Division, "Australia taking strong action to protect whales", available at: http://www.antarctica.gov.au/media/news/2006/australia-taking-strong-action-to-protect-whales, last checked on 1 July 2013.

[124]CMJ, Ann. 60, Chairman's Report of the 52nd Annual Meeting, p. 44.

majority. But it omits to mention those adopted when the anti-whaling block was a minority amidst the shifting sands of IWC politics. For instance, the 2006 St. Kitts and Nevis Declaration[125] stated rather bluntly that "the IWC can be saved from collapse" only by adopting the RMP. It called for "normalising the functions of the IWC", "respect for cultural diversity and traditions of coastal peoples", and "the need for science-based policy and rulemaking".

53. In 2007, it was agreed to discuss "The Future of the IWC" with a view to achieving a consensus solution. In 2009, a Support Group was established as part of a confidence-building process aimed at adopting a consensus solution. Its distinguished Chair was Sir Geoffrey Palmer, IWC Commissioner and former Prime Minister of New Zealand, and its members included Australia, Japan, Antigua and Barbuda, Brazil, Cameroon, Germany, Iceland, Mexico, St. Kitts and Nevis, Sweden and the United States.

54. On 20 February 2010, just as a consensus proposal was within reach, Australian Prime Minister Rudd warned visiting Japanese Foreign Minister Okada that if special permit whaling continued, Australia would take Japan to the Court. Given the timing, it was difficult not to conclude that this threat was intended to kill any hope of an IWC consensus.

55. Australia filed its Application on 31 May 2010, 20 days before the IWC's 2010 Annual Meeting in Agadir, Morocco. Some days earlier, on 11 May 2010, the IWC Chair, Cristian Maquieira of Chile and the Vice-Chair, Anthony Liverpool of Antigua and Barbuda, had presented a "Proposed Consensus Decision to Improve the Conservation of Whales"[126]. They had also issued a Press Release[127] with the rather explicit title of: "If you really care about whale conservation — give our proposal a fair reading". In a desperate plea, they warned of "the possible collapse of the IWC" and emphasized that the confrontational "*status quo* is not an option for an effective multilateral organisation".

56. The consensus proposal however, was dead on arrival. Almost immediately after it was circulated by the IWC Chair, the new Australian Environment Minister Peter Garrett said that "it

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[125]CMJ, Ann. 60, "St. Kitts and Nevis Declaration", Resolution 2006-1, Ann. C, Chair's Report of the 58th Annual Meeting, *Annual Report of the International Whaling Commission 2006*, p. 68.

[126]"Proposed Consensus Decision to Improve the Conservation of Whales", available at: http://iwc.int/index.php?cID=752&cType=document, last checked on 1 July 2013.

[127]Revised Press Release: IWC Chair and Vice-Chair; "If you really care about whale conservation — give our proposal a fair reading", http://iwc.int/index.php?cID=50&cType=document&download=1, last checked on 1 July 2013.

was now time to close the door on the Proposed Consensus Decision"[128]. He rejected the compromise because it failed to close what he described as the Article VIII "loophole" and demanded that Japan "immediate[ly] halt" scientific whaling[129]. Amidst the ruins of his hard work, the Chair of the Support Group, Sir Geoffrey Palmer of New Zealand, "paid tribute" to the United States "for its . . . leadership" and I quote, "to Japan for their huge commitment and their willingness for compromise"[130]. It was against this backdrop that Australia came before the Court in 2010, accusing Japan of bad faith.

57. It is opportune to say a word here about "collective regulation", which is a theme in both Australia and New Zealand's pleadings. Japan accepts, of course, the obligations that flow from membership in a treaty-based multilateral organization. The important question is what those obligations are. The IWC is empowered to decide on certain issues, just as Contracting States are permitted, by Article V (3), to opt out of the binding effect of such decisions. Yes, Contracting States collectively consider what steps are appropriate for the proper conservation and the orderly development of the whaling industry. But this is not a system in which the majority is empowered to impose its will upon the minority, not least if the majority is intent on defeating the fundamental object and purpose of the treaty. It would be as if an anti-navigation majority took over the International Maritime Organization and banned all navigation on the seas.

