

CR 2013/14

International Court  
of Justice

LA HAYE

Cour internationale  
de Justice

THE HAGUE

YEAR 2013

*Public sitting*

*held on Wednesday 3 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)*

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VERBATIM RECORD

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ANNÉE 2013

*Audience publique*

*tenue le mercredi 3 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))*

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COMPTE RENDU

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

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*Présents :* M. Tomka, président  
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 open. This afternoon the Court will hear the examination of the expert called by Japan. The procedure for this examination is the same as that for the examination of Australia's experts last week so I will not repeat it. I now give the floor to the Agent of Japan. You have the floor, Sir.

Mr. TSURUOKA: Thank you, Mr. President. Mr. President, Japan calls as its expert Professor Lars Walløe, Professor Emeritus of the University of Oslo and the President of the Academia Europaea. Professor Walløe will be examined by Professor Vaughan Lowe. Thank you, Mr. President.

The PRESIDENT: Thank you, Mr. Agent. Mr. Walløe may now take his place at the rostrum. Good afternoon and welcome Mr. Walløe. I call upon you to make the solemn declaration for experts as set down in Article 64, subparagraph (b), of the Rules of Court. Please, you have the floor.

Mr. WALLØE: Thank you, I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth and that my statement will be in accordance with my sincere belief.

The PRESIDENT: Thank you very much and I now give the floor to Professor Lowe to begin the examination of Mr. Walløe. You have the floor, Sir.

Mr. LOWE: Thank you, Mr. President. First of all I thank you for coming to give us your evidence. You are Japan's solitary expert witness. Can you confirm that you wrote the expert report that is in front of you at the end of the day bundle and that you stand by it, please? We can hand you a copy of Japan's day bundle here.

Mr. WALLØE: Yes, I can confirm that this is my expert statement.

Mr. LOWE: Thank you. Your C.V. is attached to the report. Will you please explain briefly to the Court what the Academia Europaea is, of which you are currently President?

Mr. WALLØE: Academia Europaea is a pan-European academy of science and letters. It is 25 years old. It was established on the initiative of the European Commission at the time, but includes also countries like Switzerland and Norway. The idea was that Europe needed an academy independent of the European political institutions, a kind of academy like we have in most European countries, but a pan-European academy.

Mr. LOWE: Thank you. Would you please explain briefly your experience in the International Whaling Commission and its Scientific Committee?

Mr. WALLØE: My experience with whales and whaling in Norway started in 1986, when the pressure was put on Norway, like on Japan and Iceland, to give up its objections to the moratorium and where I was called upon to examine first the Norwegian research and then the statements made by scientists in the Scientific Committee. I participated in the Scientific Committee, first briefly in a meeting without being part of any delegation but then, from 1988, as a member of the Scientific Committee and then from the next year also as part of the Norwegian delegation to the Commission.

Mr. LOWE: Thank you. Your C.V. does not refer explicitly to two major projects that you undertook at the invitation of the Ms Brundtland, who became Prime Minister of Norway. Will you please tell the Court briefly what they are?

Mr. WALLØE: I was head of the Norwegian programme on acid rain, which was a conflict at that time between Norway/Sweden on one side and the UK and, at that time, West Germany on the other side, on the reason for changes especially in freshwater fish and the acidification of rivers in Norway and Sweden. So I was head of that Norwegian research programme which ended in 1980. In this time Ms Brundtland, who was and still is a friend of mine — that was the reason I was asked — I supervised what was going to be her PhD. at the time, never finished because she became a politician. But then I was also engaged by the following research programme, which was a joint programme between the Royal Society in the UK, the Swedish Academy of Science and the Norwegian Academy of Science and Letters, started theoretically or formally in 1984 but really started in 1986.

Mr. LOWE: And the other work you did, the drafting?

Mr. WALLØE: I was also, like Ms Brundtland, involved in the work leading to the so-called Brundtland Commission, the book of our common future, so I was part of a small Norwegian editorial group established by Ms Brundtland at the time. The other member was Johan Jørgen Holst, he was a social scientist: he later became Foreign Minister of Norway, now dead.

Mr. LOWE: Thank you. I know that I should ask you to speak slowly and I should remind myself not to intervene as soon as you have answered so as to leave a pause for the translators to make the translation. In accordance with the Court's letter of 21 June, you have prepared a short statement of your evidence. Would you please make that statement to the Court?

Mr. WALLØE: Sorry, I am not sure I understand the question.

Mr. LOWE: In accordance with the Court's letter of 21 June, which related to the manner in which expert evidence would be handled, you have prepared a statement of your evidence. Would you give that statement, please?

Mr. WALLØE: Are you referring to the introduction?

Mr. LOWE: Yes.

Mr. WALLØE: The paragraph is on the third page of my statement.

"I have been asked by the Government of Japan to prepare an independent report providing a scientific review of certain issues raised by the Memorial of the Government of Australia dated 9 May 2011 in the case *Whaling in the Antarctic (Australia v. Japan)* before the International Court of Justice. I was in particular asked to consider certain questions relating to Appendix 2 of the Memorial. This contains an independent report by Dr. Marc Mangel of the University of California Santa Cruz, bearing the title *An Assessment of Japanese Whale Research Programs Under Special Permit in the Antarctic (JARPA, JARPA II) as Programs for Purposes of Scientific Research in the Context of Conservation and Management of Whales*. The Government of Japan also asked me to provide this independent Expert Opinion in preparation for possible appearance as an expert witness under Article 57 of the Rules of Court in the above case."



Mr. LOWE: Rather than me ask you questions about that, I asked you if you would prepare a statement of about 20 minutes which you would give to the Court now. So would you give that statement to the Court, please?

Mr. WALLØE: Thank you. Mr. President, Members of the Court, last week I listened with interest to the presentations given by the lawyers representing Australia and especially, of course, to the cross-examination of my two colleagues, the expert witnesses of Australia. Of course, I have comments to what they said with regards to my expert statement. However, I cannot cover everything in the 20 minutes Professor Lowe has given me. Let me first state that nothing of what I have heard in this Court and nothing I have read in the different written statements by Professor Mangel and Dr. Gales have made it necessary for me to change any part of my written statement.

I shall start with the issue of scientific methods and hypotheses, although I shall not spend much time on it. My main point is that, in spite of the comments by Professor Mangel in his last document, I still think my two examples, the Mendel genetic example and the acid rain example are perfectly valid. Mendel worked for a long time without hypothesis. For the acid rain example, I was a little imprecise on the exact timing when things happened.

As I told, a little earlier now, the Norwegian acid rain programme was finished in 1980 and the joint Swedish, Norwegian and British programmes started officially in 1984, but in reality in 1986. The searching without hypothesis I described in my statement took place in the years between the two programmes. It is easy to find other examples, both from the old history of science, Alexander Humboldt from Germany and his research in South America, could be one example. And from modern science, for instance genetic and DNA, and connections to diseases in humans could be another example, a modern example, as pointed out by Judge Donoghue, if I understood her questions correctly last week.

I am not a geneticist, but I do have quite detailed information about the current research in this field. Since Professor Mangel in his statement writes, "data mining is not science" and further "most exploratory data analysis do no lead anywhere meaningful and do not contribute to scientific knowledge or understanding", I cannot resist the temptation to mention that Dr. Gales' institution,

the Australian Antarctic Division on its website has a page called “data mining enhances scientific knowledge”. There, a scientist with a somewhat curious title, “data miner”, Ben Raymond “uses a variety of techniques to help scientists to make the most of their data”. And he presents a very good example of just that on that webpage.

Over to more serious matters. Why lethal sampling? Is lethal sampling necessary? In the strict theoretical sense it is possible to obtain the genetic information by biopsy sampling. After I received Dr. Gales’ comment on this point in his last written document, I went back to my Norwegian colleagues who operate in the field in the North Atlantic and the Barents Sea. They still supported my written statement that it is much more easy and thus much more efficient to obtain samples, genetic samples, from killing of whales, than by biopsy sampling. The first issue dealt with by information obtained from genetic samples, but also from morphometrics, which can only be obtained from killed whales, is the question about stock structure of minke whales in the Antarctic Ocean.

One important result from the JARPA program was that there is at least two stocks of minke whales in the investigated area, and that they mix during feeding, south of Australia. Dr. Gales said, as a response to a question from Mr. Gleeson, that this was known before JARPA started. It is correct that two Japanese scientists, Wada and Numachi, in 1979 published an article, claiming two stocks based on morphology, that <sup>is the</sup> colour pattern on the body, and allozymes, which is the difference between different proteins. This paper was heavily criticized and was never accepted by the IWC Scientific Committee.

A later paper, by the same two Japanese authors, failed to find any difference between minke whales east and west of Australia, as mentioned by Professor Hamamoto this morning. The fact is that the result that the Antarctic minke whales were composed of at least two stocks was first presented to the JARPA review meeting in 2006 and was first accepted by the Scientific Committee in 2007. This is contrary to Dr. Gales’ claim.

But there is another, and more important aspect of the stock structure question. There is no indication of any sub-stock structure in any of these two regions, which is of great importance for a possible future implementation of RMP. To be able to state this conclusion with high certainty, a very large sample is necessary, which is obtained by the JARPA and JARPA II programs. Age

can only be determined by killing of whales. Age is important for at least three different types of investigations. The first is the catch at age, which will show, for instance, how the abundance has changed with time. An increase up to approximately 1970, then a decline, a little steeper in the beginning, <sup>of</sup> the decline. Especially the exponentially like increase in the 1960s is interesting, because the uncertainty here is not large and it shows that the minke whales may increase by about 3 per cent per year, which has obvious implications for a possible future revision of the RMP. The second use of the age data is that it tells the age at sexual maturity, which gives important information about changes in the food availability for minke whales. The age at sexual maturity declined from 11 years by 1945 to approximately 7 years by 1970. It is a large decline. The question now is whether it <sup>will</sup> increase ~~x~~ again. Possibly, as I expect, with a substantial time delay. There is also a methodological question here, because some have claimed, in the Scientific Committee, that the so-called "transition zone", which can be observed in the earplug data, does not indicate puberty. The Japanese now have the possibility to check this assumption, ~~by~~ ~~comparing~~ because they are catching also younger whales, while the old commercial catches took only, or mainly, old and large whales. The third use of the age data is that makes it possible to get information about cohort productivity and cohort mortality. I don't have time to go more into the use of these data.

My next issue is the blubber thickness and its changes over time. I first got involved during a preparatory meeting for the JARPA review meeting, to which I was invited by Japan. I think it was in 2005. To me the results indicated that some important changes were happening in the Antarctic ecosystem, but if I may say so, without insulting my Japanese scientific colleagues too much, it was very poorly analysed and presented. So from then on I participated in the analysis. The results were presented at the review meeting itself, and at the Scientific Committee meetings in 2006 and 2007. It was lengthy critical discussions in the Scientific Committees both years. Many scientists from anti-whaling countries asked critical questions. Among them the prominent scientist, Tom Polaschek, from Australia.

But, during these two years we managed to reanalyse the data and convince the Committee of the reality of the findings, of the decline. The manuscript was later, in 2008, published in a

journal of reasonably high standing, "Polar Research", after thorough peer review process, since this term has been a theme last week, peer review.

Then for three years the results remained accepted by, not only the Scientific Committee of IWC, but <sup>by</sup> the larger scientific community. Then in 2011 questions were asked by an Australian scientist, who came back to the Scientific Committee after having been away from the Committee for many years. And he asked about the results and he suggested additional analyses, which were performed during the same Scientific Committee meeting by a Norwegian colleague of mine <sup>, Hans Skang,</sup> I think to the surprise of the Australian scientist that he was able to do it in that short period of time. I myself <sup>re-analysed</sup> ~~realized~~ the data using a robust different method called "jack-knife." All these analyses gave the same results as the original, a decline in blubber thickness over the JARPA years. Dr. Gales on Thursday told Mr. Gleeson "it is a very small change". That depends of course on what we mean by a small change. It is a 9 per cent decline over the 18 JARPA years. All the different analyses showed the same decline.

We also investigated two related measurements which gave the same result. The two other variables were the circumference of the thickest part of the body and the amount of fat, total store of fat in the whale body which we analysed in a sub-set of the total sample.

The Australian scientist asked to get the primary data. Japanese authorities were reluctant to give <sup>him</sup> ~~them~~ the data, but I convinced them that he should get access to them. But then he decided not to use them. My interpretation is that he had expected not to get the data, <sup>that</sup> and he was surprised to get the offer. Maybe he regarded that it was better for him, and Australia, to keep the uncertainty floating.

In the Scientific Committee this year, he again asked me new questions. To me this is similar to what, in a political context, would be called "filibuster techniques". In observational study, where it is not possible to randomize groups, it is always possible to ask new questions and that is what the Australian scientist does.

On the stomach contents issue, Dr. Gale said to Mr. Gleeson: "Well, the stomach content data has added in similar ways to the earplug nothing to what we already knew. We know the Antarctic minke whales eat Antarctic krill almost exclusively; we already knew that." I am afraid that this answer shows that Dr. Gales either has not read the paper presented to the Scientific

Committee last year, or has misunderstood it completely. The main point in the paper is that the amount of <sup>Food</sup> ~~fat~~ in the fore-stomach of Antarctic minke whales has declined over the JARPA years when all other variables which influence the amount of food in the stomach has been taken care of. The manuscript is now under editorial review of a reasonably good scientific journal. I am confident that it will also be published.

My last issue will be all the statements made by Professor Crawford and Professor Sands last week, for example, statements like “Professor Walløe has nothing to say on these resolutions”. There <sup>was</sup> ~~are~~ a number of these statements presented last week. My easy way out would be that the Government of Japan did not ask me about resolutions. But I would like to add an additional explanation.

When I first got involved in the IWC matters and attended meetings in the late 1980s, my Norwegian Commissioner at the time was Head of the Legal Office in our Foreign Ministry. His name was Per Tresselt; I think he was Agent for Norway to this Court in the *Jan Mayen-Greenland* case. Mr. Tresselt told me,

“Don’t mind the resolutions, they are not legally binding. The group of anti-whaling countries has a simple majority in the IWC” — he told me — “but they don’t have three quarters majority anymore. They cannot change the Schedule. And if they manage to get the three quarters majority in the future, we may lodge an objection. But at present” — he said — “they can pass as many resolutions as they like, that will not change the Convention.”

And indeed the following years, Japan and Norway ~~were subject~~ ✕ and Iceland — were subject to resolutions every year. We heard the number in one of the Australian presentations last week. I am not speaking on the legal issue. I am just explaining why I did not deal with the resolutions in my Expert Statement.

