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*CR 2013/15*

**International Court  
of Justice**

**LA HAYE**

**Cour internationale  
de Justice**

**THE HAGUE**

**YEAR 2013**

*Public sitting*

*held on Thursday 4 July 2013, at 10 a.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 jeudi 4 juillet 2013, à 10 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  
Caçado 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  
Caçado 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 morning. The sitting is open. The Court meets this morning to hear the continuation of Japan's first round of oral argument. Thus I shall now give the floor to Professor Vaughan Lowe. You have the floor, Sir.

Mr. LOWE:

## STANDARD OF REVIEW

### Introduction

1. Thank you, Mr. President, Members of the Court, Australia has put before you its account of Japan's actions in relation to JARPA II, and it has put before you the terms of the Whaling Convention, as it interprets them. What it has not done is explain the legal reasoning as to how precisely it reaches the conclusion that Japan's actions amount to a breach of the Convention. Australia appears to assume that that is self-evident: but it is not.

2. Australia has said that it accepts that lethal whaling is sometimes justified<sup>1</sup>; but, it will no doubt say, not on the scale of JARPA II. So the question is, what is the Court's role where Contracting Governments disagree over an Article VIII research program?

3. If one of the Contracting Governments to the Whaling Convention thinks that catching 300 or 600 minke whales is enough for scientific purposes, is that a matter for the Court to decide? If one Government thinks that the importance of determining the age structure of a whale stock requires lethal stock sampling *now*, but another Government thinks that the age-data is not required *this year*, is the Court to decide if a delay is necessary?

4. Such questions arise in all international organizations and under all treaties where States have powers to act for certain purposes or in certain contexts. The question is, what is the Court's role in reviewing a State's decisions regarding the exercise of its powers?

5. The essence of my submission on behalf of Japan in this round of the oral pleadings lies in two propositions:

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<sup>1</sup>CR 2013/7, pp. 33-34, para. 38 (Gleeson); CR 2013/8, p. 49, para. 77 (Crawford); CR 2013/9, p. 15, para. 5 (Sands); CR 2013/9, pp. 40, 46, 61, 64, 65, 71 (Mangel); CR 2013/10, p. 45, para. 17 (Crawford).

- (i) First, that the Court can review the exercise of a State by its powers, but only in circumstances where that exercise is alleged to violate an identified obligation of that State under international law;
- (ii) Second, that the result of the applicable obligations in this case is that the question for the Court is whether Japan, as a Contracting Government to the Whaling Convention, has acted in bad faith in establishing the JARPA II program.

**Australia must show that Japan has violated a legal duty**

6. As to the first proposition, it is in our submission axiomatic that the Court cannot be called upon to review an exercise of governmental power by a State unless that exercise is alleged to violate an obligation of that State under international law. An applicant cannot, for example, properly call upon the Court to review and condemn the provisions of another State's tax laws or criminal laws just because it does not like those provisions. It *must* allege that the other State is legally obliged not to maintain the provisions in question. That point is obvious, but important.

7. What is the obligation that Australia says is violated here? Japan has pointed out that the right to issue special permits is *not* created or given by the Whaling Convention: whaling, whether for commercial or scientific reasons, was an undisputed exercise of the freedom of the high seas for generations before the 1946 Whaling Convention and its predecessors were even conceived. There is no suggestion that Japan could not have issued permits for JARPA II in the past as an exercise of the high seas freedom of fishing and/or high seas freedom of research.

8. Whaling for scientific purposes was a freedom that pre-existed the Whaling Convention, and Article VIII stipulates that it is exempt from the operation of the Whaling Convention. So, the question here is not, "what are the limits of a power given by a treaty?", but rather "what limits on the exercise of a freedom have been imposed by a treaty?" And our friends on the other side have not addressed that point.

9. My colleagues will address that point. They have already explained, and will explain further, that the limits imposed by Article VIII do no more than require that Japan comply with the procedural obligations set out in the Convention, and that Japan *has*, most assuredly in fact, complied with all those procedural obligations.

10. The question therefore is whether any *other* provision in the Convention forbids the activities involved in JARPA II. Australia says that JARPA II violates the moratorium on commercial whaling in paragraph 10 (*e*) of the Schedule, and in the case of fin whales the provision on the Southern Ocean Sanctuary in paragraph 7 (*b*), and again in the case of fin whales, the moratorium on catching by means of factory ships in paragraph 10 (*d*). Australia sometimes slides over the facts that Japan is not bound by the Southern Ocean Sanctuary provisions as regards minke whales, and that the moratorium on factory ship whaling is a moratorium rather than an outright prohibition, and that it is stated — twice, in the 47 words of paragraph 10 (*d*) — that it does not apply to minke whales.

11. Australia says that these provisions are violated because Japan cannot rely upon its Article VIII right to conduct scientific whaling because it is acting in bad faith, and that its reliance on that right is an abuse of right.

12. Australia and New Zealand also hint at the proposition that the Convention extinguished all the pre-existent rights under customary international law to conduct whaling, for whatever purposes, except for “whaling for scientific purposes” within the particular meaning that they give to it under the Convention; a hint that Japan must prove that JARPA II falls within the scope of the “scientific purposes” provision. The proposition that the Convention extinguished all customary international law rights relating to whaling has not been argued before you, and we cannot see any basis for it. So we leave that point there.

13. The claim that we have to answer is, essentially, that JARPA II is not an exercise of the right to carry out whaling for purposes of scientific research, but is commercial whaling. Professor Iwasawa will explain shortly how the aims and methods of catching whales under JARPA II is quite different from the practice of commercial whaling, and that JARPA II is not commercial whaling.

14. Japan authorized JARPA II as a scientific expedition, and it has described the scientific methods and purposes of JARPA II. Australia carries the burden of persuading the Court that Japan’s considered determination that JARPA II *is* a scientific research program that can properly be authorized under the Whaling Convention’s Article VIII, is legally invalid and must be set aside.



### **The importance of the standard of review**

15. The question that immediately arises is, what is the standard of review? How should the Court approach the task of deciding whether an exercise of discretion by a State — the exercise of a legal freedom or right that undoubtedly exists — is invalid and without legal effect on the plane of international law?

16. Australia has given no clear indication of what its case is on this point. The Memorial did not make clear whether Australia thought that this was close to an appeal against Japan's decision on JARPA II, in which the Court could consider the matter *de novo* and substitute its own view on the desirability of JARPA II for the view of Japan; or whether the Court should, for example, overturn a Contracting Government's determination under Article VIII only if it could be shown to be manifestly arbitrary or capricious; or whether the Court could look only at the process by which the determination was made and not at its substance.

17. We are still not clear what Australia's position is. Professor Crawford rejected the idea that there was any margin of discretion or appreciation allowed to Contracting Governments<sup>2</sup>, presumably with the result that what the Court decides what is, or what was — and there is an important question between those two formulations — “necessary” for the purposes of scientific research; and the question is then whether JARPA II does or does not get over that line. It does not matter how far or how close it is to that line; and it does not matter that other Governments, other tribunals, and other scientists might have drawn the line in a different place.