58. Mr. President, Members of the Court, the main victim of Australia's "no compromise" "zero tolerance" policy has been the IWC. The attempt to impose what the Agent described as Australia's "total" opposition to science-based sustainable commercial whaling has alienated whaling nations and undermined future regulation. A notable example was the anti-whaling block's rejection in 2012 of Denmark's request to slightly adjust Greenland's aboriginal subsistence catch[131]. In response, the exasperated Inuit people of Greenland decided to set their

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[128]Peter Garrett, "Whales worth more alive than dead", available at: http://www.theage.com.au/opinion/politics/whales-worth--more-alive-than-dead-20100428-trc1.html, last checked on 1 July 2013.

[129]*Ibid.*

[130]IWC Chair's Report of the 62nd Annual Meeting, p. 8.

[131]Chair's Report of the 64th Annual meeting 2-6 July 2012, p. 30.

own quota in defiance of the IWC[132]. They did so with the support of Denmark. They took their business elsewhere, to a sustainable whaling organization that functions, to the North Atlantic Marine Mammal Commission, NAMMCO, that, as I explained earlier, was established in 1992 when anti-whaling nations sabotaged the RMP and Iceland withdrew from the IWC. The report of a 2006 workshop in Denmark explains why these whaling communities are creating an alternative organization. In the words of the participants:

> "NAMMCO is a totally different organisation with a very different attitude and debate than what we have experienced in the International Whaling Commission (IWC). The tendency in IWC has been that the hunter in some quarters is looked upon as the 'enemy', whereas in NAMMCO the hunter has always been an important co-player."[133]

59. It may be asked whether Australia is "Saving the Whales" by bringing the IWC to the brink of collapse? Even the former United States IWC Commissioner spoke of the "intransigence of anti-whaling nations" that has degenerated the IWC into what he called "a science-free forum for eco-posturing". He warned that in a world with far more serious challenges, "the example of an international environmental agency politicizing itself into irrelevance is alarming"[134].

60. Surely, other nations may look at Australia's IWC campaign against Japan and wonder if the treaty that they sign in good faith today will come back to haunt them tomorrow. Surely, even more whaling nations will consider withdrawing from an increasingly dysfunctional organization. Australia can best save the whales by saving the IWC. The choice is not between sustainable whaling and no whaling at all. The choice is between sustainable whaling and no regulation at all.

V. The Scientific Committee's view on the scientific merit of JARPA

61. I now turn to the fundamental question before the Court; namely, whether Japan is acting in bad faith when it asserts that JARPA has a scientific purpose. In this regard, we agree with Professor Sands that in line with its jurisprudence, the Court should draw on "findings of fact

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[132]Government of Greenland, "Greenland Quotas for Big Whales", available at: http://naalakkersuisut.gl/en/Naalakkersuisut/Press-Statements/2013/01/Whales, last checked on 1 July 2013.

[133]Report of the NAMMCO Workshop to Address the Problems of "Struck and Lost" in Seal, Walrus and Whale Hunting, North Atlantic House, Copenhagen, Denmark, 14-16 Nov. 2006, p. 12: http://www.nammco.no/webcronize/images/Nammco/818.pdf, last checked on 1 July 2013.

[134]William Aron, William Burke, and Milton Freeman, "Flouting the Convention", *The Atlantic*, May 1999.

made by third bodies, independent third bodies, third parties with no direct interest in the case"[135]. We agree further with him that the Scientific Committee is exactly such an "independent third body". It is after all established for the specific purpose of providing independent scientific advice to the IWC. Where we disagree is his assertion that the Scientific Committee, and I quote, "has never — never — offered any positive assessment of either program's contribution to the conservation and management of whales"[136].

62. Mr. President, Members of the Court, English is not my mother tongue, but it would seem that "never" is a rather categorical word. "Never say never" Charles Dickens wrote, especially if an assertion is patently false. Professor Hamamoto will address the Scientific Committee's findings at greater length. For present purposes, I will provide just a few illustrative examples of what are clearly positive assessments of JARPA's scientific merit, shown at tab 19-8.