In a similar way, the different Annexes from L to P are specifying what special permit proposals should contain and how they should be dealt with in the Scientific Committee. Again I cannot speak on the legal interpretation, but I can speak on how these documents have been understood and dealt with both in the Scientific Committee and in the Commission. The texts of these documents have always first been proposed by the Scientific Committee, then accepted by the Commission, in both bodies by consensus. The reason consensus was possible, was always that the list of possible objectives included a possibility for research which was not connected to

conservation or management of whales. The Annexes were always understood both in the Scientific Committee and the Commission as self-contained, not dependent on any additional resolutions as claimed by Professor Crawford.

In my Written Statement, I used Annex O to illustrate this point, because Norway had to argue in relation to Annex O when it, Norway, was preparing a proposal for a three-year special permit catch in 1991. We made it clear in the proposal that the research was not intended to address management questions or contribute towards a comprehensive assessment, as it was called at the time, but questions related to the management of fish stocks. Norway regarded that as a critically important research need, to use the words in Annex O. Both the Scientific Committee and the Commission accepted that <sup>this</sup> was a relevant argument for a special permit catch. The words used in the current Annex P are, as you may read, that

“three possible objectives, either to improve the conservation and management of whales stocks, or improve the conservation and management of the living marine resources or the ecosystem to which the whale stocks are an integral part, or test hypotheses not directly related to the management of living marine resources”.

And in the Scientific Committee and in the Commission, this third objective has always been understood as independent of management or conservation of whales. This is the background for my Statement that the claim by Professor Mangel that all special permit catches must be motivated by its importance to the conservation and management of whales, is a “fundamental misunderstanding.” That is <sup>the</sup> ~~is~~ <sup>words</sup> ~~word~~ strong I used. To me, it was reassuring that one prominent member of the Scientific Committee agrees with me on this point, but not only on this point but all main points in my Expert Statement, as you can read in the documents from Japan.

Mr. President, Members of the Court, let me conclude. <sup>First:</sup> JARPA II is definitely a scientific research program. Two: both JARPA and JARPA II have given valuable information for the possible implementation of the current version of RMP and for possible future improvements of RMP. Three: for me even more important, is that the programs are giving critical information about the ongoing changes in the Antarctic ecosystem. Thank you for your attention.

Mr. LOWE: Thank you, Professor Walløe. I have no other questions.

The PRESIDENT: Thank you very much, at the end of 30 minutes period. So I thank you, Professor Lowe, for this less interactive than usual examination of expert. I now give the floor to Mr. Gleeson, who I understand is going to cross-examine Mr. Walløe. Mr. Gleeson, you have the floor.

Mr. GLEESON: Thank you, Mr. President. Mr. Walløe, when did you write your interesting non-interactive presentation we just heard?

Mr. WALLØE: When I wrote it?

Mr. GLEESON: Yes.

Mr. WALLØE: Most of it, I wrote the two last days after I heard the Australian presentation last week.

Mr. GLEESON: Did you have any assistance in writing it?

Mr. WALLØE: No, absolutely not.

Mr. GLEESON: All right.

Mr. WALLØE: Neither did I have any assistance in writing my own original statement.

Mr. GLEESON: I think you told the Court twice this afternoon, when you read out the first paragraph from your report, that you are an independent expert. Do you remember saying that?

Mr. WALLØE: Yes.

Mr. GLEESON: And you told the Court about your experience as a Norwegian representative to the Commission, do you remember that?

Mr. WALLØE: Yes.

Mr. GLEESON: Is it also the case that you have received one of the highest available honours which Japan gives to a foreigner?

Mr. WALLØE: Yes.

Mr. GLEESON: And that happened in 2009?

Mr. WALLØE: Yes.

Mr. GLEESON: And could you confirm for us that the citation for that honour was for the services you rendered in the promotion of Japan's policy in the field of fisheries? Is that accurate?

Mr. WALLØE: I do not remember, but it could be accurate. I would like to add that I have had additional influence on the Japanese earlier and I think that is also important. That was for an issue not related to the Scientific Committee, but on the killing of whales issue, which was my ~~main~~ <sup>first</sup> interaction with the Japanese. Not with the scientists but with a Japanese delegation to the Commission.

Mr. GLEESON: Well, in terms of your interaction with JARPA II scientists, is this accurate: Japan invited you in 2005 to participate in a domestic Japanese review of the original JARPA project to assist Japan in the presentation of the results of JARPA to the wider scientific community. Is that accurate?

Mr. WALLØE: That is accurate, but I would like to add that it is not the only time. You will probably come back to that. But it is not the only time I have been invited to consultation meetings where I have been presented results from ongoing research and giving comments on it. But I would also like to say that I have similar interaction with scientists from the United States for aboriginal hunt of bowhead whales in Alaska. Both with scientists in Seattle, ~~scientists in Anchorage~~ and scientists in Barrow. So, I believe in scientific co-operation, and Japan is only one of the countries. I have interacted with scientists from Russia. on their hunt in the eastern part, with scientists from Denmark, or rather Greenland, on the aboriginal hunt in Greenland. And, as I said, most importantly, also with the United States scientists in Seattle and in ~~the other countries in~~ Alaska.



Mr. GLEESON: I would ask for you to turn to the statement you have provided to the Court — if you have a copy of it with you?

Mr. WALLØE: Yes, I have a copy.

Mr. GLEESON: To page 7 please. In the last two paragraphs on page 7, you referred to work which has been done on JARPA in the area of, firstly, the number of stocks, secondly, blubber thickness, and thirdly, stomach contents. Would you confirm that, although you do not provide any references — as we see on the screen — three of the references which underpin this paragraph, are joint publications, present or proposed, between you and scientists from the ICR? Is that accurate?

Mr. WALLØE: I am not quite sure I understand the question. But, if the question is whether my name is on the publication, that is true.

Mr. GLEESON: And the three publications we see on the screen in the areas of stock mixing, blubber thickness and stomach contents which, you say on page 7, provide useful results from JARPA, are in part your own work? Is that accurate?

Mr. WALLØE: It is accurate that I did the first statistical analysis using different methods from what the Japanese had done. I have not been involved in the preparation of the collection of data, I have just been involved in the analysis. Because, as I said, I saw some difficulties with the analysis carried out by the Japanese, but I still thought that it contained relevant information. That was my background for helping, whether I was a member, and my name appears on the publication or not. That is, sometimes I do, sometimes I do not, when I do this kind of collaboration. For me it is important that when I reach, not only my age, but my scientific <sup>standing</sup> what shall I say — I feel secure in my science. It is not always necessary to be a member of the list of authors; I often give advice without being. But here, the Japanese insisted that my name should appear on the publication.

Mr. GLEESON: Thank you for that explanation. Would you confirm that the three joint publications involving you that we see on the screen, are some of the publications which underpin the statements you make on page 7 in the last two paragraphs? Is that accurate or not?

Mr. WALLØE: Sorry, I have to read it first to be sure. As far as I can see, I still have that statement, yes.

Mr. GLEESON: Is there a reason you did not tell the Court, or Australia, that the publications you were commending on page 7 were your work done together with scientists from the ICR?

Mr. WALLØE: No, I did not think that was necessary. But, yes, I have no reason to try to hide it. That was not my reason and, of course, especially the first publication is in the public domain.

Mr. GLEESON: Thank you. Now, let me turn to a topic you spoke about this afternoon to the Court — which is the work done by Japanese scientists and yourself, on the topic of blubber thickness. I will ask for you to be provided with a folder of documents which the Court has, and Japan has. And, would you turn please to tab 7 of that folder? And do you recall in your evidence-in-chief, you made what might be unkindly described as an attack upon a scientist from Australia as engaging in the equivalent of a “filibuster”? Do you remember offering the Court that word?

Mr. WALLØE: I used that word, I agree that it is a strong word. And I think that it is sometimes appropriate to use a strong word.

Mr. GLEESON: And, do you recall telling the Court that, in effect, your work on blubber thickness, done with Japan, has been as it were, accepted, as valid and helpful by the scientific community?

Mr. WALLØE: I told that a few minutes ago, yes. For three years.

Mr. GLEESON: If you go to the document at tab 7, this is the meeting of the Scientific Committee this year, which you attended. Is that correct?

Mr. WALLØE: Tab 7? Yes, the report of the working group of the ecosystem modelling?

Mr. GLEESON: And, on page 4 of tab 7, under Section 4.1, the first statement of the Scientific Committee, is that at meeting 63 — that is several years ago — the variance of the trend in blubber thickness reported by Mr. Konishi and others — that includes you — was found to have been underestimated for a number of reasons given. Now, do you accept that is a finding that the Scientific Committee came to about two years ago in respect to the usefulness and reliability of your work on blubber thickness? Do you accept that?

Mr. WALLØE: I accept that this was at the 2011 meeting, and that the question was raised by the Australian scientists, and we realized that the reference here is to Skaug. He was recruited as statistician in my team, so <sup>he</sup> reanalysed the data which I brought to the meeting, using the methods suggested by the Australian scientists. And, he got the same result, the same decline, as also my jackknife analysis. Same decline, but the variance was a little larger. But it was still scientifically significant at the 5 per cent level.

Mr. GLEESON: Professor Walløe, in order that I don't lose my entire hour, I'm going to try and make my questions as precise as I can and I would invite you, if possible, to also keep the answers as precise as you are capable of, if you would. If you go to the next paragraph on page 4, the Scientific Committee recalls that the analyses requested by the Committee in 2011 had not been conducted, but instead Dr. Butterworth, a member of this Japanese delegation, produced certain jackknife estimates. Do you see that?

Mr. WALLØE: Yes.

Mr. GLEESON: And I won't read the detail but the following paragraphs on that page and the first two paragraphs on the next page record discussion in detail about the jackknife estimates and do you see that in the third paragraph on page 5, Dr. Butterworth considered the evidence and

candidly said to the Scientific Committee that the conclusions of the paper were invalidated. Do you recall that happening just a few weeks ago in your presence, Dr. Walløe?

Mr. WALLØE: Yes. I agree, but I would like to add that this jackknife is not the same jackknife analysis I was talking about which happened two years ago. It is a different jackknife analysis. I was invited to be a co-author on that paper and I declined because I was uncertain about the results. So I think this was done in too much of a hurry, so I have no problems with the third paragraph on page 5. But the difficulty, that you referred back to on the last page, that the question asked two years ago, when the Australian scientists did not accept to re-analyse the data himself, which to me was, I argued for it, just for the Japanese Government at the time, and for him. I said <sup>to him:</sup> you should re-analyse and see what you can get. Now he comes back and says what is important is for each whale to have the distance from the ice edge, which is a difficult question because then you have for each year of the JARPA years, to have the ice edge and then measure for each whale the position, and then measure the distances. It is a huge work to <sup>to do that</sup> ~~work that out~~. That was the reason it had not been done.

Mr. GLEESON: Do you see, Professor Walløe, that in the next two paragraphs that follow, there is a record of you and Dr. <sup>Solvang</sup> ~~Solvic~~ presenting a new analysis and the conclusion of the Scientific Committee's Working Group in the last paragraph is, in effect, they encouraged everyone to go away, do some analyses and the matter would be considered next year.

Mr. WALLØE: I agree, and of course the analyses of <sup>Solvang</sup> ~~Solvic~~ and myself was what I mentioned, one of the other variables, not blubber thickness but the total contents of the fat in the whale body which was analysed, not on every whale but only on the first whale caught every day, in the JARPA period. So it was a much lower number <sup>of whales</sup> but still we got the same decline then in fat content of the total body. And I agree that we should continue, but to me, when we do a large amount of different analysis, and the Scientific Committee includes some people who are interested in not saying that this is an interesting result, we always end up — this is a kind of what I refer to as filibuster technique — we always get, well, the only thing we can agree on is that we need more analysis. This is not uncommon in the Scientific Committee. But I still think that our findings of a

decline in blubber thickness is a valid result, the original papers have not been retracted; it still is in the public domain, ~~a result~~. And I am quite sure that when we do all these analyses, we will still get the same result. But I agree that we shall do this work or the Japanese ~~follow~~ <sup>colleagues</sup> shall do this work before the next year's meeting.

Mr. GLEESON: I want to ask you two questions to conclude on the topic of blubber thickness and if possible could you see whether you are capable of either answering them yes or no. The first question is: after 26 years of data from JARPA and JARPA II, is it a fact that to date, neither the IWC nor the Scientific Committee has confirmed that the data allows reliable conclusions on trends in blubber thickness?

Mr. WALLØE: Well, my personal opinion is not. But it is the conclusion of the Scientific Committee. My own scientific conclusion is that the data is not only marginally ~~sufficient~~ <sup>significant</sup> but that they ~~were~~ <sup>indicate</sup> strongly ~~indicating~~ a decline. But I agree that this is a Scientific Committee and we heard from Dr. Gales the other day that the Scientific Committee is not a political body, it is a purely scientific body which is not my recollection and impression. It's much politics going on in the Scientific Committee when the issue is about politically-sensitive issues.

Mr. GLEESON: I'm going to ask you the second of the two questions, and again if possible, a yes or no answer would be helpful. The question is: would you agree that after 26 years of data from JARPA and JARPA II, neither the Commission nor the Scientific Committee has affirmed that investigations of blubber thickness are required for the conservation or management of whales or for any other critical research need. Do you agree with that proposition?

Mr. WALLØE: On the first question, I agree. It is not necessary for the management of whales or whaling. On the second question, I think we have indications that something is happening in the Antarctic ecosystem and to me as a scientist, it is important. So I think that that is an important question.

Mr. GLEESON: I take it from your last answer that you think it's important, but you would agree with me that neither the Commission nor the Scientific Committee has affirmed that investigations into blubber thickness are required as a critical research need. Is that accurate?

Mr. WALLØE: No. Because the Scientific Committee two years ago made a statement—and I can find the reference—that it is important to get an answer to the question about blubber thickness. And I can get the reference, I don't have it in my head. That was two years ago. In the Scientific Committee and all people in that Subcommittee and later in the Scientific Committee, including the Australian scientists I refer to, and Dr. Gales, were present in that meeting and supported that statement.

Mr. GLEESON: Let me turn to the second of the three areas where you are a joint researcher on the JARPA II project which is the topic of stomach contents that you mentioned this afternoon. I am going to ask for you to be shown by Australia's Agent, Dr. Gales's report of 31 May which I believe you have read. And if you <sup>have</sup> that report, could you please go to paragraph 4.9.

Mr. WALLØE: Yes. I have it. To 4.9. Yes, I have it.

Mr. GLEESON: Would you accept as accurate that the extract there given from the 2007 Scientific Committee represents the current position which the Committee has taken, on whether JARPA data on stomach contents is useful or relevant.

Mr. WALLØE: I would have to read it first. It is a long paragraph so, please excuse me for a few minutes.

Mr. GLEESON: Please do.