18. The Solicitor-General, on the other hand, spoke in terms of the “departure from standards of reasonableness and *bona fides*” by Japan in the exercise of its right<sup>3</sup>, which seems rather closer to Japan's position than to Professor Crawford's. The Solicitor-General vigorously advanced the argument that Japan had indeed been “arbitrary and capricious” in its action, and he identified the arbitrary and capricious action as a breach of the procedural requirements to give real consideration to the Whaling Commission's views, and a failure to “show” the compelling need to kill so many of the objects of study — both of which Japan equally vigorously denies<sup>4</sup>.

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<sup>2</sup>CR 2013/8, p. 45, paras. 63-64 (Crawford).

<sup>3</sup>CR 2013/11, p. 38, para. 43 (Gleeson).

<sup>4</sup>CR 2013/11, p. 40, para. 51 (Gleeson).

19. In our submission the question of the standard to which Japan is being held accountable is of central importance in this case. Professor Pellet will set out our submissions on the legal requirements of the doctrine of good faith under international law. My preliminary task is to address the standard of review more broadly.

20. I referred some moments ago to some of the standards of review: appeals and *de novo* reviews; reviews based on the manifest arbitrariness or capriciousness of decisions; attacks based on the procedures by which decisions were adopted; and so on.

21. *De novo* review is clearly not appropriate, or even practicable, here. Tribunals engage in *de novo* review in circumstances where the procedures by which cases come before those tribunals are designed so as to bring the case in a manner that enables the tribunal to act *effectively* in conducting a full *de novo* review.

22. That requires, for example, the presentation to the tribunal of all of the evidence on which the original decision was — or should have been — based. The Solicitor-General outlined on Friday the matters that he said Japan should have addressed in good faith, and these would necessarily have had to be supported by evidence presented to the Court<sup>5</sup>. He referred to the questions, how might the objectives of JARPA be revised so that they align with the critical research needs, identified by the Whaling Commission and the Scientific Committee, and how might the methods of JARPA be adjusted to have a real likelihood of achieving the objectives so tailored?

23. He said “rather than start with a pre-determined view that a certain number of whales had to be killed each year, how might non-lethal means — existing or reasonably capable of development — provide a partial or complete alternative?”<sup>6</sup> We have yet to see what evidence Australia thinks it may have for the accusation, which Japan emphatically rejects, that it started with a pre-determined view that a certain number of whales had to be killed each year; and we hope that Australia might think of rephrasing its claims so that they stay closer to the evidence that it has adduced. But the question of how far non-lethal means, which currently exist or are

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<sup>5</sup>CR 2013/11, p. 27, para. 9 (Gleeson).

<sup>6</sup>CR 2013/11, p. 27, para. 9 (Gleeson).

reasonably capable of development, provide for a partial or complete alternative to lethal takes is certainly another question to be addressed in a *de novo* review.

24. The Solicitor-General's fourth question was, should JARPA be suspended or deferred until those other questions could be answered? That looks like a policy question; and it is not clear what criteria or supporting evidence the decision-makers should use. But again, it adds to the evidence that must, in Australia's submission, be considered before the necessity or propriety of JARPA II as an Article VIII research program can be decided.

25. That decision would require a survey of the existing data, an analysis of the questions left unanswered by that data and of the importance of that data and of the alternative ways in which that data might be obtained, and of the levels of accuracy needed. It would involve the determination of the necessary sample size, and of the frequency and duration of the data collection. Crucially, it would be premised upon a determination of what are the proper questions that people — biologists, oceanographers, ecologists, resource managers, environmentalists or whatever — should be asking, or perhaps are entitled to ask — it is not clear how much freedom Australia would permit in framing research aims — whether these questions be classical hypotheses such as “whale abundance is related to krill abundance” and “krill abundance in Antarctic waters is declining”, or broader questions within a scientific framework such as “given that we know that the Antarctic climate is changing, what are the effects upon whale populations?”

26. But Australia has *not* put before the Court the information that is necessary for the making of decisions on these questions. And, with respect, it is not obvious that the Court has the necessary expertise to enable it to analyse such information, even if it were put before it.

27. That is not to say that the Court cannot question — and in appropriate cases, declare to be in contravention of international law — decisions taken by national authorities. Let me be clear. Japan does not argue that there should be complete deference to decisions taken by Contracting Governments.

28. But there is a great deal of intermediate ground between *de novo* review and total deference. We are all familiar with the concepts in domestic law: the quashing of decisions because they are arbitrary, or are decisions that no reasonable person could possibly have reached, or that rest upon incorrect facts; the distinction in administrative law in civil law countries between

*le pouvoir discrétionnaire*, and *la compétence liée*. And, the question is, what is the test in international law?

### **The different roles of courts in relation to international organizations**

29. Well, that question arises here under the International Whaling Convention, and in our submission, it must be answered in that specific context. A comparison with other treaty organizations established around the same time shows that different bodies were set up to work in different ways.

30. For instance, the constitutions of both the World Health Organization (1946) (Art. 75) and the United Nations Food and Agriculture Organization (1945) (Art. XVII) give this Court the key role in the settlement of disputes concerning the interpretation of those constitutions. The Whaling Convention gives the ICJ no role.

31. Neither the FAO nor the WHO Constitution provides for the imposition of binding substantive measures upon Member States by majority vote, although the WHO (Art. 20) does oblige Member States to furnish a statement of the reasons for the non-acceptance of any convention or agreement adopted by a two-thirds vote in the WHO Health Assembly. The Whaling Convention provides for the adoption by a three-quarters majority vote of amendments to its schedule; but those amendments do not bind objecting States. Moreover, the Whaling Convention does not require any reasons to be given for objections — a point which was regarded as significant by President Klaestad in the *Constitution of IMCO* case<sup>7</sup>.

32. The 1958 Convention on Fishing and the Conservation of Living Resources on the High Seas provides for a Commission to decide disputes, — and specifically, in Articles 7, 9, and 10, disputes over the need for the urgent application of conservation measures and the existence of a basis for such measures in “appropriate scientific findings”. That Commission, whose members would be drawn from those specialized in administrative or scientific questions relating to fisheries (not only from lawyers), would decide by majority vote with binding effect on the parties in dispute.

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<sup>7</sup>See *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, p. 150; dissenting opinion of President Klaestad, p. 175.

33. These four examples — the IWC, the WHO, the FAO and the 1958 Convention on Fishing — illustrate something of the range of institutional arrangements that there might be. The point is that one needs to look at the specific terms of a convention in order to determine the role of the Court in relation to determinations which are made by the contracting parties under that convention.

#### **The specific procedural requirements under the ICRW**

34. Article VIII of the Whaling Convention preserves the right of Contracting Governments to authorize whaling by special permit for research purposes. The Convention does not require the Government to give a reasoned decision on authorization; it does not require the consent of the International Whaling Commission or its Scientific Committee to such authorization; it does not even require that the authorization be given by the Government “acting on the advice” of the Scientific Committee, as do many provisions in European Union law.

35. The Whaling Convention requires (in paragraph 30 of the Schedule) only that members of the Scientific Committee have the opportunity to “review and comment” on permits that a Government proposes to issue.

36. Japan accepts that the provision for “review and comment” implies that the comments are to be considered through a process which enables an informed expert view on the merits of any comments received to be put before the officials taking the final decision on the issue of the permit, and that the comments and the appraisal of them be taken into account by the officials when taking the final decision.