63. These are some conclusions from the 1997 Mid-Term Review:

— "JARPA . . . has provided substantial improvement in the understanding of stock structure."[137]

— "JARPA data . . . would allow estimation of the biological parameters with reasonable levels of precision."[138]

— "There was general agreement that the data presented on stock structure, particularly the new genetic data, were important contributions to the objectives of JARPA and stock management."[139]

64. These are some conclusions from the 2006 Review:

— "[T]he JARPA dataset provides a valuable resource."[140]

— "The results of analyses of JARPA data could be used . . . to increase the allowed catch of minke whales in the Southern Hemisphere, without increasing depletion risk."[141]

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[135]CR 2013/8, p. 62, para. 16 (Sands).

[136]CR 2013/8, p. 63, para. 19 (Sands).

[137]CMJ, para. 4.159; "Report of the Scientific Committee", *Rep.int.Whal.Commn* 48, 1998, p. 103.

[138]*Ibid.*

[139]CMJ, para. 4.34; SC/49/Rep1, 3.5.

[140]CMJ, para. 4.132; "Report of the Intersessional Workshop to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic", SC/59/O1, J. Cetacean Res. Manage. pp 411-445, 5.5.

[141]CMJ, para. 4.161; *ibid.*, 8.1.

— "considerable progress has been made in addressing the issue of stock structure"[142].

— "[T]he JARPA dataset provides a valuable resource to allow investigation of some aspects of the role of whales within the marine ecosystem."[143]

65. There is yet more:

— "[JARPA] has also resulted in a number of publications in the IWC Journals and in other international peer-reviewed journals."

— "[T]here have been 22 articles in *Rep. Int. Whal Commn* and *J. Cetacean Res Manage.*, and 58 articles in English language journals."

— "[A] total of 182 scientific documents based on JARPA data have been presented to the IWC Scientific Committee meetings."[144]

66. And if this is not enough, at tab 19-9, here is a statement of the Scientific Committee Chair from 2008:

— "The Japanese input into cetacean research in the Antarctic is significant, and I would say crucial for the Scientific Committee."[145]

67. Against this record, it is difficult to understand how Professor Sands could stand before this Court and assert that there has "never — never been any positive assessment" of JARPA by an independent body. Indeed, the Scientific Committee reports are fatal to Australia's contention that JARPA has had "no or negligible scientific results"[146].

68. It should be noted further that JARPA II will be reviewed by the Scientific Committee next year, in 2014, under its enhanced Annex P procedure, unanimously endorsed by the IWC. Perhaps Australia's haste in coming before the Court is to try and pre-empt yet another positive review.

69. It is telling that even staunchly anti-whaling IWC members recognize the scientific merit of JARPA. A notable example is United States Ambassador David Balton, who testified before a

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[142]CMJ, para. 4.53; *ibid.*, 8.1.1.

[143]CMJ, para. 4.132; *ibid.*, 5.5.

[144]*Ibid.*

[145]Arne Bjørge, President of the Scientific Committee at the time of this statement, 2008, *quoted in* CMJ, para. 4.166.

[146]MA, para. 5.132.

Congressional committee on 6 May 2010 that, and I quote: "Japan does perform scientific research on the whales they take, and probably have the best whale science as a result."[147]

70. Instead of reliance on these unambiguous scientific reviews, Australia's oral pleadings resembled an introductory seminar on scientific methodology. There were musings on hypotheses about hypotheses, a quaint book on scientific masonry from 1905, an NGO-sponsored open letter in the New York Times signed by environmental activists, and two expert witnesses whose authority must be weighed against that of some 150 independent experts comprising the Scientific Committee.

71. Mr. President, Members of the Court. We are not here to determine if JARPA should win the Nobel Prize for science. We are here only to determine if it falls within the Article VIII exception. We submit that no third party independent body is better situated than the Scientific Committee to assess JARPA's scientific merit. We therefore invite the Court, consistent with the line of cases referred to by Professor Sands — *Armed Activities on the Territory of the Congo*, *Pulp Mills*, and the *Genocide Convention* case — to rely substantially on the factual findings of the Scientific Committee, as reflected in its official records. Those findings, we submit, leave no doubt, no doubt whatsoever, as to the scientific merit of Japan's research program.