Mr. WALLØE: I have read it and I agree that this was from the report of the Scientific Committee meeting. I am not sure I agree on all the contents of it, but of course, as I have indicated, there are differences of opinion in the Scientific Committee and also in the Subcommittee here. But for the last bold fac<sup>Section agreed</sup> thing, I <sup>agree</sup> that at the time <sup>we</sup> <sup>have</sup> a much better <sup>. We now</sup>

manuscript being considered for publication ~~now~~ than we had at that time, and I agree that we had some unresolved questions at that time.

Mr. GLEESON: My question, Professor Walløe was, do you agree that the statement of the Scientific Committee in 2007, reproduced here, is at present the last word of the Scientific Committee on stomach contents investigations? Is that accurate?

Mr. WALLØE: It is accurate that this is the last statement from the Scientific Committee and I did not in my statement say that we have any more recent statement. I said I have a manuscript under editorial review; that is what I stated.

Mr. GLEESON: Would it be fair to conclude that in giving your evidence this afternoon and in your report you are in part defending your own scientific work or not?

Mr. WALLØE: It is true that I am part of this team who have investigated this. The primary results, data, are obtained independent of my advice and with methods I have not had any influence on. But it is true that I am taking part in the analysis.

Mr. GLEESON: In the light of the questions I have asked you this afternoon, would you wish to withdraw the claim that you are an independent witness?

Mr. WALLØE: No, I would not. I think I am an independent witness in the sense that—much more so than, for instance, Doctor Gales is an independent witness. So, my main concern is science and that is why I co-operate with Japanese scientists, with American scientists, with Russian scientists, and on other fields, not whaling, ~~with~~ scientists from many other countries. I believe in scientific international collaboration.

Mr. GLEESON: Let me move to the topic of testable hypotheses. You have clarified for the Court this afternoon in relation to the acid rain project that you worked on that in two stages. Firstly up to 1980, in Norway and subsequently, from the mid-1980s as part of the joint UK/Swedish/Norwegian project. Correct?

Mr. WALLØE: Yes.

Mr. GLEESON: You also corrected an imprecision in your statement and said that the period during which there was no testable hypotheses was between 1980 and, you said, about 1986. Do you remember saying that?

Mr. WALLØE: Yes.

Mr. GLEESON: Now, I would like to show you first a document at tab 8, which was written by the head of the joint project where he confirmed the methodology identified at the outset of the joint project and you will see highlighted that aluminium was identified as one of the possible culprits from the very beginning of the joint project. Do you remember that?

Mr. WALLØE: I do not remember that. I see it here, it was not <sup>published but in 1990,</sup> in 1986, <sup>known</sup> it may have been already, that is my small correction. In 1980 it was certainly not accepted.

Mr. GLEESON: Let me take you, Professor Walløe to the next document, which is at tab 9, on the screen. The authors, in a publication you also wrote, Messrs. Morris and Reader, said that the effects of aluminium on the salmonids had been demonstrated by fieldwork and experimental studies and they gave references, three of which were from the year 1980. Does that cause you to recall that by 1980, if not earlier, the work done by various people in the field, including yourself, had identified that aluminium was a possible culprit?

Mr. WALLØE: No. I am not agreeing on that ~~because, as I remember it now,~~ <sup>but</sup> I should have been more precise on my timing.

Mr. GLEESON: Let me take you then, Sir, to tab 10, which is an extract from your article in this same publication where you reflected back on your valuable contribution to this project. And you recorded that previous analyses had pointed to concentrations of inorganic aluminium species as the main determinants and the work you did, which was valuable statistical work, was to conduct a regression analysis on 14 variables, including aluminium and you concluded aluminium was one of three main causal factors. Is that accurate?



Mr. WALLØE: It is accurate, but not with the year 1980. It was published much later. As you see, it was published in 1990.

Mr. GLEESON: What I would like to suggest for your consideration, Sir, is that your work in collaboration with international scientists on the acid rain project is a sound demonstration of the scientific method at work. And let me put to you three aspects of that to consider. Firstly, there was a clearly-identified problem at the outset. True?

Mr. WALLØE: That the acid rain was a hypothesis? That is true. It was a hypothesis from the beginning.

Mr. GLEESON: The problem, Sir, that I put to you was that the fish were dying and one needed to know whether it was the sulphur emissions from the U.K. and German factories or whether geology was the cause. Was not that the identified problem?

Mr. WALLØE: Yes.

Mr. GLEESON: And, in addressing that identified problem, a range of potential causal factors were identified, one of which was aluminium, was it not?

Mr. WALLØE: No! Aluminium was not identified at that stage.

Mr. GLEESON: Yes, and if the author of the project recorded that in his book you would say he was simply mistaken, would you?

Mr. WALLØE: It is difficult, I have not that book in front of me now but 1990 was when the book was written, and even the paper, so we may have been imprecise in specifying. But I am quite sure, since ~~it~~<sup>was</sup> involved in this, that after we finished our project in 1980, this was not even a hypothesis, it was not. No indication of aluminium at the time, although in some of the analysis we would go back afterwards and saw that aluminium was present.

Mr. GLEESON: Let me ask you more generally on this topic. Before a scientist embarks on a large-scale field project, including one involving the killing of species, do you accept that there

are any minimum criteria which must be addressed to establish the scientific validity of the project?  
And, if so, what are those criteria?

Mr. WALLØE: I agree that you must have a question. Some field of interest and something you would like to investigate, but not necessarily to the level specified by Professor Mangel, that you should have an hypothesis which is not <sup>a</sup>vague hypothesis but is an hypothesis where you can design an experiment or an observational study and you can decide at which significance level and what should be the power of the test and all the rest of it; all the whole statistical instrumentarium of modern statistics. I do not accept that part, but I accept that you should have some indication of what you would like to study. And I agree with Doctor Mangel and some of <sup>your lawyers</sup> ~~you~~ citing Poincaré that a pile of stone is not science — although sometimes a pile of stone in this meaning could be of importance for later scientists when they suddenly discover that there is information here. But I agree that you should have some idea why you are studying this, why you are collecting this data.

Mr. GLEESON: Do you accept that a literature review is a standard scientific step to take before embarking on a large-scale fieldwork project?

Mr. WALLØE: That you should investigate the literature? Yes. But the problem with the Antarctic Ocean is, of course, that there <sup>was</sup> ~~is~~ not so much precise literature available, at least at the point when the project was started.

Mr. GLEESON: Do you accept that the scientist would formulate the hypotheses as clearly and specifically as possible given the limits of the subject-matter?

Mr. WALLØE: Not necessarily. I mean it's possible sometimes to formulate a hypothesis, but that is when I, in my statement, referred to Professor Tukey. He said that sometimes it is possible to formulate the specific hypothesis, but that is <sup>often</sup> asking the wrong question, instead of being more vague and discover something. So, yes, I like Professor Tukey's statement on this methodological question which is also supported by the person who is a prominent person in the Scientific Committee.

Mr. GLEESON: Do you accept that there is a connection between the formulation of the hypothesis and questions such as the selection of methods, the choice of sample sizes, and so on?

Mr. WALLØE: Yes.

Mr. GLEESON: And the hypothesis may inform the degree of precision required in the selection of the sample sizes?

Mr. WALLØE: Yes.

Mr. GLEESON: And would you also agree that before embarking on the large-scale field project, the scientist would give real consideration to choices between different available methods?

Mr. WALLØE: I am not quite sure I understand the question.

Mr. GLEESON: Before a scientist embarks on a field work project, the scientist would ask "what alternatives do I have to that project in order to advance the knowledge I am seeking?"

Mr. WALLØE: In a general sense, yes, I agree.

Mr. GLEESON: And if a prior extensive field work project has already been conducted, would you agree that the scientist would very carefully monitor and review the results and the lessons from the prior project in order to understand how that informs the question before the scientist?

Mr. WALLØE: Yes, in a general sense, I agree. But I think I know where you are going and I am not sure I will agree with your next question.

Mr. GLEESON: Your evidence leaves me with two impressions, Professor Walløe. The first is that you are more humorous than me, but the second, more seriously is, you do appear to me, and I must put it to you, to be presenting your evidence in the fashion of an advocate and not a witness. What do you say to that?

Mr. WALLØE: Well I don't know whether I should regard that as an insult, or an honour. But I'm trying to explain why I'm doing this, and being an expert witness, it's not obvious that any person in the Scientific Committee, even if they agree with the general background from the JARPA II program that they would be willing to appear as a witness here, outside this court room what kind of harassment you could be subject to.

Mr. GLEESON: Well I trust I'm not harassing you. What was the extra matter that you wished the President to give you the opportunity to say to the Court, at this stage?

Mr. WALLØE: Sorry, I'm not.

Mr. GLEESON: You said you wanted to say something more, you knew where I was going, what did you want to tell the Court, please tell the Court now.

Mr. WALLØE: No, I'm not sure what you are referring to, I'm referring to what I didn't have time to say in my 20 minutes I was given by Professor Lowe, is that what you're referring to?

Mr. GLEESON: I'll move on Professor Walløe. I'm now going to ask you in the folder before you to go to tab 14 please.

Mr. WALLØE: Yes.

Mr. GLEESON: And go to page 10, this is the JARPA proposal.

Mr. WALLØE: This is <sup>the</sup>JARPA II proposal.

Mr. GLEESON: Yes, and at tab 10, under the heading "Research Objectives", the first objective is the monitoring of the Antarctic ecosystem.

Mr. WALLØE: Yes.

Mr. GLEESON: Has the IWC, or the Scientific Committee, identified that it considers such a project is a critical research need?

Mr. WALLØE: I must admit I'm not sure exactly what the Scientific Committee — although I participated in all these meetings — I'm not quite sure about the statements which have been made on this. It's quite clear that some of us in the Scientific Committee regard monitoring the Antarctic ecosystem as an important — whether you should say critically important — it is an important research need.

Mr. GLEESON: But I think you're confirming that the Committee as a whole, and for that matter the Commission has not identified that a long-term project to monitor the Antarctic ecosystem is a critical research need. Is that accurate?

Mr. WALLØE: I think that is accurate. But you have, again, to remember that the Scientific Committee is not like a scientific committee in my other scientific fields, in physiology or in statistics. There are close connections here with politics, especially for some of the members.

Mr. GLEESON: Could I then ask you to go to page 11 of JARPA II where about halfway down you find the second objective, which is to model competition among whale species, and at this point, the proposal refers to a series of hypotheses having been developed and those hypotheses are spelt out on page 61 of the document you might agree.

Mr. WALLØE: Page 61 of the document?

The PRESIDENT: At tab 14. You are on page 11, now you have to move to page 61.

Mr. WALLØE: Yes. Sorry. I now see it. Yes.

Mr. GLEESON: Now, you said in your report that you disagree with Professor Mangel because he said he could only find one hypothesis in JARPA, and you said there were some more. Are the hypotheses that you found the ones before you, on pages 61 and 62?

Mr. WALLØE: I agree that some of these hypotheses are related to the krill surplus hypothesis. But they are not different versions of it. Some of them are also independent of that. But I agree on that point: these are many of them, connected to that.

Mr. GLEESON: What I am putting for your consideration, Sir, is that to the extent one can find any hypothesis in JARPA II, we find them at pages 61 and 62. That's the first point. And the second point is: if you go back to page 11, the hypotheses relate to only one of the four objectives, namely, the objective of building an ecosystem model. Do you agree with that?

Mr. WALLØE: I agree, but first I would like to comment on the first hypothesis in Appendix 5 on page 61. The hypothesis of the constant overall carrying capacity is not related to the krill surplus hypothesis. That could be related to climate change, for instance.

Mr. GLEESON: Yes. Thank you. Now, looking at these hypotheses and the goal of building a model, do you understand from JARPA II the model is designed to explore competition between whale species?

Mr. WALLØE: Yes. I realize some of it is dependent upon competition. But you have to ~~have the right~~ understanding of what is meant by competition here: competition is not necessarily ~~the~~ <sup>a</sup> competition ~~that~~ <sup>where</sup> the animals are in the same area eating on the same krill at the same time. It could be that humpback whales were eating krill at one point in the ocean and minke whales at another time in another area, but still the krill abundance is limited, so if the humpbacks eat much, then it will be less left over for the minke whales, even if they don't see each other, they are not competing in the sense that lions and hyenas are competing over a killed animal in Africa.

Mr. GLEESON: Could you tell the Court, Sir, whether the second objective that we are looking at together with the hypotheses and the model-building exercise reveals what data is necessary to collect in order to build the proposed model.

Mr. WALLØE: No, I am not agreeing on that point because to measure krill, which I think is what you are . . .

Mr. GLEESON: So, you may not understand my question. My question was whether, when we read objective 2, on pages 11 and 12, do the JARPA scientists tell us what data they propose to collect in order to test the hypotheses and build a model?

Mr. WALLØE: I am not sure I understand your questions but . . .

Mr. GLEESON: It is a simple question, Sir. Can you read from these pages what data Japan proposes to collect to test the hypotheses and to build the model. Can you tell us whether you can read that on these pages or not?

Mr. WALLØE: Sorry but it will take me some minutes to read these pages and I have not read them now, so I am not sure I can answer the question without either being given time to read, if it is page 11 and then page 61, or shall I try to answer without having read?

Mr. GLEESON: No Sir, if you need time to read, please do, but I understand you told the Court earlier this afternoon that you have read every report from Australia, you have heard all the evidence last week and nothing causes you to change your mind. Is that your position?

Mr. WALLØE: That is my position but I do not recollect every word of what I have read in these reports.

The PRESIDENT: Maybe Mr. Gleeson, you can identify the paragraph which Mr. Walløe has to read now? Not the full two pages but the relevant paragraphs.

Mr. GLEESON: Yes. I am inviting you to read Sir, on page 11, the second half of the page . . .

Mr. WALLØE: "The monitoring of cetacean habitat", is that the part?

Mr. GLEESON: Commencing with the heading, the heading is the next one: "The second objective is modelling competition", I invite you to read that and read over to page 12.

Mr. WALLØE: To No. 3 there, five lines?

Mr. GLEESON: To No. 3, and then I will ask you the question again.

Mr. WALLØE: Yes, I will read this paragraph. Yes, I have read these paragraphs.

Mr. GLEESON: Now, to be fair to you, I am also going to ask you to go to page 15, near the bottom of the page you see the same heading, "Modelling competition" and you see more detail on the model over on page 16, so if you read the bottom of page 15 and then most of page 16 and then tell us when you are ready.

Mr. WALLØE: So I read down to II, is that what you are . . ? I have done.

Mr. GLEESON: Yes, my question is, having refreshed your memory on objective 2 and the model building exercise, does the JARPA II proposal tell us what data needs to be collected to carry out this exercise?