37. Japan has done this. Japan is well aware of the controversy concerning lethal whaling; and it studies and considers views from the Whaling Commission and its Scientific Committee with the greatest care.

#### **The duty to act in good faith**

38. Japan accepts, too, that the discretion which Contracting Governments have under Article VIII is not unrestricted. As a matter of international law, if Australia proved that the decision to issue permits for JARPA II had been taken in bad faith and was manifestly an abuse of

Japan's rights, the Court would be entitled to review the decision and to declare that it contravened the Convention.

39. It is not uncommon for the Court and other international tribunals to be faced with cases in which the actions by a State are challenged on the basis that although the action is nominally an exercise of a power that indisputably exists, the circumstances are such that the action cannot be regarded as a "proper" exercise of that power.

40. The Court has consistently approached these situations by requiring the applicant State to prove that the action was taken in bad faith. Let me mention some of the most illuminating examples.

41. Bad faith arises in two contexts: the interpretation and the application of treaties; and the exercise of rights in international law in general.

42. The obligation to interpret and apply treaty provisions in good faith is spelled out in Articles 31 and 26 of the Vienna Convention on the Law of Treaties. It has been reiterated in many cases and I need not take you to them. But I should refer you to the Court's decisions in the *Conditions of Admission*<sup>8</sup> and *Peace Treaties*<sup>9</sup> cases — the latter an instance of a case where the Court might have introduced a general reference to good faith to override the specific wording of a treaty, but very firmly refused to do so. In arbitral practice, there are the awards in the *North Atlantic Coast Fisheries* case<sup>10</sup>, and in the *La Bretagne* arbitration, where the tribunal referred to the "principle of good faith which is of necessity a principal factor in the performance of treaties"<sup>11</sup>.

43. What is significant about this body of practice is not so much that there *is* such a duty in relation to the interpretation and application of treaties — it is barely conceivable that there should not be. What is significant is that the duty is tied to the criterion of *good faith*, and not to some other standard.

44. The cases do not say that there is a duty to apply the treaty in the manner that the majority of the other States Parties think it should be applied, or in the manner that the Court

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<sup>8</sup>*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J Reports 1947-1948, p. 63.*

<sup>9</sup>*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950, p. 221.*

<sup>10</sup>United Nations Reports of International Arbitral Awards (UNRIAA), Vol. XI, p. 188.

<sup>11</sup>82 ILR 591, at p. 614, para. 27.

determines would be the ideal implementation. They say that there is a duty to apply the provisions of a treaty in good faith.

45. As far as the doctrine of good faith in the exercise of rights in international law more generally is concerned, the principle is again well established in international jurisprudence. In the case concerning *Rights of United States Nationals in Morocco*, the Court referred to the exercise of a power (there, of making customs valuations), saying that “it is a power which must be exercised reasonably and in good faith”<sup>12</sup>. In *Anglo-Norwegian Fisheries*, the Court referred to its power to review the drawing of a baseline in a particular locality in cases of “manifest abuse”<sup>13</sup>.

### **Good faith under ICRW Article VIII**

46. Taking the procedural obligations under the Whaling Convention and the duty of good faith together, Japan fully accepts that it is bound to consider and take account of any comments received from the Scientific Committee under paragraph 30 of the Schedule to the Convention when it decides upon the issuance and terms of any special permit.

47. But Japan does *not* accept that it is under any obligation to agree with, or to implement, every comment that it receives.

48. It was no part of the agreement made in 1951 by Japan that research related to whales conducted by any individual State or group of States should be subjected to collective control by IWC Contracting Governments, or to control by the IWC itself. We explained that in Chapter 2 of the Counter-Memorial; and we have developed that point in paragraphs 26 to 36 of our response to New Zealand’s Written Observations.

49. New Zealand tries to portray the IWC as a prototype for the subjection of high seas resources to a system of collective management by an international organization — and that achieved almost 70 years ago. But in Japan’s submission, that view is not borne out by the examination of the *travaux préparatoires*, to which New Zealand barely refers, or by the reading of the 1946 Convention itself. The International Whaling Commission has the powers that it is given under the Convention: no less, and no more.

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<sup>12</sup>Case concerning *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment, I.C.J. Reports 1952, p. 212.

<sup>13</sup>*Fisheries (United Kingdom v. Norway)*, Judgment, I.C.J. Reports 1951, p. 142.

50. If Japan formulates a plan for the conduct of scientific research into whaling and, if it involves a lethal take, it submits to the Scientific Committee the proposal to issue whaling permits, and it gives the necessary consideration to the reviews and comments that it receives, and it reaches a decision in good faith as to how to proceed, and that includes an informed consideration of those reviews and comments, then Japan says that it validly exercises its rights to authorize the killing, taking and treating of whales for purposes of scientific research under the Convention. And Japan's decisions arrived at in this way cannot be overturned by the Whaling Commission or, in our respectful submission, by this Court.

51. So, in Japan's submission, a Contracting Government fulfils the requirement when it exercises its Article VIII rights in good faith if, in issuing a special permit, it considers:

- (a) whether there is a need for data of the kind that it is proposed to collect;
- (b) what are the appropriate methods for the collection of that data;
- (c) the number of whales that, according to good scientific practice, should be caught, and the length of time over which they should be caught, in order to generate a sound database; and
- (d) whether that number of whales can be taken without damaging the health and sustainability of the stocks from which they are taken.

52. And as that procedure was modified in 1979 with the adoption of paragraph 30 of the Schedule, also Japan accepts the duty to submit proposed permits for review and comment by the Scientific Committee.

53. *That* is what Japan agreed to. *That* is the procedure on which the functioning of the Whaling Commission is based. And *that* is the procedure that Japan in fact adopted in relation to JARPA II. And Japan submits that in doing so it fulfilled its obligations under the Whaling Convention.

54. The role of the Court, in our submission, is to secure the integrity of the process by which the decision is made, and not to review the decision itself. Unless there is evidence that Japan acted in bad faith, there is no basis for holding that Japan's decision to authorize JARPA II amounts to a violation of the Convention.



### Australia's argument

55. Last Friday, counsel for Australia said that “Japan has never opened its mind to a consideration of making the slightest change to the core aspects of its lethal methodology; scale, continuity and indefinite period, have never been the subject of reconsideration by Japan”<sup>14</sup>. “Japan” — whichever individuals are to be counted under that label — “never opened its mind to a consideration of making the *slightest* change”. There is no evidence offered in support of that astonishing, categorical assertion, one of several made by Australia in its pleadings. It was not supported by Professor Mangel; and it may be that Australia thinks it appropriate to come back with a more carefully articulated statement of its position next week.

56. But the point is that Australia has produced no evidence of bad faith. It seems to regard the very fact that Japan and Australia are in profound disagreement on this matter as indicating that Japan *must* be acting in bad faith. But that is not so. As a matter of fact Japan has not acted in bad faith. And as a matter of law, as the tribunal in the *Lac Lanoux* case observed, “there is a general and well-established principle of law according to which bad faith is not presumed”<sup>15</sup>.