VI. Australia's case is about neither science nor the Whaling Convention

72. Mr. President, Members of the Court, Australia's case can best be described as "science fiction". It is perplexing to understand why it would bring such a manifestly untenable case against Japan, a case that can easily be refuted by the Scientific Committee's official record.

73. It cannot go unnoticed in this regard that Professor Crawford went to great lengths to distance Australia from Sea Shepherd's violent actions. He explained that "it is of no relevance to the present case" and that "[t]he real reason for the Japanese Government's decision to reduce target catches is . . . the sharp decrease in domestic demand for whale meat in Japan"[148]. Of course,

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[147]U.S. Leadership in the International Whaling Commission and H.R. 2455, the International Whale Conservation and Protection Act of 2009: Joint Hearing before the Subcommittee on International Organizations, Human Rights and Oversight and the Subcommittee on Asia, the Pacific and the Global Environment of the Committee Foreign Affairs, House of Representatives, One Hundred Eleventh Congress, Second Session, May 6, 2010, Serial No. 111–95, p. 29.

[148]CR 2013/11, p. 20, para. 68 (Crawford).

once again, the Scientific Committee would disagree. Its 2013 Report recognized that "research activities were interrupted several times by the Sea Shepherd, which directed violent sabotage activities against Japanese research vessels"[149]. The so-called "business model" argument is also easily refuted as Professor Iwasawa will explain in his presentation. The Japanese chef in the Tokyo restaurant would tell Professor Crawford that under Article VIII (2) of the Convention, Japan is obligated to sell the meat rather than dumping it into the sea. The Australian tourist seated in the next table would add that his Government uses the same self-financing model for its fisheries scientific research. Leaving these issues aside, the insistence that Sea Shepherd is irrelevant to this case is rather intriguing.

74. Sea Shepherd's violent actions have been repeatedly condemned by the IWC and the International Maritime Organization. The United States Federal Bureau of Investigation has labelled it as "eco-terrorism"[150]. On 25 February 2013, the United States Court of Appeal for the Ninth Circuit held that the Sea Shepherd attacks against Japanese research vessels are, and I quote, "the very embodiment of piracy" under international law[151]. There is currently an Interpol Red Notice against its notorious founder, Paul Watson, for multiple criminal charges in different countries[152].

75. A quick glance at the Sea Shepherd website demonstrates what is a private army used to wage war against Japanese research vessels on the high seas, using Australia as a base. The image before you, and at tab 19-10, is entitled "Operation Zero Tolerance" and refers to a fleet of "four ships", "drones", "helicopters", and "new tactics". A little below you will see that this year's "Operation Zero Tolerance" was launched from the Australian port of Williamstown, using ships registered in Australia and the Netherlands. This sample photo, at tab 19-11, demonstrates one such ship, named after the Hollywood celebrity Bob Barker, attacking Japanese research vessels in February of this year in Antarctic waters.

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[149]SC, 2013, para. 17.2.2; JARPA II, p. 79.

[150]Federal Bureau of Investigations, "The Threat of Eco-Tourism", available at: http://www.fbi.gov/news/testimony/the-threat-of-eco-terrorism, last checked on 1 July 2013.

[151]*Institute of Cetacean Research et al* v *Sea Shepherd Conservation Society, Opinion*, US Court of Appeals for the Ninth Circuit, 25 Feb. 2013, p. 6, available at: http://cdn.ca9.uscourts.gov/datastore/general/2013/02/25/1235266.pdf, last checked on 1 July 2013.

[152]"INTERPOL Red Notice issued for Paul Watson at Japan's request", available at: http://www.interpol.int/News-and-media/News-media-releases/2012/N20120914, last checked on 1 July 2013.

tactics . . ."[156]. He had also "urged thousands of Australians to vote for [Prime Minister] Rudd" in the August 2010 federal elections because he "promised to take Japan to court"[157]. Indeed, on 29 April 2010, just a month before the Application was filed, an opinion poll had asked whether "the Rudd government has done enough to stop commercial whaling?" Eighty-seven per cent responded "no" and agreed that "it's time for the government to finally take international legal action"[158].