Mr. WALLØE: I take it that it is not specified here in these pages? I agree. But I take it in the context that they would first of all like to have abundance data on minke whales but also maybe abundance data on the two other species mentioned, or three, humpbacks, fin whale is of course difficult, so but that is stated here, and blue whales, and in the Scientific Committee we have at least now some numbers on not only the abundance but also the rate of increase of especially humpback but also blue whales. Fin whales are more difficult.

Mr. GLEESON: Apart from that inference, does the document tell us what data is needed to build the model?

Mr. WALLØE: No, but I assume . . .

Mr. GLEESON: Thank you, Sir. Could I ask you the next question. If we are not told what data is needed for the model, does that mean that we do not have any statistical basis for knowing how many whales must be killed in order to build the model?

Mr. WALLØE: No, not necessarily because there is a reference to a model here which I know fairly well, the Mori and Butterworth 2004 model, which of course was a model developed with less data, but it is an interesting model and I think that something starting from that model would be interesting and you have abundance data and especially for minke whales you would get



more abundance data, not only from JARPA II but also from the other research programs going on in the Southern Ocean.

Mr. GLEESON: You know, do you not, Sir, that the Mori and Butterworth model is referenced here as an example of a model tried in the past. JARPA II does not say it seeks to populate that model. Is that accurate?

Mr. WALLØE: It does not say it here, no. I do not know whether it is mentioned somewhere else but it is quite clear that in the Scientific Committee the Mori and Butterworth model has been discussed many times and in many different contexts. And it has also been agreed in discussions in the Scientific Committee that to measure krill abundance in itself by acoustic means or by other means is very difficult because they are patchy in their distribution, they can hide somewhere where you do not get access to them by the acoustic methods, so to use the abundance of whales and especially changes in the abundance of whales is a good way to also get hold of, is anything changing by the primary production, <sup>and</sup> for instance, of krill.

Mr. GLEESON: Let me ask you to go back to your statement to the Court, at page 9 of your statement to the Court. And this is on the topic of sample size.

Mr. WALLØE: Page 9?

Mr. GLEESON: You say on page 9, in the middle paragraph, you have repeated some calculations for a few variables making assumptions and you believe the results in JARPA II are of the right order of magnitude. Why did you not include those calculations in your report so that the Court and Australia could consider them?

Mr. WALLØE: The reason is, and that is one of the, as I state here, weaknesses of the JARPA II documents, that I do not really know how they have calculated the sample sizes. I have to make guesses and that is what I state. Somewhere here I write that the explanation <sup>is</sup> ~~that~~ not always <sup>clear</sup> ~~is~~. I mean that is my criticism of the JARPA II program. I had to make a number of assumptions which may or may not agree with <sup>what</sup> the Japanese scientists <sup>have done</sup> but the basic is, if you should detect changes over a six-year period, and of course a six-year period is arbitrary, you could choose

12 years or something else, but I think the Japanese scientists wanted to see if they could detect changes over six years. And then it is not only the ~~higher~~<sup>five</sup> per cent significance level but also the power of the test, with what probability should they be able to detect any changes, the ~~lower~~<sup>minimum</sup> degree of changes. So I calculated, for instance, because it had special interest to me, for the change in age and sexual maturity and I found that to get any detectable ~~change~~<sup>change</sup> you would need in the order of magnitude 900 whales.

Mr. GLEESON: Professor Walløe, this seems to be your evidence: firstly, when you read JARPA and tried to make sense of the statistical calculations of sample size, you have found great difficulty doing so. Is that accurate?

Mr. WALLØE: Yes.

Mr. GLEESON: And secondly, you have done a piece of work, which is somewhere, but not before this Court, where you have attempted to see whether you can understand the JARPA II calculations. Is that accurate?

Mr. WALLØE: That is accurate and I think that is what I am writing in my report. I note the numbers ~~that~~<sup>and</sup> I found difficulties in ~~them~~<sup>them</sup>.

Mr. GLEESON: These calculations that you did Professor Walløe, where are they?

Mr. WALLØE: Well, I think they are ~~on~~<sup>on</sup> my desk back in Norway. I do not have them in my mind here now.

Mr. GLEESON: No. Was there a reason why you chose not to include them in your report so that the Court and Australia could consider your opinion properly?

Mr. WALLØE: I think that to say that ~~it was~~<sup>the calculations were</sup> not sufficiently clear. ~~I think that the~~<sup>The</sup> Japanese have given a table, which I think is based on ~~my interpretation and~~<sup>literature</sup> I have not discussed this with my Japanese colleagues but I think what they have done is to look up in a textbook of statistics and they have seen that some of these calculations have been done in that textbook. I think I also know

which textbook it is but without having better evidence, I would not like to present it. I do not think that they are guessing, they are using some statistical textbook.

Mr. GLEESON: I will just ask you again, Mr. Walløe, why did you not bring your calculations to this Court and to Australia so that we could assess the work you were doing? Is there a reason or not?

Mr. WALLØE: There is no other reason that I did not think that was, when I made the criticism — and of course I have, you have, Australia also had the documents — where they present this table, so I thought that was sufficient to say that I did not really understand it but that is my answer.

Mr. GLEESON: Let me take this a step further. If we go to tab 15, and it is on the screen shortly, the calculation in JARPA for humpback whales, in order to get a sample size somewhere near the 50 which is in JARPA, required two assumptions; firstly a project running for 12 years, and secondly seeking to detect a change in the relevant parameter of either 3 per cent up or 3 per cent down. Do you recall analysing that?

Mr. WALLØE: Yes.

Mr. GLEESON: And the parameter here we are looking at is the proportion of pregnant female whales. Do you recall that?

Mr. WALLØE: Yes.

Mr. GLEESON: Now, would you agree that an assumption of a change of 3 per cent per annum, or 36 per cent over the 12 years, is biologically implausible, based on what we know about humpback whale pregnancy?

Mr. WALLØE: I am not sure I can answer that question because I think we have had that kind of discussion <sup>in the Scientific Committee,</sup> but 3 per cent per year for a humpback whale, I am not sure that that is unrealistic.

Mr. GLEESON: I do not wish to be unfair to you, perhaps I should ask you this question: when you read the JARPA proposal, did you find a justification in JARPA for thinking that a 36 per cent change, up or down, over 12 years, was a plausible hypothesis worth testing? Did you find that in JARPA?

Mr. WALLØE: No, but I am a little uncertain.

Mr. GLEESON: Thank you. Could I ask you my next question? My time is very short.

Mr. WALLØE: My comments in my Expert Statement are not on humpback whales but on minke whales.

Mr. GLEESON: Bear with me for one moment, Sir. I will now ask you to be shown tab 16 which is where with the fin whales, putting it briefly, would you agree that the exercise of sampling 50 whales assumed a 12-year project and a 36 per cent change up or down over that period.

Mr. WALLØE: I think, before you continue, that what I did not write in my Expert Statement, but what I was prepared to say, is that during the consultations I had with Japan, Japanese scientists, I never liked ~~the~~, especially, ~~x~~ the fin whale proposal which is what I said to the Japanese before they <sup>started</sup> . . . I never liked the fin whale proposal because I think, and especially with 18 whales caught, it is no information you can get from it. And also there are difficulties with the humpback proposal, although I think that is better presented and justified than the fin whale proposal.

Mr. GLEESON: Thank you for that candid statement. Just my question though was, would you agree that in terms of what JARPA tells us, the fin whales are approached the same way as the humpbacks, namely the sample size of about 50 assumes a 12-year collection program and a 36 per cent increase up or down over that 12 years. And if you do not make those two assumptions, the whole statistics are worthless, are they not?

Mr. WALLØE: Yes.

Mr. GLEESON: Now I will ask for you to be shown at tab 17 the equivalent table for the minke whales. If one carried through the same assumptions — 12 years and a 3 per cent change — the JARPA proposal indicates you would only need to kill 18 whales. Is that correct?

Mr. WALLØE: Well . . .

Mr. GLEESON: Is that correct as far as that goes? I will ask you the next question after that.

Mr. WALLØE: I agree that this table shows this, but then I would like to point out that in my Expert Statement I say that most of these calculations — and it is not only for whale research, my experience is from medical research — is that the power calculations in giving these kind of small numbers, never is justified in practise because you do not know the distribution, you do not know the shape of the distribution, and for this reason in medical research I have been involved in, I mentioned it in my Expert Statement, there is always reason to have fairly large additional number of patients in the medical research and in this case I do not believe these small numbers when you rely on ~~power~~<sup>power</sup> analysis.

Mr. GLEESON: You would agree, though, if one applied the principles of the humpback and the fin whales to the minke whales — that is 12 years and 3 per cent change — you would only need a small number of whales?

Mr. WALLØE: Yes.

Mr. GLEESON: However, what JARPA II does is make two changes to assumption. Firstly it looks for a smaller change, namely 1 to 1.5 per cent, and secondly it changes to six years and not 12 years. That is what allows JARPA II to get a number somewhere in the range of 850, isn't it?

Mr. WALLØE: Yes.

Mr. GLEESON: When you read the proposal, did you find a scientific explanation for choosing 12 years for humpback and fin, but only six years for minke whales?

Mr. WALLØE: As I said a moment ago, I was not that much concerned about the fin and humpback whales because I did not really like that part of the JARPA program.

Mr. GLEESON: Did you find a scientific justification for choosing 12 years in two cases and six years in the other case?

Mr. WALLØE: No, I did not consider the 12 years in the two first cases but I did consider six or 12 years in the minke whale case. The argument, as I understood it, was that because implementation reviews in RMP take place every six years, that was the period the Japanese scientists or maybe even the Government, had chosen because of the six-year implementation review period of the RMP.

Mr. GLEESON: Then why choose 12 years for humpback and fin, Sir?

Mr. WALLØE: As I said, I never considered humpback and fin because I did not like the proposal to catch, especially fin whales, but also humpback whales.

The PRESIDENT: Mr. Gleeson, you have three or four minutes remaining. I would say three.

Mr. GLEESON: Thank you, Mr. President. If you go back to your report, Sir, to page 10.

Mr. WALLØE: Excuse me, I have to remove this then. To page 10?

Mr. GLEESON: In the second paragraph you say you often had the impression that sample sizes were also influenced by funding considerations. Could you explain what you mean by that?

Mr. WALLØE: I meant that funding considerations are also considered when funding bodies, like research councils and so on, are considering costly research projects or a research program, and in this case this is of the order of, what, 850 is what one such vessel could cope with in one season and bring back to Japan. So I think these kinds of considerations were part of the number 850. But I would also like to say that for some of the questions, even larger sample sizes than are written here, would be necessary.

Mr. GLEESON: Two final questions, Sir. If you have problems with the humpback and fin aspect of the proposal, do you consider that undermines the credibility, scientifically, of a proposal which says it is seeking to model competition between the various whale species?

Mr. WALLØE: I consider especially the proposal of fin whales not very well conceived because the main part of the fin whale population are outside the area of JARPA, further to the north, and again this <sup>sampling</sup> . . . cannot be random because of the length~~x~~ limit, they only could catch small fin whales.

But for humpbacks, I am sorry to say this because I know that humpbacks are, well it has been used the word "sacred" animals here previously, I understand that it would be emotionally very difficult, but it is a better scientific justification for taking humpbacks, because they operate in the same area and it would be interesting, even with a small number, to see whether there are changes in, for instance, the amount of krill in the stomach of the humpbacks or whether there are changes in the blubber, and so on. There are many questions you could ask the humpback but I understand also that it is emotionally difficult and I think it is possible, even without sampling humpbacks, to get the information about the changes in the ecosystem and perhaps about the competition. One such example is . . .

Mr. GLEESON: Professor Walløe, could I interrupt you there, without being rude, I am at my final time. My last question is this. Have you formed the view that the Norwegian chair of the IWC, that is the first chair, Mr. Birger Bergersen, now deceased, had in mind that Article VIII would be appropriate under science for taking less than ten whales and he never intended for hundreds of whales to be killed for this purpose and, if you did, what was the source of your statement?

Mr. WALLØE: I agree and I expected this question, because I know I was interviewed, that is quite a while ago but I was at the time, that was after I was engaged in the whaling, I was asked to write an article about Mr. Birger Bergersen for the Norwegian Encyclopedia of Prominent Persons — you know, you have <sup>similar</sup> ~~it~~ in the UK, you have it in other countries, a national biography — I was asked to write his biography so I went to the National Archives, looked into his papers and I

had a somewhat different picture from what we heard from the Australian side about the history of the Convention because much of the work occurred not in 1946 but in the 1930s, resulting in the agreement of 1937. And I read Birger Bergersen's old, everyday notes from the meeting in London in 1937, I read all of them, and it is also true that the concept of what is now Article VIII which had a different number at that time, appeared on the very last day of that long meeting in London. It was introduced without any explanation and in his notes at that time, Birger Bergersen, he was an anatomist, Kellogg from the United States was an archaeologist, they were not whale scientists, but Birger Bergersen in a letter to Kellogg wrote that it could be necessary to even if there was a new species of whale and, remember at that time, Bryde's whales was discovered not many years before. It was discovered that it was a species separate from the Sei whale. That was in the 1920s. So ten years later, Bergersen as an anatomist argued that we need this paragraph which is now Article VIII to be sure that we could kill whales if we needed. So that was his science and that was his <sup>justification of Article VIII</sup> . . . but I said so in an interview and I expected this question to come because of that.

Mr. GLEESON: I am not sure you have explained why you have concluded he thought no more than ten would be necessary.

Mr. WALLØE: If you are an anatomist, you would probably in some cases only need one animal but what he said was a low number and ~~he~~ wrote in that note, for example, less than ten.

Mr. GLEESON: Thank you. Thank you, Mr. President.

The PRESIDENT: You would like to re-examine, Mr. Lowe, please?

Mr. LOWE: Thank you, Mr. President, I have no other questions.

The PRESIDENT: Thank you very much. The Court will now retire for ten minutes but the Parties and experts should remain in the vicinity of the Main Hall of Justice and after ten minutes' break we will return and my understanding is that a few judges will have questions for Mr. Walløe. The sitting is suspended for ten minutes.



Certainly I expect that Mr. Walløe will enjoy these ten minutes to refresh and not to be engaged in conversation either with members of the Japanese delegation or Australian or some of his colleagues from the Scientific Committee.

Mr. LOWE: Yes, no contact with counsel during this break.

*The Court adjourned from 4.35 p.m. to 4.50 p.m.*

The PRESIDENT: Please be seated. The hearing is resumed. The first judge to put a question or questions to Mr. Walløe is Judge Greenwood. You have the floor.

Judge GREENWOOD: Thank you very much, Mr. President. Professor Walløe, I think it would save time if you had a copy of your own report open in front of you, because I want to ask you a couple of questions.

Mr. WALLØE: I have it here.

Judge GREENWOOD: Would you look at page 10, please?

Mr. WALLØE: Yes.