57. Australia's experts were frank and helpful. Professor Mangel made it clear that his views on the indicia of “scientific research” were not aimed at the term “scientific research” as a legal term in a treaty. He was providing:

“a general assessment of what it means to do a program for purposes of scientific research and then by reference to the IWC's writings, the activity of the Commission and the Scientific Committee, to try to make it in some sense more operational for the context of conservation and management of whales”<sup>16</sup>.

58. He accepted that there is a difference in meaning between the term “for purposes of scientific research”, which is what the Convention says, and “for the purposes of scientific research in the context of conservation and the management of whales”, which is the term upon which he focused<sup>17</sup>. Professor Mangel's testimony gave a clear view of his own understanding of the desiderata of scientific research in a specific context, but he did not purport to address the legal requirements imposed under the Convention, which refer to scientific research in a different

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<sup>14</sup>CR 2013/11, p. 36, para. 36 (Gleeson).

<sup>15</sup>24 *ILR*, p. 126; XII *UNRIIA*, p. 305.

<sup>16</sup>CR 2013/9, p. 53 (Mangel).

<sup>17</sup>CR 2013/9, p. 52 (Mangel).

context. Even in its own terms, Professor Mangel accepted that his approach does not produce a bright-line test: there may be border-line cases where some scientists think that a project falls on one side of his criteria, whilst others think that it falls on the other side<sup>18</sup>.

59. Dr. Gales accepted that there have been a number of divisive issues in the Scientific Committee and that there are times when it is quite legitimate to have disagreement within that Committee<sup>19</sup>. His criticism was that the divisions of opinion over JARPA II have not been able to advance in the Scientific Committee so as to enable it to advise the Commission on how it should understand that division of views. His criticism is that it has impeded the development of a unified message from the Scientific Committee.

60. It is evident that Japan and Australia disagree fundamentally over JARPA II. But the fact that Japan takes a different view on certain technical matters does not entail the conclusion that Japan is acting in bad faith. In the field of science and scientific debate, bad faith is the refusal to listen, not the refusal to agree. Listening and disagreeing, and exploring the reasons for the disagreement and the evidence bearing upon it, is how science progresses.

### **Conclusion**

61. Mr. President, Members of the Court, my submission is that Japan has fulfilled all of the requirements set out in the Whaling Convention in respect of the issuance of the JARPA II permits, and that there is no legal basis upon which the Court can find that the issuance of those permits violated Japan's legal obligations under that Convention. Unless I can be of further assistance, Mr. President, I would ask you now to invite Ms Takashiba to take the floor.

The PRESIDENT: Thank you very much, Professor Lowe. I give the floor to Ms Takashiba. You have the floor.

Mme TAKASHIBA : Thank you Mr. President.

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<sup>18</sup>CR 2013/9, p. 59 (Mangel).

<sup>19</sup>CR 2013/10, p. 27 (Gales).

## La portée et la pratique du paragraphe 30

### Introduction

1. Mr. President, distinguished Members of the Court. It is a great honour for me to appear before you today. To represent one's country is a privilege, but for me it is a particularly humbling moment.

2. Monsieur le président, il m'incombe de vous exposer le cadre procédural de la mise en œuvre de JARPA II. En particulier, je me propose de montrer que la procédure d'«examen et de commentaires» du comité scientifique conformément au paragraphe 30 du règlement ne revient pas à un «examen et approbation» préalables à la chasse scientifique, comme le suggèrent l'Australie et la Nouvelle-Zélande. Pour en arriver là, l'Australie a tenté la semaine dernière de réécrire unilatéralement des observations du comité scientifique en fonction de ses intérêts<sup>20</sup> et a prétendu que les résolutions adoptées<sup>21</sup> par la commission baleinière internationale (CBI), en dépit de ses divisions, se fondaient sur de telles observations qui n'existaient pas, pour dire que le Japon rejette tout mécanisme prévu par la convention<sup>22</sup>. Or cette construction n'informe guère sur les exigences exactes <sup>déoulant</sup> ~~des colonnes~~ du paragraphe 30. Je me propose donc de remettre le paragraphe 30 dans son contexte véritable dans lequel le comité scientifique joue un rôle central et de montrer que le Japon se conforme pleinement aux exigences du paragraphe 30.

3. La Cour a déjà longuement entendu parler du paragraphe 30. Il exige des gouvernements contractants qu'ils notifient les propositions de permis au comité scientifique de la CBI avant leur délivrance pour que ce dernier puisse «les examiner et formuler un avis»<sup>23</sup>. Les gouvernements doivent aussi présenter les résultats préliminaires de toute recherche issue des permis au comité. Le paragraphe 30 établit donc un mécanisme pour faciliter l'échange des renseignements de caractère scientifique nécessaire pour accomplir les buts de la convention. Le comité n'étant pas lui-même muni de ses propres vaisseaux ou d'équipes de recherche, il dépend des recherches scientifiques effectuées par les gouvernements contractants.

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<sup>20</sup> CR 2013/8, p. 25, par. 44 (Burmester) ; CR 2013/8, p. 63, par. 19 (Sands) ; CR 2013/9, p. 21, par. 27.

<sup>21</sup> CR 2013/11, p. 35, par. 36 (Gleeson).

<sup>22</sup> CR 2013/8, p. 20, par. 24 (Burmester).

<sup>23</sup> Paragraphe 30 du règlement annexé à la convention.

4. L'Australie a beaucoup insisté sur la première exigence du paragraphe 30 dans ses plaidoiries<sup>24</sup>. Elle a, en revanche, très peu mentionné l'échange de renseignements scientifiques, alors que c'est le but même de cette disposition. Au lieu de le faire, l'Australie a tenté d'avancer deux arguments : premièrement, elle suggère que l'adoption du paragraphe 30 atteste que la convention restreint le pouvoir discrétionnaire des Etats pour octroyer des permis scientifiques en vertu de l'article VIII<sup>25</sup> ; et deuxièmement, que, dans la pratique, le Japon se trouve en violation des exigences procédurales du paragraphe 30 au mépris de la CBI<sup>26</sup>.

5. Avant de traiter de ces deux arguments, force est de constater que l'Australie invoque ce paragraphe 30 d'une manière fort curieuse. Pendant les décennies de négociations, l'Australie n'a jamais prétendu que le Japon avait violé cette disposition. *A fortiori*, le comité scientifique n'a jamais discuté une telle réclamation. Cette disposition a fait l'objet de controverses uniquement après que l'Australie eut saisi la Cour de la présente affaire.

6. Monsieur le professeur Pellet a déjà expliqué pourquoi l'amendement du règlement ne peut pas restreindre le pouvoir discrétionnaire des gouvernements contractants d'octroyer des permis scientifiques sans autorisation préalable en vertu de l'article VIII. En conséquence, j'expliquerai maintenant, *primo*, la portée exacte du paragraphe 30 et la conformité de l'attitude du Japon à celle-ci (I.) ; *secundo*, je démontrerai que le Japon est allé bien au-delà de l'exigence minimum du paragraphe 30 en s'engageant de manière continue dans un dialogue scientifique (II.).