80. Now Australia's motives for bringing this case may or may not be legally relevant. But it cannot go unnoticed that prior to this case, senior Australian officials openly admitted that Japan's scientific whaling was within its rights under Article VIII. When asked about potential litigation in 2006, the Environment Minister of the previous Government, Senator Ian Campbell, endorsed the view of New Zealand's IWC Commissioner, Sir Geoffrey Palmer, as follows — and I quote here from the Australian Antarctic Division website, which is at tab 19-14:

> "We have been looking at the legal theories that are available against the Japanese for some months . . . and there is no legal theory that is available that can prevent, in our view, the Japanese from doing what they are doing."[159]

81. Minister Campbell and Sir Geoffrey were by no means alone in this assessment. The following year, in August 2007, the Australian Minister of Defence, Dr. Brendan Nelson, stated in the House of Representatives that: "although we find it objectionable, scientific whaling is permissible under the Whaling Convention"[160]. Perhaps it was put best by Australia's former IWC Commissioner, Peter Bridgewater, who wrote in a 2012 Opinion Editorial that: "[i]t may not feel good but the Japanese are largely right"[161].

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[156]"Sea Shepherd Urges Australia to Take Legal Action against Japanese Whalers", available at: http://www.seashepherd.it/news-and-media/news-090120-3.html (last checked on 1 July 2013).

[157]Paul Watson, "The Sea Shepherd Dilemma Down Under", available at: http://www.seashepherd.org/news-and-media/2009/10/06/the-sea-shepherd-dilemma-down-under-293 (last checked on 1 July 2013).

[158]Peter Garrett, "Whales worth more alive than dead", available at: http://www.theage.com.au/opinion/politics/whales-worth-more-alive-than-dead-20100428-trc1.html (last checked on 1 July 2013).

[159]http://www.antarctica.gov.au/media/news/2006/australia-taking-strong-action-to-protect-whales (last checked on 1 July 2013).

[160]House of Representatives, Question No. 5013, 7 August 2007, p. 167.

[161]Peter Bridgewater, "Australia's anti-whaling lobby is missing the point", 2 March 2012, available at: http://www.smh.com.au/opinion/australias-antiwhaling-lobby-is-missing-the-point-20120301-1u5nr.html?skin=text-only (last checked on 1 July 2013).

76. Now I would imagine that Sea Shepherd would be very disappointed at Professor Crawford's suggestion that they are of no relevance to Japan's reduced catch this year. As shown at tab 19-12, their website triumphantly states: "[t]his was Japan's most disastrous whaling season ever. Congratulations to Sea Shepherd Australia for leading such a successful Antarctic whaling campaign."[153] Just below you will see a red tab inviting supporters to "Donate Now". Minimizing Sea Shepherd's relevance as Professor Crawford has done is clearly unhelpful for their fund-raising campaign.

77. It would seem that Sea Shepherd's influence in Australia is considerable. In a 22 May 2012 statement, former Environment Minister, Ian Campbell, hailed the fugitive Mr. Watson, as "one of the world's greatest environmental activists". Remarkably, as indicated at tab 19-13, he admitted on the Sea Shepherd website that: "I was proud to support Captain Watson when I was a Cabinet Minister in the national government of Australia"[154]. Senator Campbell is currently on the Advisory Board of Sea Shepherd, together with other influential Australian political figures. It would seem that Australia has outsourced Antarctic maritime enforcement to Sea Shepherd.

78. This brings me to Sea Shepherd's broader relevance to this case. On the first day of this hearing, a Sea Shepherd representative spoke to journalists outside this courtroom. He proudly claimed that the opening of this case "was a vindication of the group's controversial tactics" in attacking Japanese ships[155].

79. In 2009, Mr. Watson had made what he called "an offer" to the Australian Government "to take legal action against the Japanese whalers". He had stated publicly that "[i]f Australia or New Zealand . . . can agree to take legal action, Sea Shepherd will agree to back off our aggressive

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[153]"Sea Shepherd Commentary on the Cruise Report of the Japanese Whale Research Program Under Special Permit in the Antarctic — Second Phase (JARPA II) in 2012/2013", available at: http://www.seashepherd.org.au/commentary-and-editorials/2013/06/13/sea-shepherd-views-on-the-cruise-report-of-the-japanese-whale-research-program-613 (last checked on 1 July 2013).