Judge GREENWOOD: In the second paragraph there you say "it must be admitted that the Japanese scientists have not always given completely transparent and clear explanations of how sample sizes were calculated or determined, and on reading the research proposals for JARPA and JARPA II submitted to the IWC Scientific Committee, I often had the impression that sample sizes were also influenced by funding considerations". Would you just explain to the Court please which sample sizes you are referring to there, in relation to JARPA II?

Mr. WALLØE: I am referring to the sample size of what I consider 850.

Judge GREENWOOD: So the minke whales?

Mr. WALLØE: The minke whales. I am not commenting on the sample size of humpbacks or fin whales.

Judge GREENWOOD: Right. Thank you very much. And do you understand the scientific rationale, from reading the paper to the IWC Scientific Committee which you were asked about earlier, do you understand the scientific rationale for the change from the sample size under JARPA to the much larger sample size, I think it is twice what was being caught, twice the sample size in the last couple of years of JARPA and nearly three times the initial JARPA size?

Mr. WALLØE: I was not at all involved in the beginning of the JARPA but I consider it as it was explained to me that it was partly a feasibility study, although of course it was not only ten whales, it was a large number even then. But what I am considering in my expert statement was only the sample size for the JARPA II. JARPA itself is a much more difficult program and I must admit I had some reservations on some parts of JARPA, but my expert statement is only for JARPA II.

Judge GREENWOOD: Thank you very much. Well, perhaps I can just ask one follow-up question about that. When JARPA II was first put to the IWC Scientific Committee as a proposed program, part of that proposal was a move from the figure of 300 to 400 minke whales, which had been the sample size for some 16 years in JARPA, to a figure that was more than twice as high. Do you see a scientific rationale for why the original figure had been too small and therefore a new higher figure was said to be necessary?

Mr. WALLØE: I think I saw the reasons for the larger number but I did of course at that time not calculate the way I tried to do when writing this expert statement. But it was also obvious that some of the objectives for JARPA were not met during the JARPA period, partly because the sample sizes were too small. Not the only reason, but that was one of the reasons.

Judge GREENWOOD: Thank you very much.

The PRESIDENT: Thank you very much. The next judge to put a question is Judge Cançado Trindade.

Judge CANÇADO TRINDADE: Thank you, Mr. President. As specialized knowledge in the most diverse domains is seen nowadays as not self-sufficient, if not unsatisfactory, when kept

in isolation, there have been in recent years some wishful expressions of support for a *relinking* of distinct areas of knowledge (*reliant les connaissances*), also — I would add — in relation to the work of international tribunals, in their endeavours to instruct better the process, of cases brought to their attention. Keeping this in mind, I have three interrelated questions to put to Professor Lars Walloe.

— First: in your opinion, would the utilization of lethal methods for the purpose of JARPA-II, as opposed to alternative methods of “research”, lead to major or important “scientific” results? Are those methods *essential* to obtain these results, or could such results be achieved by the means of the utilization of non-lethal methods?

Mr. WALLØE: As I think I at least tried to say in my first 20 minutes here, I consider that it is in theory possible to obtain the genetic information and some other information on pollution and so on by biopsy sampling alone but my collaborators in Norway, we have experience from Barents Sea and not from the Antarctic Ocean, it was much more efficient to obtain it by lethal sampling. But there are other questions that could not be answered only by biopsy sampling. So really I accepted the Japanese argument why lethal sampling was necessary.

Judge CANÇADO TRINDADE: Secondly, retaking a point already referred to: as to the lines of the “scientific research” conducted under JARPA-II, and the objectives pursued thereunder, can one determine the *total* of whales to be killed to attain such objectives?

Mr. WALLØE: No, you mean over a long period?

Judge CANÇADO TRINDADE: Yes, such as JARPA-II's.

Mr. WALLØE: No, I cannot. I think that is difficult and it depends on which of the different questions you are focusing on. I think for the time being for some more years it will be justified to kill 850 but you must also remember that my background is, as I state, although it is not relevant for this case, I consider that the killing of whales, as long as we are quite sure that it is done in a humane way, like we kill other animals, and as long as we are quite sure that it is sustainable, I do not see any argument <sup>against</sup> to use the killing of whales as a scientific method?

Judge CANÇADO TRINDADE: And thirdly, and lastly: in your experience, can you think of other programmes where the use of lethal methods has been deemed essential? And, if so, how do you compare the use of lethal methods in other programmes to those in JARPA-II?

Mr. WALLØE: Sorry, but are you talking about whale research or research on animals in general, because then it is although not necessarily, I mean I do not have it in my head, but it is obvious that there are other examples in . . .

Judge CANÇADO TRINDADE: I am asking about *whale* research, since, as you yourself referred, minutes ago, — before our brief break —, to the exercise which will take place next year, on evaluation of JARPA-II.

Mr. WALLØE: Of course, as I mentioned in the early 1990s, Norway was conducting special permit research to get the amount of stomach contents but, in contrast to the Antarctic where one or two species of krill is the main food for the whales, in the North Atlantic and the Barents Sea there are three or four potential species and we had to show at that time how much ~~do~~ our minke whales in the North Atlantic eat of the different species dependent on the abundance of these species in the area around the minke whales. So we had to do lethal research to get this and that was used in a computer model called ~~Multspec~~ <sup>Multspec</sup>, which was presented then in fisheries associations and published in fisheries journals. So for that research, it was necessary.

Judge CANÇADO TRINDADE: Thank you, Professor Lars Walloe; thank you, Mr. President.

The PRESIDENT: Thank you very much. The next judge to put a question is Judge Yusuf.

Judge YUSUF: Thank you, Mr. President. Professor Walløe, I would like to understand better your position with regard to the criteria put forward by Dr. Mangel, on the characteristics of a program for scientific research. I understand that you disagree with those criteria? Did you say you disagree with those criteria?

Mr. WALLØE: If you are referring to the four criteria — and I do not have the text of them in front of me, so then I have to ask to have them here — but I think I agree with much of it, but not all of it. That is my recollection now, but I would like to see the statements before.

Judge YUSUF: They are on page 5 of your report.

Mr. WALLØE: In my report? Then I should be able to, I thought you were talking about some other, sorry. Oh, yes. In addition, which I did not mention here, it is the fourth criteria that it should not endanger the stock, which was one in addition to the three here. The fourth one I agree completely with, so that is the reason I did not mention it. But for these three here, I agree — that was what I tried to say in the beginning — I agree that there should be some questions, something the scientists would like to explore, but not necessarily focused questions. That is where I disagree: the focused question, <sup>if the meaning is</sup> ~~if that is meaning~~ in the sense that Mangel uses it, it is a hypothesis which is ~~so~~ <sup>so</sup> precise that you can tell which kind of observation and how many ~~will you~~ <sup>you will</sup> need to get the 5 per cent level and the power of 80 per cent or 95 per cent — to use the statistical terms — then I do not agree. But I agree on the first part; concerning the second one, yes, if you employ the correct set of empirical tools, I agree, but to answer the question, including setting sample sizes, with sound statistical reasoning, yes. But as I already wrote in ~~the~~ <sup>my</sup> statement and also explained more in detail, I have serious concerns about the use of statistical way to calculate sample sizes, because it very often fails and the reason is statistical, that you never know what kind of distributions you will have of the variables you are investigating. And that is one reason why one of my other scientific fields has been to investigate the robustness of the statistical methods and I have even developed, by computer simulation with one of my graduate students, methods which can be used in clinical studies where you do not need to calculate sample sizes beforehand. That is called sequential methods which cannot be used in this kind of whale research, but is now being very much used in clinical trials on new drugs or new treatments.

Judge YUSUF: Thank you. You have been a member of the Scientific Committee for a very long time. Has this issue of defining the characteristics of a program for purposes of scientific

research, establishing criteria for such scientific research, ever come up in the Scientific Committee — at least as long as you have been a member of that Committee?

Mr. WALLØE: It has come up, yes, in the context of JARPA and JARPAN and JARPA II, the three research programs of which only two are mentioned here. It has been discussed in the Scientific Committee and there has been a fair amount of disagreement in the Scientific Committee on these issues.

Judge YUSUF: So, the Scientific Committee has never established any criteria as far as you can recollect?

Mr. WALLØE: Not more than you can read out of the different Annexes which were agreed, proposed by the Scientific Committee then to the Commission and then ~~came~~<sup>came</sup> back, as I understand ~~it~~<sup>it</sup> legally in the form of a resolution. It needs only a simple majority, but it was always passed with consensus both in the Scientific Committee and in the Commission. And for this reason, of course that is what I meant by ~~it~~<sup>what I said earlier,</sup> we have this fourth possible objective which is different from management ~~of~~<sup>of</sup> the whales and so on. To that extent we have these Annexes which have changed a little over time, we have agreement in the Scientific Committee.

Judge YUSUF: And my last question actually which is always on the same subject is: are you aware of any criteria, or set of criteria, that have been established or adopted by professional bodies in your areas of scientific research, for the definition of a scientific research project?

Mr. WALLØE: Yes, I am aware but it depends a little on what you mean by criteria, but for instance in the area of medical research you have a set of criteria which will go both to the ethics of the study about, for instance, that it is unethical to perform a study without sufficient power because then you throw away, you use patients for ~~things~~<sup>studies</sup> which will give no useful knowledge. So in the area of medical research especially concerning patients you have a defined set of criteria, yes.

Judge YUSUF: Thank you very much, Professor Walløe. Thank you, Mr. President.

The PRESIDENT: I next call upon Judge Bennouna to put his question. Vouz avez la parole, Monsieur.

Judge BENNOUNA: Thank you, Mr. President. I have one question for you, Professor Walløe. While I will do it step by step, and probably you will see where I am going — what I mean, what will finally be my question. Professor Walløe, can you say to the Court for how long are you personally involved or active in scientific research in whaling, particularly in the Antarctic?

Mr. WALLØE: In the Antarctic, that is a little difficult to say, but my interest in the whaling issue, as I responded to a question by Professor Lowe, I can give the date even — it was in 1986, in May, when the Commission meeting ended, it was in Sweden that year, and it was shown on the television how the Norwegian Commission at the time was interviewed — Per Tresselt, I mentioned him earlier — and also a major figure on the anti-whaling body, Dr. Sidney ~~Hout~~<sup>Hout</sup>, and these two were talking against each other. Immediately afterwards I got a telephone call from Mrs Brundtland and then my engagement started. But for the Antarctic, it started with killing methods and that was both for the North Pacific and for the Southern Ocean, because it was a question whether the killing methods were efficient. The Japanese at that time used the secondary killing method, that is when the harpoon does not killing the whale, how can you then kill it? They used the method called the “electric lance”. It was very heavily criticized in the Commission, it was not <sup>a</sup> ~~the~~ topic for the Scientific Committee. At one point in time, that was in 1996, I was asked or I offered — that is more correct — because I thought the Japanese had good evidence that the electric lance was efficient although I thought that the Norwegian method, of shooting by rifle was better, so I offered to do the calculations. After some time I was given the data and that was my first involvement with — that was ten years after I started in the Commission and in the Scientific Committee — I had no contact with the Japanese except for pleasantries in the Commission <sup>and the Scientific</sup> ~~during~~ <sup>Committee</sup> the first ten years, but then it started.

Judge BENNOUNA: Thank you very much. I imagine that Japan was concerned by scientific research in whaling before the launching of JARPA?

Mr. WALLØE: Yes.

Judge BENNOUNA: In 1987. You know also that in 1987 — this is an important date because you started yourself, you said, in 1986 — is concomitant with the acceptance by Japan of the moratorium on whaling for commercial purposes. My question, or what I would like, or the Court, would like to know from you is first how Japan conducted its research in this field before JARPA? If you know?

Mr. WALLØE: I know some of it, but maybe my information is not sufficiently precise. But, they obtained samples and data from the commercial whaling. And that is for instance, what gave the information about the decline in age of sexual maturity from the year 1945 to 1970 which I referred to. That is in total based on the commercial catches. So evidence obtained. I do not know whether they had scientists on board the vessels or whether their samples were collected after the vessels came to port. So I do not have detailed information. But it was conveyed, in the Antarctic, from the commercial catches.

Judge BENNOUNA: That is interesting. So the samples were taken from commercial catches? So my following question, perhaps it is the final one — do not worry — do you know exactly why, is it by pure chance, why Japan decided precisely with the moratorium, the end of commercial catching, to launch this program of JARPA for scientific research in 1987? Why, do you know exactly why, Japan decided at that time, in 1987, to launch this program called JARPA?

Mr. WALLØE: I have two comments. Because I was, as you understood, close to my Prime Minister at the time, Ms Brundtland, I was involved; not part of the negotiations, but I was observing and giving her information on what was happening. And, what was happening was, as we have heard the other day, the United States put strong pressure on three countries: Japan, Iceland and Norway. And the two other countries gave in to the pressure. Well, Ms Brundtland was stubborn, and said we are a loyal member of NATO, we are doing everything according to United States wishes, I do not want to be put under pressure here. So, she decided *not* to withdraw the moratorium. But of course, we had contacts. But, I was not involved, I only heard about it from my Prime Minister that the Japanese were considering to withdraw the objection, because



they expected that in 1990 there would be a reconsideration. And, as there were many whales in the Antarctic Ocean — but this is indirect, I did not hear this from the Japanese, I heard it from Ms Brundtland and her people at the Prime Minister's office. So, I think that was the background, but also, and that was part of why we managed — the Norwegians managed — to resist the pressure, was that we then decided at least we have to collect scientific evidence. And I was first put in as a Chair of a small group of scientists — the United Kingdom and one American scientist. The American, later, was not allowed by his Government to take part, so it ended up by two Norwegian and two British scientists — prominent British scientists — Roy Anderson and Ray Beverton. As a result, the next year, was that there was no strong evidence that the minke whale abundance in the North Atlantic was declining but that if Norway wanted to continue its catch of minke whales, we should have better scientific evidence. And then the science started on our part. I know that the Japanese needed better and more research, but now I am guessing, I guess that there is a reason why they started this JARPA program immediately. But that is what I heard from the Japanese.

Judge BENNOUNA: Thank you very much.

The PRESIDENT: Thank you. And the next judge is Judge Keith. Please, you have the floor.

Judge KEITH: Thank you, Mr. President. Thank you, Professor Walløe. Could I take you back to your initial document and the bottom of page 13 and the top of page 14, where you are commenting about the purpose of monitoring the Antarctic ecosystem? And I take your point that the area that the Japanese said they were monitoring was half the circumference of the Antarctic, a very large area. As a matter of scientific method — and this a question very much from the position of ignorance — there were, I understand, or there are I understand, a number of other research projects related to that very broad matter going on in your part of the world as well, as well as my part of the world, although where I live we are only halfway to the Antarctic, but as thinking of SORP, Pacific and CCAMLR and the Scientific Committee for Antarctic Research. And I think there are two Japanese institutes for Polar Research and for Far Eastern Fisheries. And

my question is whether it would make good scientific sense in the case of a project like JARPA and JARPA II for there to be linkages, because I have not noticed that there are any linkages into such other projects which have the broad Antarctic ecosystem in mind? Thank you.