### **I. La portée de l'exigence procédurale selon le paragraphe 30 du règlement et le respect de cette disposition par le Japon**

#### **A. Notification préalable de propositions de permis scientifiques au comité scientifique**

7. En ce qui concerne mon premier point, Monsieur le président, Mesdames et Messieurs de la Cour, la question est assez simple. Le paragraphe 30 se réfère à l'«examen» et aux «commentaires». Le sens ordinaire de ces termes ne peut être plus clair. Il s'en déduit, d'une part, une obligation de notifier des propositions qui s'impose aux gouvernements contractants et, d'autre part, la possibilité pour le comité de formuler un avis. Il n'est fait mention nulle part d'une

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<sup>24</sup> MA, par. 4.20-4.24 ; CR 2013/8, p. 33, par. 26-30 (Crawford).

<sup>25</sup> MA, par. 4.22 ; CR 2013/8, p. 32, par. 23-24 et p. 34, par. 30 (Crawford) ; CR 2013/11, p. 34, par. 33-35 (Gleeson).

<sup>26</sup> MA, par.5.127.

procédure d'examen *et d'approbation*. Le texte entier du paragraphe 30 se trouve sous l'onglet n° 45 de vos dossiers et s'affiche en ce moment à l'écran. Comme cette disposition vous est familière, nul besoin pour moi de la lire.

[Projection n° 1.]

«Il appartient à tout gouvernement contractant de fournir au Secrétaire de la commission baleinière internationale ses propositions de permis scientifiques avant leur délivrance et dans un délai suffisant pour permettre au comité scientifique de les examiner et de formuler un avis à ce sujet.»

Ensuite, cette disposition identifie les quatre types de renseignement à spécifier dans les propositions, comme vous le voyez à l'écran :

«*a*) les objectifs de la recherche ; *b*) le nombre, le sexe, la taille et la population des animaux à capturer ; *c*) les possibilités de participation aux recherches de scientifiques provenant d'autres pays ; et *d*) les effets potentiels de cette chasse sur la conservation de la population concernée»<sup>27</sup>.

8. L'adoption du paragraphe 30 en 1979 ne fut nullement «une date historique dans l'évolution du système de délivrance de permis spéciaux»<sup>28</sup>, comme l'affirme l'Australie aujourd'hui. [Début de la projection n° 2.] En effet, la disposition n'a fait que préciser l'obligation découlant déjà de l'article VIII, paragraphe 3, de la convention de transmettre les renseignements de caractère scientifique<sup>29</sup>, obligation qui se reflète déjà dans la règle F du règlement intérieur du comité scientifique<sup>30</sup>. [Fin de la projection n° 2.]

9. M. Gleeson a prétendu que le Japon «avait systématiquement refusé de se plier» à cette exigence «en ne soumettant pas ses propositions de permis scientifiques à l'examen de la commission avant de lancer ses campagnes de chasse»<sup>31</sup>. Mais l'élément de preuve qu'il a voulu apporter ne l'amène nulle part. M. Gleeson se réfère à des permis que le Japon a soumis à la commission *après* les avoir délivrés alors que le Japon a soumis la proposition *avant* de délivrer des permis, comme l'exige le paragraphe 30<sup>32</sup>. La prétendue méconnaissance de cette exigence par

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<sup>27</sup> Paragraphe 30 du règlement.

<sup>28</sup> MA, par. 4.22.

<sup>29</sup> Derek Bowett, «Avis juridique sur une disposition du règlement annexé à la convention de 1946 qui prévoirait l'examen préalable des permis scientifiques et l'interdiction de la chasse à la baleine dans le cadre d'opérations pour lesquelles toutes les données requises n'auraient pas été fournies», IWC/31/9, p. 4 (CMJ, annexe 78).

<sup>30</sup> Adoptée en 1977. Disponible à l'adresse <http://iwc.int/index.php?cID=2385&cType=document&download=1>.

<sup>31</sup> MA, par. 5.127. CR 2013/11, p. 34, par. 33 (Gleeson).

<sup>32</sup> CR 2013/11, p. 34, par. 33 (Gleeson).

le Japon n'a jamais été invoquée au sein du comité scientifique. Au contraire, il est incontestable que le Japon n'a jamais délivré ses permis scientifiques sans avoir au préalable donné au comité scientifique la possibilité d'examiner les projets de permis et de formuler un avis à ce sujet bien avant l'expiration des délais, et ceci tout au long des périodes de JARPA et JARPA II.

#### **B. La procédure d'«examen et de commentaire» du comité scientifique**

10. Une fois soumise, [projection n° 3] la proposition fait l'objet d'un examen et de commentaires du comité scientifique lors des réunions annuelles, conformément aux lignes directrices du comité scientifique, incluses dans les annexes à ses rapports.

11. Quant à la portée des commentaires, absolument rien n'indique qu'ils aient un caractère  
× contraignant ni qu'ils constituent une condition préalable à la chasse scientifique. ~~La fonction du~~  
comité scientifique n'a pas pour fonction de valider, modifier ou révoquer les permis proposés. Ceci n'est pas seulement l'interprétation du Japon. Avant d'adopter le paragraphe 30, la CBI avait sollicité l'avis du professeur Derek Bowett. Celui-ci avait précisé que la licéité de l'amendement envisagé était conditionnée à l'interprétation stricte de celui-ci, qui ne pourrait être conçue comme ajoutant des conditions à l'article VIII, ou comme conférant au comité scientifique le pouvoir d'autoriser ou de censurer les permis notifiés par les gouvernements contractants [début de la projection n° 4] :

*“The function of the Scientific Committee must therefore be retained as one of ‘review and comment’. There can be no question of the Scientific Committee assuming a power to authorise or disallow a permit. Even the fixing of the number of whales to be taken, and any other conditions, rests in the discretion of the Contracting Governments (‘as the Contracting Government thinks fit’), so that the most the Scientific Committee can do is to comment on these conditions, and this by way of reports and recommendation to the Commission as the Rule J 3 recognizes.”<sup>33</sup>*

[Fin de la projection n° 4.]

Je note au passage que l'Australie, qui cite cette consultation<sup>34</sup>, se garde d'en reproduire ce passage crucial dans le corps de son mémoire, ou dans ses annexes.

12. Dans le même sens, le commissaire de l'Islande a insisté : «Paragraph 30 of the Schedule ... is carefully drafted so as not to question the right granted by the Convention.»<sup>35</sup>

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<sup>33</sup> Bowett, D., voir ci-dessus, (CMJ, annexe 78).

<sup>34</sup> MA, par. 4.66.

Cette interprétation est bien celle de la CBI. Elle l'a affirmé à plusieurs reprises que : «the ultimate responsibility for issuing [proposed scientific permits] lies with the member nation»<sup>36</sup>.

M. le professeur Crawford a soutenu la semaine dernière que la question de savoir si le comité scientifique assumait un pouvoir d'autorisation ou de désapprobation n'était pas la question et que seul compte le caractère obligatoire du paragraphe 30<sup>37</sup>. Avec tout le respect dû, cela n'est pas la question. Le Japon est d'accord avec l'Australie en ce que le paragraphe 30 s'impose à lui. Mais c'est sur l'apport exact de cette disposition que les Parties divergent.

13. Dans ses écritures, la Nouvelle-Zélande transforme de manière arbitraire la procédure d'examen et de commentaires en «système de réglementation collective». Pourtant, rien dans la disposition ne subordonne la délivrance des permis à l'examen par la CBI des recommandations du comité scientifique<sup>38</sup>. Elle est encore moins soumise à l'approbation des autres gouvernements contractants.