[154]"Letter From the Former Minister of the Environment of Australia Senator Ian Campbell to the President and Environment Minister of Costa Rica", available at: http://www.seashepherd.org/news-and-media/2012/05/22/letter-from-the-former-minister-of-the-environment-of-australia-senator-ian-campbell-1383 (last checked on 1 July 2013).

[155]Mike Corder, "Japanese Whaling Ban Urged By Australia in Highest U.N. Court", available at: http://www.huffingtonpost.com/2013/06/26/japanese-whaling-ban_n_3502842.html?utm_hp_ref=green (last checked on 1 July 2013).

82. So, it may be asked, what new theory emerged from one Government to the next to justify a case against Japan? As I have explained, this case is plainly *not* about the scientific merit of JARPA. It is about an emotional anti-whaling moral crusade that in the name of "zero tolerance", tolerates Sea Shepherd's violent extremism, the politicization of science, the collapse of the IWC, and now before this Court, baseless accusations of bad faith against Japan.

83. Mr. President, Members of the Court, Australia's position on lethal sampling is absolutely clear. Its IWC Commissioner has stated in categorical terms that Australia is "opposed to any research that involves the killing of whales"[162]. Its Agent in this proceeding has said, just beyond the confines of this hall, that: "You don't even need to kill one whale to conduct scientific research."[163] This position cannot possibly be reconciled with the plain terms of Article VIII of the Convention.

84. Mr. President, Members of the Court, the days of civilizing missions and moral crusades are over. In a world with diverse civilizations and traditions, international law cannot become an instrument for imposing the cultural preference of some at the expense of others. Whether JARPA II offends Australian public opinion or not, it is clearly within Japan's rights under Article VIII of the Convention.

85. That concludes my presentation and Japan's pleadings for today. I thank the Court for its patience and indulgence.

The PRESIDENT: Thank you, Professor Akhavan. However, today's sitting does not conclude with your presentation. Two Members of the Court have questions to put to Australia or Japan. To that end, I shall now give the floor to Judge Greenwood. Judge Greenwood, if you please.

Judge GREENWOOD: Thank you very much, Mr. President. Mr. President, my question is for Australia but also for New Zealand.

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[162]Verbatim Records of the IWC, 1989, p. 131.

[163]Associated Press, "Australia to World Court: Ban Japanese Whaling", 26 June 2013, available at: http://bigstory.ap.org/article/australia-world-court-ban-japanese-whaling (last checked on 1 July 2013).

"What is the precise legal basis on which it is said that Japan has a legal obligation arising from the recommendations contained in resolutions of the IWC, and what is the precise content of that obligation?"

Mr. President, obviously I do not expect an answer from Australia until its second round presentation, but I ask the question now so that New Zealand has a chance to give its observations and also, of course, I look forward to any comment Japan wishes to make in their second round.

The PRESIDENT: Thank you, Judge Greenwood. I shall now give the floor to Judge Donoghue. Judge Donoghue, you have the floor.

Judge DONOGHUE: Thank you, Mr. President. I have two related questions and they are both addressed to Japan. My first question is:

"What analysis of the feasibility of non-lethal methods did Japan conduct prior to the setting of sample sizes for each year of JARPA II?"

And my second question is:

"How did any such analysis bear on those sample sizes?"

Thank you, Mr. President.

The PRESIDENT: Thank you. Japan is invited to reply orally to the question if possible during the first round of oral argument, and Australia will be free during its second round of oral argument to comment on the reply of Japan. Should Japan require more time to prepare the answer to the question, and answers the question during the second round of oral argument, then the Court will determine the procedure for Australia having the opportunity to comment.

As there is no more business for today, this meeting is closed and the Court will meet again tomorrow on Wednesday 3 July at 10.00 a.m. to hear the continuation of Japan's first round of oral argument. The sitting is closed.

The Court rose at 6 p.m.