Mr. WALLØE: I am not quite sure I understand the question. But was the question whether my opinion on a possible co-operation between the CCAMLR science and the JARPA II program?

Judge KEITH: Yes.

Mr. WALLØE: And because that covers the whole circumference of the Antarctica? Of course I would consider that valuable if it was possible. But, and this brings me back to the political issue, there are strong opinions in the Scientific Committee about the value of the lethal research. And some of the same scientists are from the CCAMLR Scientific Committee. One of them is the scientist I referred to in my earlier speech. So, we have Norwegian scientists on the CCAMLR, because Norway has some political interests in the Antarctic. But I think it would be difficult for personal and political reasons. But I would like to add that, to my personal meaning, it would be helpful and, since this was not asked by the Australian examiner of me previously, I would like to state that I am now also entering into collaboration with Australia on the SORP program, in collaboration with Dr. Gales. Because I consider, as you suggest, that co-operation will be useful.

Judge KEITH: Two of the bodies I mentioned — and I realized that was a big wrapped up question — but two of the bodies were Japanese institutes, and there would not be the same political problem there, would there? But do you have any reaction in terms of the Japanese Institute for Polar Research and for Far Eastern Fisheries? Maybe their fields do not sufficiently overlap, I do not know?

Mr. WALLØE: Again, I have some difficulties in hearing what you were saying. But are asking “Are there other scientific institutions in Japan that we could have a better collaboration with?” Yes, I agree.

Judge KEITH: Thank you.

The PRESIDENT: Thank you. And, Judge Charlesworth's question. You have the floor, Madam.

Judge CHARLESWORTH: Thank you, Mr. President. Thank you, Professor Walløe. My question is also just one of scientific method, like Judge Keith's. I am just wondering how do scientists assess whether the sample of minke whales it has taken under JARPA II is representative of the minke population as a whole? How do you know you are not just catching the slow whales, for example?

Mr. WALLØE: Of course it is, in a statistical sense, not representative of minke whales from the other half of the circumference of Antarctica. We do not know where the outer borders of the two main stocks are. They could meet on the other side of the Antarctica or there could be one or more other stocks with different biological characteristics. But, we, at present, do not know that. But, I still think that the information collected will be of great value for the two stocks. And also the problem of their sub stocks, of which there are no evidence, so far.

The PRESIDENT: Thank you very much. This completes the examination of Professor Walløe. I thank him, on behalf of the Court, for appearing before us and he can now leave the rostrum. And as we have some 45 minutes left, I call on Professor Pellet to continue in his pleading.

Mr. WALLØE: Before I leave, may I say thank you, Mr. President, and thank you to the Members of the Court for the interesting questions.

The PRESIDENT: Thank you very much, Professor.

M. PELLET : Merci beaucoup, Monsieur le président. Je pense que ça tombe bien et que je ne devrais pas du tout dépasser les 45 minutes.

Monsieur le président, Mesdames et Messieurs de la Cour, ce matin, j'ai montré que l'article VIII était limpide ; «crystal clear», c'est bien plus poétique. Dans ces conditions, il n'est pas nécessaire de recourir à des méthodes complémentaires ou auxiliaires d'interprétation, <sup>même si,</sup> comme je l'ai dit, cela ne nuit pas et ces méthodes, en fait, confirment en tout point ce que la lecture du

texte enseigne lorsque l'on s'en tient au sens clair et naturel de ~~ces~~<sup>ses</sup> termes. C'est vrai s'agissant du préambule, des travaux préparatoires ou de la pratique ultérieure et c'est à cette pratique ultérieure que j'en suis arrivé, à la fin de la session de ce matin.

### C. La pratique ultérieure

36. Monsieur le président, l'Australie fait grand cas de la pratique ultérieure des Parties<sup>1</sup>. Elle ne sert pas davantage sa thèse que le recours au contexte ou aux travaux préparatoires. Au contraire, la pratique *pertinente* — et je me permets d'insister sur ce mot, Monsieur le président, la pratique *pertinente* — confirme que l'article VIII, qui constitue une exception au regard des autres règles applicables à la chasse à la baleine, contenues dans la convention, confère un pouvoir discrétionnaire aux gouvernements contractants pour délivrer les permis spéciaux et fixer leur contenu, y compris l'autorisation de «tuer, capturer et traiter des baleines» et le nombre d'animaux concernés conformément à ce qu'il juge «opportun».

37. Trois constatations peuvent être faites :

1. les textes de droit dérivé ayant une valeur obligatoire qu'invoque l'Australie ne sont pas applicables en l'espèce ou n'ont pas la signification qu'elle leur prête ;
2. s'il est exact que d'autres semblent conforter la thèse australienne, il s'agit exclusivement d'instruments qui constituent de pures recommandations ; et
3. c'est bien pour cela que l'Australie et d'autres Etats «antichasse» ont tenté d'obtenir la révision de la convention, et en particulier de l'article VIII — et ceci en vain à ce jour.

#### 1. La valeur juridique variable des textes adoptés par la Commission

38. L'usage massif que fait l'Australie des textes adoptés par la CBI<sup>2</sup> conduit à s'interroger sur le rôle que ceux-ci peuvent se voir attribuer dans la présente affaire.

39. Le paragraphe 2 de l'article III de la convention, qui précise les compétences appartenant à la CBI et les conditions de leur exercice, pose le principe de l'adoption des «décisions» de la

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<sup>1</sup> MA, p. 164-170, par. 4.65-4.80 ; CR 2013/8, p. 35-41, par. 35-52 (Crawford).

<sup>2</sup> Voir surtout p. 27-52, par. 2.47-2.98, p. 147-152, par. 4.20-4.30, p. 160-161, par. 4.53-4.56, p. 164-170, par. 4.65-4.80.

commission «à la majorité simple des membres votants», mais il précise qu'«une majorité des trois quarts des membres votants sera requise pour les décisions prises en vertu de l'article V».

40. Cette différence dans le système de vote se traduit par une différence de valeur normative entre les deux types d'actes que la CBI peut adopter : les amendements au règlement d'une part et les actes recommandatoires d'autre part. L'article V de la convention donne en effet à la commission le pouvoir de modifier le règlement annexé à la convention, qui a la même valeur que celle-ci<sup>3</sup>. En conséquence, les amendements adoptés par la CBI selon la majorité renforcée des trois quarts<sup>4</sup> sont obligatoires pour les parties, sauf dans le cas où «un gouvernement présente à la commission une objection à un amendement, avant l'expiration [d'un] délai de quatre-vingt-dix jours»<sup>5</sup>, auquel cas ~~il ne s'impose pas~~ cet amendement ne s'impose pas ~~à~~ à ce gouvernement. Par contraste, les actes adoptés par la commission selon la règle de la majorité simple n'ont pas de valeur obligatoire, qu'un gouvernement y objecte ou non.

41. Parmi les amendements au règlement adoptés par la CBI, un seul concerne la matière régie par l'article VIII de la convention : il s'agit du paragraphe 30 du règlement adopté en 1979<sup>6</sup> — son texte figure sous l'onglet n° 2 du dossier des juges. Les autres amendements auxquels l'Australie fait référence comme étant des «mesures supplémentaires de conservation»<sup>7</sup> («additional conservation measures», écrit-elle) — à savoir : l'instauration des sanctuaires de l'océan Indien<sup>8</sup> et de l'océan Antarctique<sup>9</sup>, ou le moratoire de la chasse commerciale<sup>10</sup> ou le moratoire sur les usines flottantes<sup>11</sup> — tous ces autres règlements sont applicables à la seule chasse commerciale, mais non aux permis spéciaux. Ils ne peuvent donc en aucune manière informer l'interprétation de l'article VIII.

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<sup>3</sup> Voir art. 1<sup>er</sup>, par. 1.

<sup>4</sup> Art. III, par. 2.

<sup>5</sup> Art. V, par. 3 a).

<sup>6</sup> CMJ, annexe 6.

<sup>7</sup> MA, p. 160, par. 4.53. Voir aussi CR 2013/11, p. 34-35, par. 35 (Gleeson).

<sup>8</sup> CMJ, annexe 6, par. 7 a).

<sup>9</sup> *Ibid.*, par. 7 b).

<sup>10</sup> *Ibid.*, par. 10 e).

<sup>11</sup> *Ibid.*, par. 10 e).

42. L'Australie déduit du paragraphe 30 du règlement que celui-ci a eu pour effet de réduire le pouvoir discrétionnaire dont les gouvernements contractants bénéficient en vertu de l'article VIII. Selon elle, l'introduction de cette disposition aurait eu pour effet d'amender cet article, pour établir «detailed criteria that had to be addressed before a Contracting Government could issue a permit under Article VIII»<sup>12</sup>. Bien qu'elle soit plus nuancée, la Nouvelle-Zélande estime pour sa part que le paragraphe 30 a été introduit pour permettre à la commission de surveiller l'application de l'article VIII, impliquant ainsi, sans doute, mais sans vraiment oser le dire, que la CBI pourrait se prononcer sur la validité des permis octroyés pour, éventuellement, en empêcher l'octroi<sup>13</sup>. Je relève tout de même que, prudemment, le professeur Crawford affirme que «là n'est pas la question» — «that is not the point»<sup>14</sup>. J'ai connu mon ami moins circonspect — et il faut sans doute que «la question» lui paraisse bien embarrassante pour qu'il botte ainsi en touche...

43. En réalité, le paragraphe 30 guide un pouvoir qui demeure discrétionnaire, mais n'en contraint pas l'exercice. Il en va de même des lignes directrices, qui sont des documents adoptés par le comité scientifique<sup>15</sup> afin de guider l'application du paragraphe 30 en ce qui concerne l'examen des permis spéciaux. Ces documents, qui sont appelés annexes (L, O ou P)<sup>16</sup>, ont été par la suite endossés par la CBI, à travers une série de résolutions. Ni l'un ni les autres ne transforment un pouvoir discrétionnaire en une compétence liée. Mme Takashiba reviendra plus longuement sur ce point demain matin.

44. Il me suffira donc de dire que le Japon ne conteste pas la valeur obligatoire du paragraphe 30, mais il n'en résulte pas pour autant que cette disposition puisse être réputée avoir modifié la convention comme nos amis de l'autre côté de la barre le prétendent<sup>17</sup>. Nulle part dans la convention, il n'est envisagé que la commission pourrait modifier les dispositions mêmes de

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<sup>12</sup> MA, par. 4.30.

<sup>13</sup> Voir OEN, par. 86 ou 105.

<sup>14</sup> CR 2013/8, p. 33, par. 29.

<sup>15</sup> Voir CMJ, par. 8.31. Voir aussi CR 2013/8, p. 21-22, par. 28-30.

<sup>16</sup> Voir CMJ, par. 8.68.

<sup>17</sup> Voir CR 2013/7, p. 61, par. 66 (Boisson de Chazournes).

celle-ci par le biais d'amendements au règlement en vertu de l'article V<sup>18</sup>. Certes, le règlement est partie intégrante de la convention, mais les amendements que la commission peut lui apporter de temps à autre font l'objet — en vertu de l'article V — de règles spécifiques, qui ne s'appliquent pas à la revision du corps même de la convention. Et ceci montre bien que les Parties ne sauraient amender la convention par le biais de cette procédure simplifiée.

45. Du reste, la pratique ultérieure des Etats parties confirme qu'ils n'ont pas investi la CBI d'un tel pouvoir de modification. Ainsi, dans l'unique hypothèse dans laquelle ils ont amendé le texte même de la convention, ils l'ont fait par le biais d'un protocole, lui-même soumis à signature et à ratification<sup>19</sup>.

46. Les conditions de l'adoption, en 1956, du seul protocole à la convention sont révélatrices à plus d'un égard. Il s'agissait de modifier des dispositions du texte même de la convention afin d'étendre les compétences de la CBI. Les gouvernements contractants s'accordaient à considérer que ceci ne pouvait se faire à la sauvette, en se bornant à insérer dans le règlement des dispositions modifiant le corps de la convention, si bien qu'il a été entendu que le protocole n'entrerait en vigueur que lorsque tous les Etats parties l'auraient ratifié. Ceci montre bien qu'il ne suffit pas que la commission adopte des textes votés à la majorité, même renforcée, pour modifier la convention elle-même<sup>20</sup>. L'Australie et la Nouvelle-Zélande en sont bien conscientes et cela aussi fait partie de la pratique ultérieure puisque c'est sous la forme de protocoles formels d'amendements qu'elles se sont efforcées, sans succès jusqu'à présent, d'obtenir des modifications de la convention et en particulier de son article VIII — je vais y revenir dans quelques instants, et plus longuement demain.

47. Contrairement au paragraphe 30 du règlement, dont les dispositions sont obligatoires pour les gouvernements contractants, les avis du comité (et les positions que la CBI pourrait être conduite à adopter sur les permis spéciaux notifiés par les gouvernements) n'ont nullement valeur obligatoire. Il s'agit d'actes purement recommandatoires, facilitant la coopération entre un Etat

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<sup>18</sup> Voir, en ce sens, «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, disponible en ligne: <http://www.regjeringen.no/cn/dep/fkd/Whats-new/News/2013/scientific-research-on-whales.html?id=731449>.

<sup>19</sup> Voir le protocole du 19 novembre 1956, amendant les articles II et V de la convention (MJ, annexe 6).

<sup>20</sup> Voir article III, paragraphe 2, du protocole du 19 novembre 1956, amendant les articles II et V de la convention (CMJ, annexe 6).

octroyant un permis spécial et les organes de la convention, notamment le comité scientifique — organes qui n'ont pas vocation à restreindre les droits que les Etats tiennent de l'article VIII ; la CBI n'est pas une organisation supranationale. Et ceci me conduit à répondre aux questions que M. le juge Greenwood ne nous a pas posées ... ; mais je pense qu'il ne m'en voudra pas de m'y essayer tout de même :

First question: «What is the precise legal basis on which it is said that Japan has a legal obligation [I suppose, Judge Greenwood that you mean binding legal obligation?] arising from the recommendations contained in resolutions of the IWC»; answer: there is no such legal basis;

Second question: «and what is the precise content of that obligation»; answer: no legal basis, no obligation, no content at all...

48. Ceci n'a pas empêché le Japon d'adopter une attitude extrêmement constructive à l'égard de ces recommandations, comme je le montrerai demain, dans ma prochaine — et dernière — intervention. Mais ça ne les rend pas juridiquement obligatoires.