14. Il est aussi instructif d'examiner la portée du paragraphe 30 à la lumière du rôle des comités scientifiques dans d'autres organisations internationales et régionales pour la pêche, telles que l'Organisation des pêches de l'Atlantique Nord-Ouest (OPANO) et la Commission internationale pour la conservation des thonidés de l'Atlantique (ICCAT). Dans le cadre de ces mécanismes, similaires à celui prévu par le paragraphe 30, le rôle des comités scientifiques n'est pas celui d'un organe qui a pour but de juger des actions des Etats contractants. Il s'agit également d'organes consultatifs<sup>39</sup> constituant des forums de consultation et de coopération avec les gouvernements contractants<sup>40</sup>.

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<sup>35</sup> Procès-verbal de la CBI, 1986, p. 24.

<sup>36</sup> Rapport du président sur les travaux de la 57<sup>e</sup> Réunion annuelle de la CBI, 2005, p. 48, par. 10.1.1 (onglet n° 47 du dossier des juges) ; Rapport du président sur les travaux de la 58<sup>e</sup> Réunion annuelle de la CBI, 2006, p. 40, par. 11.1.2.

<sup>37</sup> CR 2013/8, p. 33, par. 29 (Crawford).

<sup>38</sup> Answer by the Minister of Fisheries and Coastal Affairs of Norway, Lisbeth Berg-Hansen to Written Question from Terje Aasland dated 20 June 2013, disponible à l'adresse (<http://www.regjeringen.no/en/dep/fkd/What-s-new/News/2013/scientific-research-on-whales.html?id=731449>). Voir observations écrites de la Nouvelle-Zélande (OEN, par. 105).

<sup>39</sup> Voir, par exemple, OPNA, art. IX ; SEAFO, art. 10 ; CCAMLR, art. XIV ; CCSBT, art. 9 ; CGPM, règles de procédure, règle X ; CITT, art. XI ; CICTA, art. IV ; CTOI, règles de procédure, règle X ; CPAPN, règles de procédure, par. 11 ; WCPFC, art. 11.

<sup>40</sup> Voir, par exemple, OPNA, art. IV. OPNA, art. VI ; SEAFO, art. 10, 13 ; CCAMLR, art. XV ; CCSBT, art. 5 ; CGPM, règle de procédure, règle X ; CITT, annexe 4 ; CICTA, art. IX ; CTOI, règle de procédure, règle X ; CPAPN, règle de procédure, par. 11 ; WCPFC, art. 12, 13.

15. Le comité scientifique établi par la CBI ne se distingue guère à cet égard. Il a exclusivement pour fonction de servir d'organe consultatif conformément à la règle M (4) des règles de procédure<sup>41</sup>.

### **C. La proposition de JARPA II a dûment fait l'objet d'examen et de commentaires par le comité scientifique**

16. Je vais maintenant expliquer comment la procédure d'«examen et de commentaires» a été mise en œuvre dans le cadre de JARPA II. M. Gleeson prétend encore une fois que la proposition de JARPA n'aurait pas été soumise au comité de sorte que les renseignements requis par le paragraphe 30 n'auraient pas été soumis. Mais c'est inexact car [début de la projection n° 5] le Japon a bien soumis la proposition de JARPA II en mars 2005 et a exposé des types de renseignements conformément au paragraphe 30<sup>42</sup>. Le comité scientifique a reconnu que «The proposal provides the information under Paragraph 30 of the Schedule.»<sup>43</sup> Après un échange de questions et réponses entre les membres du comité et les scientifiques participant à JARPA II<sup>44</sup>, le comité scientifique, conformément à son mandat, s'est acquitté de la tâche de l'examiner et de formuler des avis sur la méthodologie, les effets de captures sur la population concernée et sur les possibilités de participation aux recherches, conformément à la ligne directrice du comité dans l'annexe Y dans son rapport de 2001<sup>45</sup>. [Fin de la projection n° 5.]

17. Afin de mettre en cause l'examen du comité scientifique, l'Australie se réfère à la résolution de la CBI 2005-1 qui condamne JARPA II<sup>46</sup>. Cependant, la résolution n'a rien à voir avec la procédure du paragraphe 30 : seul le comité scientifique peut examiner le mérite scientifique de la proposition. Comme on l'a déjà vu, les discussions au sein de la commission au sujet des constatations du comité scientifique à l'égard des permis scientifiques sont dominées par une autre dynamique. La résolution de la CBI, elle-même à peine adoptée à une faible majorité de

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<sup>41</sup> Voir règle M (4) des règles de procédure du comité scientifique. Disponible à l'adresse <http://iwc.int/index.php?cID=2385&cType=document&download=1>.

<sup>42</sup> CMJ, Annexe 150.

<sup>43</sup> JCRM 8 (Suppl.), 2006, p. 50 (onglet n° 48).

<sup>44</sup> *Ibid.*

<sup>45</sup> Lignes directrices pour l'examen de propositions des permis scientifiques, annexe Y, JCRM 3 (Suppl.), 2001 [MA, annexe 48] ; rapport du comité scientifique (SC Report) 2005 (JCRM 8 (Suppl.), 2006), p. 49. Tous les rapports du comité scientifique cités ici sont disponibles à l'adresse <http://iwc.int/scientific-committee-reports>.

<sup>46</sup> MA, par. 5.16 ; CR 2013/11, p. 32, par. 28 (Gleeson).



30 Etats contre 27<sup>47</sup>, ne peut pas annihiler la procédure suivie par le comité scientifique sur la base de critères scientifiques.

18. Tant M. le professeur Sands que M. Gleeson ont souligné en outre le fait que 63 membres — sur 195 — du comité scientifique ont été absents lorsque la proposition de JARPA II a été examinée par le comité, pour ainsi réfuter la validité de sa procédure<sup>48</sup>. En réalité, l'absence de 63 scientifiques, y compris les membres australiens, atteste plutôt du manque de coopération dans le cadre du paragraphe 30 par les scientifiques qui s'opposent à la chasse. Leur absence ne prouve certainement pas un manque de conformité du Japon. L'Australie ne peut pas s'appuyer sur le boycottage de délibérations au sein du comité scientifique par des scientifiques qui s'alignent à sa politique et prétendre devant la Cour maintenant que ces membres n'ont pas eu la possibilité de participer aux délibérations. Les choses sont claires. Après la soumission, par les 63 scientifiques, d'une déclaration d'objection à l'examen de la proposition<sup>49</sup>, et d'une réfutation écrite de cette objection<sup>50</sup>, le comité s'est acquitté de sa fonction. Le comité n'a jamais recommandé de changer les méthodes de recherche. En revanche, lorsque le comité scientifique avait estimé qu'une proposition de permis — soumise par des autres Etats — ne répondait pas à ses critères, il avait recommandé spécifiquement de ne pas délivrer les permis demandés<sup>51</sup>. Ce fut le cas, par exemple, lorsqu'il avait estimé que le programme d'observation prévu n'était pas assez aléatoire ou que les impacts sur la population suscitaient des préoccupations. Ce n'était pas le cas pour JARPA II.

19. Les 63 scientifiques se sont retirés de la salle en 2005, en déclarant qu'il serait inapproprié de présenter une critique détaillée avant que l'évaluation de JARPA ne soit achevée<sup>52</sup>. En décembre 2006, l'évaluation finale des résultats de JARPA a été effectuée par le comité. Ses conclusions ont été ensuite appuyées par le comité scientifique dans sa réunion annuelle de

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<sup>47</sup> JCM, par. 5.88.

<sup>48</sup> MA, par. 5.86 ; CR 2013/9, p. 33, par. 66-67 (Sands) ; CR 2013/11, p. 32, par. 25-27 (Gleeson).

<sup>49</sup> JCRM 8 (Suppl.), 2006, p. 260, annexe O1, appendice 2 (JCM, annexe 108).

<sup>50</sup> JCRM 8 (Suppl.), 2006, p. 262, annexe O1, appendice 3 (JCM, annexe 152).

<sup>51</sup> Voir, par exemple, *Rep. Int. Whal. Commn* 37, 1987, p. 29 ; *ibid.* 38, 1988, p. 54 (onglet n° 49).

<sup>52</sup> SC Report 2005 (JCRM 8 (Suppl.) 2006), p. 49.

mai 2007<sup>53</sup>. Cependant, personne parmi ces 63 scientifiques n'a saisi l'occasion de formuler une critique détaillée de la proposition de JARPA II à cette occasion<sup>54</sup>. Voici ce que le comité a dit en 2010 [projection n° 6] : «the chair noted that both JARPA II and JARPN II are continuing on the basis of plans already submitted and reviewed in the Scientific Committee»<sup>55</sup>. Pour le comité, la procédure prévue a donc été pleinement suivie.

## II. L'engagement continu du Japon dans le dialogue scientifique

### A. Le Japon a été à l'écoute du comité scientifique

20. Ceci m'amène à ma deuxième partie. L'Australie soutient maintenant que le Japon n'était pas à l'écoute des préoccupations soulevées par les membres du comité scientifique<sup>56</sup>.

21. A la lumière du but du paragraphe 30, les échanges entre le comité scientifique et un gouvernement contractant sont évidemment de nature scientifique. La disposition n'impose pas d'exigence de coopération entre les gouvernements contractants eux-mêmes. L'Australie déforme le sens du paragraphe 30 en suggérant que les vues d'autres Etats de la CBI puissent intervenir dans la procédure du paragraphe 30<sup>57</sup>.

22. En tant que membres de la CBI, les gouvernements contractants doivent coopérer afin de s'acquitter de bonne foi de leurs engagements pour la réalisation du but de la convention. Lorsque le comité scientifique examine la proposition, le gouvernement concerné doit tenir compte sérieusement des discussions qui ont eu lieu en son sein et de ses éventuelles conclusions.

23. Cependant, premièrement, la mauvaise foi ne peut pas être présumée<sup>58</sup> mais doit être prouvée<sup>59</sup>. Deuxièmement, les moyens spécifiques de coopération demeurent largement à la discrétion des Etats<sup>60</sup>.

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<sup>53</sup> SC Report 2007 (JCRM 10 (Suppl.) 2008), p. 58.

<sup>54</sup> SC Report 2007 (JCRM 10 (Suppl.) 2008), annexe O, p. 342-345, 347-350.

<sup>55</sup> SC Report 2010 (JCRM 12 (Suppl.), 2011), p. 57 (onglet n° 50).

<sup>56</sup> MA, par. 5.84-5.93 ; CR 2013/8, p. 26, par. 45 (Burmester) ; CR 2013/9, p. 33, par. 74-76 (Sands) ; CR 2013/11, p. 14 (Crawford).

<sup>57</sup> MA, par. 5.88 ; OEN, par. 86 ; CR 2013/8, p. 34, par. 30 (Crawford).

<sup>58</sup> Voir également, *Essais nucléaires (Nouvelle-Zélande c. France)*, arrêt, C.I.J. Recueil 1974, p. 473, par. 49 ; *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)*, arrêt, C.I.J. Recueil 2009, p. 267, par. 150 ; *Application de l'accord intérimaire du 13 septembre 1995 (ex-République yougoslave de Macédoine c. Grèce)*, arrêt du 5 décembre 2011, par. 168.

<sup>59</sup> *Application de l'accord intérimaire du 13 septembre 1995 (ex-République yougoslave de Macédoine c. Grèce)*, arrêt du 5 décembre 2011, par. 138.

24. Les arguments de la Nouvelle-Zélande à cet égard sont erronés. En se fondant sur sa propre interprétation de la convention en tant que système (complet) de réglementation collective, la Nouvelle-Zélande prétend, sans fondement, que la coopération effective dans le cadre du paragraphe 30 exige que «le gouvernement contractant prenne en compte les vues exprimées par les autres parties, dans le respect de leurs intérêts, et soit prêt à modifier sa proposition de permis scientifique en conséquence»<sup>61</sup>. Et bien évidemment, pour la Nouvelle-Zélande, le seul moyen de s'acquitter de ce devoir consisterait à se plier aux avis des Etats hostiles à la chasse à la baleine<sup>62</sup>. C'est là une interprétation assez originale du terme «coopération». Elle tente en outre de renverser la charge de la preuve, en soutenant qu'il appartient au gouvernement contractant octroyant les permis spéciaux de «démontrer qu'il a dûment tenu compte des vues du comité scientifique et de la commission»<sup>63</sup>. La Nouvelle-Zélande part de la position selon laquelle un Etat est présumé agir de mauvaise foi sauf s'il peut démontrer le contraire<sup>64</sup>. Il s'agit d'une théorie fort nouvelle et indéfendable.

25. Dans la mesure où la convention impose un devoir particulier de coopération, la question se pose de savoir si le Japon a tenu compte de bonne foi des commentaires du comité scientifique. Comme la Norvège l'a indiqué récemment : «The <sup>State</sup> party concerned will also have to take into account any advice provided by the Scientific Committee under Article VI — such advice, however, being recommendations as opposed to decisions or injunctions.»<sup>65</sup> Dans le cadre de la consultation préalable avec le comité scientifique, et non du consentement préalable de la CBI — que rien n'impose, la question n'est pas de savoir si le Japon a modifié sa proposition en postulant, à tort, que les commentaires constituent une décision contraignante ou conformément

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<sup>60</sup> Murase, Shinya, *International Law: An Integrative Perspective on Transboundary Issues*, Sophia Univ. Press, 2011, p. 114.

<sup>61</sup> OEN, par. 106.

<sup>62</sup> *Ibid.*

<sup>63</sup> OEN, conclusion e), p. 66.

<sup>64</sup> *Application de l'accord intérimaire du 13 septembre 1995 (ex-République yougoslave de Macédoine c. Grèce)*, arrêt du 5 décembre 2011, par. 132.

<sup>65</sup> Answer by the Minister of Fisheries and Coastal Affairs of Norway, voir ci-dessus.

aux «vues exprimées par les autres parties»<sup>66</sup>. A cet égard, la pratique du comité scientifique est claire et c'est sur ce dernier point que je me pencherai maintenant.