49. Ceci me conduit, Monsieur le président, à examiner brièvement le rôle que peuvent jouer (ou que ne peuvent pas jouer) un certain nombre d'instruments de droit mou (de *soft law*) sur lesquels s'appuie l'Australie pour tenter de faire dire à l'article VIII le contraire de ce qu'il dit.

## **2. La valeur du droit dérivé *soft***

50. L'Australie invoque en effet une série de résolutions de la CBI portant sur les permis spéciaux<sup>21</sup>, les lignes directrices du comité scientifique<sup>22</sup> et certains commentaires des Etats parties<sup>23</sup>, qui constitueraient selon elle une pratique ultérieure pertinente pour l'interprétation de l'article VIII.

51. Dès lors que l'Australie affirme qu'il résulte de cette «pratique» une interprétation de l'article VIII allant à l'encontre du texte clair de cette disposition, ce n'est que si elle démontrait que cette prétendue pratique avait *modifié* la convention — ce qui serait possible — que cet argument aurait un semblant de pertinence. Or, il n'en est rien.

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<sup>21</sup> MA, par. 4.68, par. 4.70-4.80. Voir aussi CR 2013/8, p. 19-21, par. 21-27 (Burmester) ; CR 2013/8, p. 37-38, par. 40-45 (Crawford) ; CR 2013/11, p. 33-35, par. 30-35 (Gleeson).

<sup>22</sup> MA, par. 4.67. Voir aussi CR 2013/8, p. 21-22, par. 28-31 (Burmester) ; CR 2013/8, p. 34-35, par. 31-34 (Crawford) ; CR 2013/11, p. 25, par. 2 ; p. 32, par. 25-26 (Gleeson).

<sup>23</sup> MA, par. 4.78-4.79.



52. Les conditions pour que l'on puisse reconnaître une pratique ultérieure modificatrice sont extrêmement strictes. Dans son projet de convention sur le droit des traités, la CDI avait envisagé la possibilité qu'une pratique ultérieurement suivie modifie les dispositions expresses d'un traité. Dans le commentaire du projet d'article 38<sup>24</sup>, la commission insistait sur la nécessité d'un consentement unanime des parties «en vue d'appliquer le traité d'une manière différente de celle qui est prescrite dans certaines de ses dispositions» pour qu'une telle pratique puisse «avoir pour effet de modifier le traité»<sup>25</sup>.

53. Comme l'a rappelé avec clarté une sentence arbitrale récente :

«[P]our qu'il y ait une pratique telle que celle visée par le paragraphe 3 c) de l'article 31 de la Convention de Vienne sur le droit des traités, il est nécessaire qu'il y ait une concordance indiscutable entre les positions des parties et que ces positions aient été susceptibles d'avoir fixé le sens d'une disposition du traité.»<sup>26</sup>

Ce n'est pas le cas de la «pratique» invoquée par l'Australie.

54. En premier lieu, aucun des éléments supposés la constituer (on ose à peine utiliser le mot «instruments» tant cette soi-disant «pratique» est disparate) — aucun de ces éléments donc ne présente par lui-même la moindre valeur contraignante. C'est évidemment le cas pour les prises de position de certains Etats ou groupes d'Etats ; mais ce l'est aussi en ce qui concerne les résolutions adoptées par les organes de la convention.

55. Selon les termes de l'article VI :

«La Commission pourra, de temps à autre, faire des *recommandations* à l'un, à plusieurs ou à l'ensemble des gouvernements contractants, portant sur toutes questions relatives aux baleines ou à la chasse à la baleine et aux objets de la présente convention.»

Par elles-mêmes, de telles recommandations ne peuvent être considérées comme un élément de la pratique ultérieure ni aux fins de l'interprétation de la convention, ni, moins encore, pour établir

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<sup>24</sup> Rapport de la Commission du droit international à l'Assemblée générale, *Annuaire 1966*, vol. II, p. 257.

<sup>25</sup> *Ibid.*, p. 257, par. 1 du commentaire du projet d'article 38. Voir aussi *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif*, C.I.J. Recueil 1971, p. 22, par. 22 ; *Souveraineté sur Pedra Branca/Pulau Batu Puteh, Middle Rocks et South Ledge (Malaisie/Singapour)*, arrêt, C.I.J. Recueil 2008, p. 50, par. 120 ou *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)*, arrêt, C.I.J. Recueil 2009, p. 242, par. 64.

<sup>26</sup> *Question du régime fiscal des pensions versées aux fonctionnaires retraités de l'UNESCO résidant en France*, sentence arbitrale du 14 janvier 2003, *RSA*, vol. XXV, p. 259-260, par. 74 ; voir aussi p. 258, par. 70.

l'existence d'une modification s'imposant aux gouvernements contractants<sup>27</sup>. Et je rappelle que l'article VIII doit s'entendre et s'interpréter nonobstant les autres dispositions de la convention.

56. Or, en l'espèce, bien souvent, ces recommandations vont à l'encontre du texte même de la convention, et en particulier de notre article VIII. Tel est le cas des résolutions qui requièrent que toute recherche scientifique soit menée par des méthodes non létales. Il va de soi que ces recommandations ne sauraient être appelées à l'appui d'une interprétation de l'article VIII, qu'elles contredisent et qu'elles ne sauraient dans ces conditions être considérées comme des «directives particulièrement convaincantes [ou] autorisées» «highly persuasive, [or] authoritative guidance»<sup>28</sup>. Et si la Cour a eu l'occasion de se référer dans le passé à des résolutions non obligatoires (de l'Assemblée générale ou du Conseil de sécurité des Nations-Unies)<sup>29</sup>, elle ne l'a jamais fait pour *infirmar* un texte, <sup>à</sup> moins que les conditions d'une modification coutumière de l'acte constitutif soient remplies. Ce n'est pas le cas en l'espèce.

57. A cet égard, avec tout le respect que j'ai et pour le professeur Crawford et pour les Lauterpacht, père et fils, je crois que le premier fait dire aux seconds quelque chose d'inexact<sup>30</sup> : bien sûr qu'il peut se former une pratique de l'organisation ; et bien sûr que cette pratique peut servir à interpréter l'acte constitutif de l'organisation ; mais on ne saurait tirer de la seule accumulation de résolutions sans valeur obligatoire et adoptées dans des conditions souvent marquées par un très fort antagonisme entre les Etats membres, la conclusion qu'une telle pratique établit «l'accord des parties à l'égard de l'interprétation du traité» au sens de l'article 31, paragraphe 3 b), de la convention de Vienne. Ce n'est même pas le cas lorsque de telles résolutions sont adoptées par consensus — marque souvent de résignation plus que de volonté positive — ou même à l'unanimité : voter pour une *recommandation*, par définition non obligatoire, ce n'est pas s'engager à l'appliquer — même si une telle recommandation, comme toute résolution d'ailleurs,

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<sup>27</sup> Voir, par exemple, *Affaire Cruz Varas et autres c. Suède*, Requête n° 15576/89, CEDH, arrêt du 20 mars 1991, par. 100.

<sup>28</sup> CR 2013/7, p. 31, par. 28 (Gleeson) ; voir aussi CR 2013/8, p. 35, par. 35 (Crawford).

<sup>29</sup> Voir *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif du 9 juillet 2004*, C.I.J. Recueil 2004 (I), p. 176, par. 98-99.

<sup>30</sup> CR 2013/8, p. 36-37, par. 36-37 (Crawford).

doit être prise de bonne foi en considération par leurs destinataires<sup>31</sup> ; mais c'est un autre problème, sur lequel je reviendrai demain.

[Projection n° 5 : Les votes sur les résolutions concernant JARPA.]

58. Au demeurant, les résolutions qu'invoquent l'Australie et la Nouvelle-Zélande sont loin d'être consensuelles. La Nouvelle-Zélande force donc très abusivement le trait lorsqu'elle affirme — et je cite sa demande en intervention : «These resolutions serve as an expression of the collective views of the parties...»<sup>32</sup> De la même manière et pour la même raison, l'Australie a tort de prétendre que ces résolutions reflètent ~~je cite son mémoire, non, je cite M. Burmester~~ : «the widespread view of the Convention's Contracting Governments»<sup>33</sup>, ~~ou — et cette fois, je cite de nouveau M. Burmester —~~ «the collective view of the Commission»<sup>34</sup>. Elles ne représentent que les vues communes à certains Etats membres (pour l'instant majoritaires) et, à ce titre, doivent être dûment prises en considération par tous les gouvernements ; rien de moins, certes, mais rien de plus : il ne s'agit pas de traités, de *pacta* qui seraient *servanda*.

59. Le Japon a dressé un tableau illustrant les conditions d'adoption des résolutions visant les programmes japonais de recherche<sup>35</sup> ; il est reproduit dans le dossier des juges sous l'onglet n° 38 et est projeté en ce moment. Il en ressort que, dans la plupart des cas, ces résolutions non obligatoires n'ont nullement recueilli l'assentiment de l'ensemble des Etats parties, bien qu'elles aient toujours, bien sûr, obtenu la majorité simple nécessaire à leur adoption : comme M. Gales l'a relevé, les positions au sein de la commission aussi bien que du comité scientifique sont terriblement «polarisées»<sup>36</sup> et M. Walløe l'a aussi redit tout à l'heure. Et ceci constitue une raison supplémentaire pour laquelle ces recommandations ne sauraient être opposables en tant que textes obligatoires aux Etats de la minorité et ne peuvent guère éclairer l'interprétation du traité<sup>37</sup>.

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<sup>31</sup> Voir *Procédure de vote applicable aux questions touchant les rapports et pétitions relatifs au Territoire du Sud-Ouest africain, avis consultatif*, C.I.J. Recueil 1955, Opinion individuelle de M. Lauterpacht, p. 118-119 ; voir aussi Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2<sup>e</sup> éd., Cambridge University Press, 2005, p. 179.

<sup>32</sup> WON, par. 31.

<sup>33</sup> CR 2013/8, p. 19, par. 23 (Burmester).

<sup>34</sup> CR 2013/8, p. 20, par. 26 (Burmester) ; p. 41, par. 52 (Crawford).

<sup>35</sup> CM, p. 403-40.

<sup>36</sup> CR 2013/9, p. 26.

<sup>37</sup> Voir T.I.D.M., affaire n° 14, *Hoshinmaru (Japon c. Fédération de Russie), prompt mainlevée*, arrêt du 6 août 2007, par. 86-87.

60. En outre, le contenu de ces résolutions ne témoigne pas de la conviction des Etats parties selon laquelle elles viendraient limiter leurs droits en vertu de l'article VIII. Un épisode est particulièrement révélateur à cet égard.

61. Peu après l'adoption du moratoire et avant même l'entrée en vigueur de celui-ci, certains Etats au sein de la commission ont essayé d'en étendre les effets à la chasse à des fins scientifiques. Une première résolution a été adoptée en 1985, dans laquelle la commission avait, sans la moindre preuve, laissé entendre que certains permis spéciaux octroyés en vertu de l'article VIII pourraient relever, en réalité, de la chasse commerciale<sup>38</sup>. (Les tenants de cette résolution reconnaissaient au demeurant «les droits souverains des Parties contractantes»<sup>39</sup>).

62. Mais l'année suivante, en 1986 donc, la commission a adopté, et cette fois par consensus<sup>40</sup>, une résolution sur les permis spéciaux recommandant aux Etats de collaborer étroitement avec le comité scientifique, sur la base du paragraphe 30 du règlement<sup>41</sup>. L'Australie insiste sur l'adoption consensuelle de cette résolution<sup>42</sup>, signe, selon le professeur Crawford, que «all Contracting Governments, including Japan, accepted the principles embodied in this Resolution»<sup>43</sup>. C'est oublier que nombre d'Etats, parmi lesquels le Japon justement, ont exprimé d'importantes réserves<sup>44</sup> et que, je l'ai dit, le consensus est loin de valoir acceptation. Au demeurant, le ralliement au consensus des Etats qui avaient émis des objections au moratoire, y compris le Japon, signifiait de réelles concessions de leur part et était fondé sur la prémisse que la CBI allait entreprendre, *au plus tard en 1990*, «l'évaluation exhaustive» prévue par le moratoire. Toutefois, après la clôture de la session durant laquelle cette résolution a été adoptée, le commissaire des Etats-Unis a cru pouvoir envoyer au secrétaire de la CBI une lettre demandant que des modifications soient apportées à la résolution de 1986, afin de tenter de restreindre l'exercice

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<sup>38</sup> CBI, résolution 1985-2, «Resolution on Scientific Permits» (MA, annexe 7).

<sup>39</sup> CBI, comptes rendus de la 37<sup>e</sup> réunion annuelle, 1985 (Australie).

<sup>40</sup> «Chairman's Report at the Thirty-Eight Meeting», p. 12, disponible en ligne : <http://iwc.int/cache/downloads/b5vill4sd5kckwkc04socw804/CHAIRS%20REPORT%201986.pdf>.

<sup>41</sup> CBI, résolution 1986-2, «Resolution on Special Permits for Scientific Research», disponible en ligne : <http://iwc.int/cache/downloads/5q49gvIuutssss4sgksocsg8o/Resolution%201986.pdf>.

<sup>42</sup> CR 2013/8, p. 38, par. 42 (Crawford).

<sup>43</sup> CR 2013/8, p. 38, par. 42 (Crawford).

<sup>44</sup> «Chairman's Report of the Thirty-Seventh Annual Meeting», 1985, p. 11-12 ; voir aussi CBI, Verbatim Records of the Thirty-Seventh Annual Meeting, 1985.

des droits des Etats parties en vertu de l'article VIII<sup>45</sup> — preuve *a contrario* que ce n'est pas ce que fait cette résolution de 1986<sup>46</sup>. Les Etats opposés par principe à la chasse baleinière ont néanmoins eu gain de cause l'année suivante et, revenant sur le difficile consensus réalisé par la résolution 1986-2, celle de 1987 a été adoptée après une suite de discussions très conflictuelles, par 19 voix contre 6, et 7 abstentions<sup>47</sup>. D'autres résolutions sur lesquelles s'appuie plus spécialement l'Australie ont été adoptées à des majorités encore bien plus serrées. Telles sont, Monsieur le président, les «majorités considérables»<sup>48</sup> sur lesquelles s'appuie l'Australie pour prétendre à l'existence d'une pratique représentant «l'action collective des gouvernements contractants»<sup>49</sup>.

[Fin de la projection n° 5.]

63. En tout état de cause, la seule existence de résolutions critiques de JARPA ou JARPA II n'équivaut pas à une pratique. Pour qu'il en aille autrement, il faudrait que ces recommandations traduisent l'accord unanime des Parties, soient suivies d'actes matériels d'exécution de la part des Etats, et que ces ~~Etat~~<sup>actes</sup> aillent tous dans le sens de la pratique alléguée. Ce n'est pas le cas comme le montre un examen de la pratique suivie par les Etats en matière de recherche scientifique après l'adoption du moratoire.

64. Dans la période précédant le moratoire, tous les Etats ayant une industrie baleinière, Australie incluse, avaient octroyé des permis scientifiques, comme le montre le tableau statistique inséré à l'onglet n° 39 du dossier des juges<sup>50</sup>. Tel était aussi le cas du Japon, dont je relève qu'entre 1976 et 1978, il avait autorisé la prise de 660 baleines au titre de permis scientifiques — un chiffre non négligeable si l'on tient compte du fait qu'il n'y avait pas alors de moratoire sur la chasse commerciale et que l'on pouvait donc recueillir des données biologiques également par le moyen de la chasse commerciale — et ceci confirme qu'il n'y a, décidément, rien d'arbitraire dans les quotas de chasse actuels. Si ces activités n'ont pas soulevé à l'époque — je parle d'avant le

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<sup>45</sup> Lettre de M. Calio, du 26 août 1986, reproduite dans la «Circular Communication» du 29 août 1986 (doc. RG/VJH/16202) (annexe 2 aux observations du Japon sur l'intervention de la Nouvelle-Zélande).

<sup>46</sup> Voir notamment CR 2013/8, p. 37, par. 40, ou p. 38, par. 72 (Crawford) ; CR 2013/11, p. 25, par. 44 (Gleeson).

<sup>47</sup> Voir aussi le tableau retraçant le vote des résolutions à l'onglet n° 57 du dossier des juges de l'Australie.

<sup>48</sup> Voir CR 2013/8, p. 41, par. 53 ; p. 50, par. 79 (Crawford) ; CR 2013/11, p. 27, par. 8 (Gleeson).

<sup>49</sup> Voir *ibid.* ; CR 2013/8, p. 41, par. 53 ; p. 50, par. 79 (Crawford) ; CR 2013/11, p. 27, par. 8 (Gleeson).

<sup>50</sup> Voir le tableau statistique inclus dans la «Circular Communication to Commissioners and Contracting Governments», 5 janvier 1987, RG/VJH/16365 (annexe 3 à la réponse du Japon sur les observations écrites de la Nouvelle-Zélande, 31 mai 2013).

moratoire — de difficultés particulières, comme d'ailleurs la Nouvelle-Zélande le remarque<sup>51</sup>, ce n'est pas parce qu'elles étaient fondamentalement différentes de ce qu'elles sont aujourd'hui, mais parce que la composition de la commission était différente et que certains des Etats ayant eu une industrie baleinière, comme l'Etat demandeur et l'Etat intervenant, ne s'étaient pas encore convertis à la nouvelle religion de la préservation des baleines «en soi».

65. L'Australie et la Nouvelle-Zélande<sup>52</sup> brocardent l'augmentation du nombre de baleines tuées au titre de permis spéciaux que le Japon a octroyés après l'adoption du moratoire<sup>53</sup>. Ce persiflage n'est pas de mise. Certes, après l'entrée en vigueur du moratoire, durant la saison 1987-1988, le Japon a dû développer des programmes plus ambitieux en termes de prises, pour pallier l'absence des informations que l'on pouvait tirer auparavant des prises commerciales. Mais, loin d'être la preuve d'un quelconque abus des droits reconnus par l'article VIII, cela corrobore au contraire qu'il y avait là un impératif lié à la recherche scientifique : il a fallu compenser la perte des données que procurait la chasse commerciale<sup>54</sup>.

66. Au demeurant, le Japon n'est pas le seul Etat à avoir émis des permis scientifiques après 1986 : la République de Corée, l'Islande et la Norvège ont fait de même<sup>55</sup>. Assurément, ces pays ont autorisé la prise de moins de baleines que le Japon ; mais, il faut garder à l'esprit que les deux derniers de ces pays, l'Islande et la Norvège, disposent toujours d'informations scientifiques obtenues dans le cadre de la chasse commerciale : la Norvège <sup>qui</sup> a émis une objection au moratoire, et M. Walløe a rappelé dans quelles conditions elle l'a maintenue, et l'Islande qui, après avoir dénoncé la convention suite à son adoption, est redevenue partie, mais en formulant une réserve à ce même moratoire.

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<sup>51</sup> OEN, par. 93.

<sup>52</sup> OEN, par. 78.

<sup>53</sup> Voir MA, p. 34-35, par. 2.66-2.67.

<sup>54</sup> Voir les statistiques de permis scientifiques pour la période 1987-2011 sur le site de la CBI, à l'adresse : [http://iwc.int/table\\_permit](http://iwc.int/table_permit).

<sup>55</sup> Voir les statistiques de permis scientifiques pour la période 1987-2012 sur le site de la CBI, à l'adresse : [http://iwc.int/table\\_permit](http://iwc.int/table_permit).

### 3. Les tentatives infructueuses de revision de l'article VIII

67. Monsieur le président, il existe une preuve décisive de l'inexistence de toute pratique modificatrice et, au-delà, de la fausseté de l'interprétation de l'article VIII qu'invoque l'Australie : à plusieurs reprises en effet, les Etats opposés à toute forme de chasse à la baleine ont fait savoir qu'ils souhaitent modifier l'article VIII ou le supprimer de la convention<sup>56</sup>.

68. L'Australie est l'un des, sinon le, chef(s) de file de ce courant et n'a pas caché que la suppression de l'article VIII est l'axe majeur de sa politique relative à la CBI. Je n'en donne qu'un exemple — il date de 2010 :

«Australia has been clear that we consider any new approach must include an agreement to bring an immediate end to this form of whaling and must put in place a mechanism and timetable to address the reform of Article VIII of the ICRW to permanently end this practice.»<sup>57</sup>

69. L'Australie n'en a pas moins conscience qu'une modification du texte de la convention, n'a aucune chance d'aboutir, dans l'état actuel des choses et je vais citer une autre brochure australienne en français, ce qui marque l'importance que l'Australie devait lui accorder parce qu'on ne peut pas dire que les documents australiens soient très fréquemment traduits en français :

« Une majorité des membres actuels de la Commission baleinière internationale s'oppose à l'utilisation de l'article VIII sous forme de «chasse à la baleine scientifique» à l'échelle commerciale et la plupart de ces membres ne soutiendraient pas une reprise immédiate de toute forme de chasse commerciale. Toutefois, cette majorité ne se traduit pas nécessairement par une capacité à *modifier l'article VIII* de la convention. *Modifier* la convention requiert la convocation d'une conférence diplomatique, et l'accord de toutes les parties [à] tous les changements afin de les rendre efficaces. Il est peu probable que cela se produise dans le moyen à court terme.»<sup>58</sup>

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<sup>56</sup> Voir notamment Chair's Report of the 58<sup>th</sup> Annual Meeting, *Annual Report of the International Whaling Commission 2006*, p. 23 (CMJ, annexe 65) ; voir aussi Royaume-Uni (Department for Environment, Food and Rural Affairs, *The International Whaling Commission: the way forward*, 208, disponible en ligne : <http://archive.defra.gov.uk/wildlife-pets/wildlife/protect/whales/documents/iwc-wayforward.pdf>), par. 23. Voir aussi la position de la Nouvelle-Zélande, *The Conservation of Whales in the 21st Century*, disponible en ligne : <http://doc.org.nz/documents/conservation/native-animals/marine-mammals/conservation-whales-c21.pdf>, p. 21.

<sup>57</sup> Gouvernement d'Australie, *The Future of the International Whaling Commission: An Australian Proposal*, 2 mars 2010, doc. IWC/M10/SWG 5, disponible en ligne : <http://archive.iwcoffice.org/documents/commission/future/IWC-M10-SWG5.pdf>. Voir aussi Gouvernement d'Australie, *Conservation et gestion des baleines. Un avenir pour la CBI*, doc. IWC/M08/INFO 11-FR, p. 7, document présenté à la réunion intersessions de la CBI en 2008, également disponible en ligne : <http://www.environment.gov.au/coasts/publications/pubs/iwc-future-paper.pdf>. Voir aussi Chair's Report of the 61<sup>st</sup> Annual Meeting, *Annual Report of the International Whaling Commission 2009*, p. 8 (CMJ, annexe 68).

<sup>58</sup> Gouvernement d'Australie, *Conservation et gestion des baleines. Un avenir pour la CBI*, doc. IWC/M08/INFO 11-FR, p.12, document présenté à la réunion intersessions de la CBI en 2008, disponible en ligne : <http://www.environment.gov.au/coasts/publications/pubs/iwc-future-paper.pdf>. (les italiques sont de nous).

Les deux documents que je viens de citer sont reproduits respectivement sous les onglets n<sup>os</sup> 41 et 42 de vos dossiers.

70. Faute d'amendement, l'Australie a lancé des appels à un changement volontaire dans la pratique des permis spéciaux. Ainsi, elle a *proposé* qu'à l'avenir (et c'est bien d'un *changement* futur par rapport au droit et à la pratique existants qu'il s'agit) — ~~qu'à l'avenir~~ «Governments *should commit* to activities only when authorised by the Commission»<sup>59</sup>. Ce faisant, l'Australie reconnaît que ce qu'elle plaide devant vous est souhaitable sans doute à ses yeux, mais que cela ne correspond pas au droit en vigueur. L'interprétation qu'elle donne de l'article VIII répond à ses vœux — c'est ce qu'on appelle du *wishful thinking* ; mais la réalité, même juridique, est têtue.

71. Sans avoir le temps d'y insister, j'indique au passage que la Nouvelle-Zélande avait également produit, en 2005, un document de discussion en vue de l'adoption d'un protocole modifiant plusieurs dispositions de la convention, à commencer par l'article VIII<sup>60</sup>. Ce document spécifiait qu'une telle modification ne pouvait être envisagée que par le biais d'un instrument obligatoire, ayant la même valeur que la convention elle-même, donc par un protocole. On ne saurait, Monsieur le président, envisager plaider (*a contrario*) plus convaincant en faveur de l'interprétation que fait le Japon de l'article VIII, tel qu'il continue de figurer dans la convention.

72. Certains Etats membres de la CBI ne se sont d'ailleurs pas fait faute de rappeler la nécessité d'un amendement formel lorsqu'ils ont exprimé leur désaccord avec le contenu des résolutions contraires à l'article VIII, ainsi qu'à toute tentative directe ou indirecte visant à soumettre les permis scientifiques à un régime de contrôle par la CBI<sup>61</sup>. Ces désaccords, exprimés par des Etats particulièrement intéressés tant à cette pratique prétendue qu'à l'*opinio juris* alléguée,

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<sup>59</sup> Chair's Report of the 61<sup>st</sup> Annual Meeting, *Annual Report of the International Whaling Commission 2009*, p. 11 (les italiques sont de nous) (CMJ, annexe 68) ; voir aussi Government of Australia, «Addressing Special Permit Whaling and the Future of the IWC», IWC/61/9 (2009) (CMJ, annexe 178).

<sup>60</sup> Voir Cover page for protocol, v1, 24 mars 2005 (annexe 4 aux observations du Japon sur l'intervention de la Nouvelle-Zélande).

<sup>60</sup> Nouvelle-Zélande, Discussion Document, Protocol Amending the International Convention for the Regulation of Whaling, 24 mars 2005 (annexe 5 aux observations du Japon sur l'intervention de la Nouvelle-Zélande).

<sup>61</sup> Voir Chair's Report of the 61<sup>st</sup> Annual Meeting, *Annual Report of the International Whaling Commission 2009*, p. 11.



empêchent la formation de tout accord ultérieur sur une interprétation *contra scriptum* de l'article VIII<sup>62</sup>.

73. Aussi longtemps que les Etats membres de la CBI, partagés en deux camps antagonistes, ne parviendront pas à un accord pour modifier la convention, les résolutions invoquées par l'Australie resteront l'expression de la position des Etats ayant, pour l'instant, la majorité à la CBI ; mais cette position est sans influence sur l'interprétation des dispositions conventionnelles. Cette expression est, d'une certaine manière, unilatérale, puisqu'elle ne reflète que les intérêts homogènes — ou hégémoniques ? — de ce «camp». C'est une demande, une réclamation de la majorité, mais non ~~pas~~ l'expression du droit positif. Et ce n'est pas parce que les Etats opposés à la chasse à la baleine ont, pour l'instant, acquis la majorité dans l'organe conventionnel que la convention est devenue «leur chose» et que vous pouvez, Mesdames et Messieurs de la Cour, retenir l'interprétation que deux d'entre eux (non sans quelques nuances d'ailleurs) tentent de vous faire endosser.

Mesdames et Messieurs les juges, je vous suis très reconnaissant d'avoir écouté avec attention cette longue plaidoirie ~~— mais il était peut-être opportun qu'elle soit coupée en deux —~~, qui a porté sur un problème que nous tenons pour central dans notre affaire. Mon successeur à cette barre sera le professeur Lowe, mais je suppose que vous préférerez ne lui donner la parole que demain matin même s'il est à votre disposition.

Le PRESIDENT : Merci beaucoup Monsieur le professeur. Certainement je donnerai la parole au professeur Lowe demain matin à 10 heures. Before closing this afternoon's session, I will give the floor to Judge Bhandari, with a question for Japan. Judge Bhandari, you have the floor.

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<sup>62</sup> Voir Pêcheries (*Royaume-Uni c. Norvège*), arrêt, C.I.J. Recueil 1951, p. 131 ou *Plateau continental de la mer du Nord* (*République fédérale d'Allemagne/Danemark*) (*République fédérale d'Allemagne/Pays-Bas*), arrêt, C.I.J. Recueil 1969, p. 43, par. 74 ; voir aussi *Ile de Kasikili/Sedudu* (*Botswana/Namibie*), arrêt, C.I.J. Recueil 1999 (II), p. 1087, par. 63.

Judge BHANDARI: Thank you, Mr. President. I have two questions for Japan.

“Paragraph 5.108, page 244, of Australia’s Memorial indicates that the Director-General of the Japan Fisheries Agency stated that ‘[t]he implementation of scientific whaling was viewed as the only method available to carry on with the traditions of whaling’. I would like to request your comments on this statement, in the context of the good faith doctrine.”

My additional question for Japan is:

“Before launching JARPA II, did Japan establish that it is carrying out lethal scientific research on such a large scale because it is critical and there is no other available method?”

Thank you.

The PRESIDENT: Thank you, Judge Bhandari. The written text of these questions will be sent to the Parties as soon as possible. Japan is invited to answer questions orally, preferably tomorrow during the first round of oral argument. Australia is free during its second round of oral argument to comment on the reply of Japan. The Court will meet tomorrow morning at 10 a.m. to hear the continuation of Japan’s first round of oral argument. Thank you, the Court is adjourned.

*The Court rose at 5.55 p.m.*

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