### **B. Dialogue scientifique continu même après l'examen et les commentaires par le comité scientifique**

26. La procédure que j'ai eu l'honneur d'exposer fait partie d'un dialogue scientifique plus large. Comme je l'ai mentionné tout au début de ma présentation [projection n° 7], le paragraphe 30 exige aussi la présentation de «résultats préliminaires de toute recherche issue des permis»<sup>67</sup>. Le Japon a tenu le comité scientifique au courant des progrès de JARPA II<sup>68</sup>, et d'abord en lui présentant annuellement des rapports de mission<sup>69</sup>.

27. L'Australie soutient que le Japon n'a pas répondu aux points soulevés lors de l'évaluation finale de JARPA par le comité scientifique<sup>70</sup>. JARPA II est un programme de recherche devant se dérouler sur six ans, après lesquels la première évaluation périodique est prévue pour le début 2014<sup>71</sup>. Le Japon est prêt à modifier le programme, si nécessaire, sur la base des résultats de ladite évaluation<sup>72</sup>. Il a en outre déjà accepté d'y apporter des modifications. Le comité scientifique a d'ailleurs noté :

[Début de la projection n° 8.]

«Although there is no formal requirement for Special Permit holders to report on what changes have been made to their research plans as a result to any comments or suggestions received from the Scientific Committee, the Committee agrees that it would be good practice to do so. This would help speed up future review process and would constitute an act of good faith.»<sup>73</sup>

[Fin de la projection n° 8.]

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<sup>66</sup> MA, par. 5.88 ; OEN, par. 95. Answer by the Minister of Fisheries and Coastal Affairs of Norway, voir ci-dessus.

<sup>67</sup> Paragraphe 30 du règlement.

<sup>68</sup> Voir par exemple, SC Report 2012, p. 86 ; SC Report 2011 (JCRM 13 (Suppl.), 2012), p. 54 ; SC Report 2010 (JCRM 12 (Suppl.), 2011), p. 57.

<sup>69</sup> Voir par exemple, SC Report 2012, p. 85. Tous les rapports de croisière de JARPA/JARPA II sont disponibles à l'adresse : <http://www.icrwhale.org/CruiseReportJARPA.htm>.

<sup>70</sup> MA, par. 5.87 ; CR 2013/9, p. 36, par. 75 (Sands). Voir aussi CMJ, par. 5.18.

<sup>71</sup> Rapport du président de la CBI, 2012, p. 52.

<sup>72</sup> Projet de recherche JARPA II (SC/57/O1), p. 13 (CMJ, annexe 150) : «At the end of this phase, a review will be held and revisions made to the program if required».

<sup>73</sup> MA, par. 5.90 ; SC Report 2005, (JCRM 8 (Suppl.), 2006), p. 48 (onglet n° 51).

28. C'est donc dans cet esprit que le Japon, depuis l'époque de JARPA, a continuellement participé, en toute bonne foi, aux débats scientifiques avec la communauté scientifique de la CBI, en exposant ses résultats à l'analyse et à la critique. Il a très attentivement pris en considération les vues exprimées par les membres du comité scientifique<sup>74</sup>.

29. Ce dernier a reconnu à de nombreuses reprises que le Japon avait accepté d'adapter son programme de recherche<sup>75</sup>. [Début de la projection n° 9.] : «The Committee welcomed the presentation of this report in response to a request from last year.»<sup>76</sup> C'est d'ailleurs en réponse à des avis du comité scientifique que les méthodes de collecte de données ont été modifiées pour renforcer la composante d'observation<sup>77</sup>. Les scientifiques ayant fait des propositions de modification concrète ont exprimé leur appréciation : un membre américain «noted, with appreciation, that many of the concerns he had expressed last year had been addressed in papers to the meeting<sup>78</sup>». La CBI a en outre reconnu que «the programme had been revised to try to take into account comments made by the Scientific Committee in the previous year»<sup>79</sup>. Depuis 1987, le Japon s'est employé à développer des outils spéciaux pour l'échantillonnage des biopsies<sup>80</sup>.

[Fin de la projection n° 9.]

30. L'Australie et le Dr Gales prétendent que le Japon ne s'est pas montré disposé à accepter les changements<sup>81</sup>. Cela n'est tout simplement pas exact. Le débat sur les méthodes de substitution des méthodes létales ainsi que sur l'utilité de données de JARPA/JARPA II pour la mise en œuvre de la RMP pour les petits rorquals antarctiques est très révélateur. Et ce débat doit être apprécié

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<sup>74</sup> CMJ, p. 375-380, par. 8.68.

<sup>75</sup> SC/44/SHB14 (JCM, annexe 143) ; voir également : «Report of the Intersessional Workshop to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic», Tokyo, 4-8 décembre 2006, (onglet n° 15) ; SC/64/IA4, disponible à l'adresse : <http://iwc.int/sc64docs> ; SC Report 2002 (JCRM 5 (Suppl.), 2003), p. 35) ; (JCRM 10 (Suppl.), 2008, p. 423 ; SC/59/O8, disponible à l'adresse : <http://www.icrwhale.org/pdf/SC-59-O8.pdf> ; SC/62/IA11, disponible à l'adresse : <http://iwc.int/sc62docs> ; SC Report 2010 (JCRM 12 (Suppl.), 2011), p. 26).

<sup>76</sup> *Rep. Int. Whal. Commn* 46, 1996, p. 78

<sup>77</sup> *Rep. Int. Whal. Commn* 43, 1993, p. 75.

<sup>78</sup> *Rep. Int. Whal. Commn* 42, 1992, p. 73 (comments by Smith (USA)). Voir également *ibid.*, 1992, p. 73 et p. 76 ; *Rep. Int. Whal. Commn* 44, 1994, p. 61.

<sup>79</sup> *Rep. Int. Whal. Commn* 42, 1992, p. 13.

<sup>80</sup> SC/42/O16 (*Rep. Int. Whal. Commn* 41, 1991, p. 555-557) ; Kasamatsu *et al.* 1989 (SC/41/SHMi16), disponible à l'adresse : <http://www.icrwhale.org/pdf/SC-41-SHMi16.pdf> ; Nishiwaki *et al.* 1990 (SC/42/ShMi21), disponible à l'adresse : <http://www.icrwhale.org/pdf/SC-42-SHMi21.pdf>.

<sup>81</sup> Déclaration du Dr Gales, en date du 15 avril 2013, par. 3.28-3.29 ; CR 2013/11, p. 36, par. 36 (Gleeson).

dans son contexte. En 1997, le président de la CBI a demandé aux tenants de deux positions opposées de présenter leur vues de façon succincte pour éviter que le débat ne s'éternise<sup>82</sup>. La nécessité de l'échantillonnage légal a été expliquée de façon exhaustive, sous des angles multiples : besoin de grands nombres d'individus pour les études d'identification de stocks, succès limité d'élaboration de techniques de prélèvement de biopsies sur les petits rorquals, importance de disposer de données précises sur l'âge et la morphométrie, par exemple, que les méthodes non létales ne fournissent pas<sup>83</sup>. A la même occasion, l'utilité des résultats de JARPA pour la gestion fut expressément reconnue par le groupe de travail de mi-parcours<sup>84</sup>. Pourtant, plusieurs années plus tard, en 2005, lorsque le comité scientifique a examiné la proposition de JARPA II, les 63 scientifiques évoqués tout à l'heure ont à nouveau soutenu qu'«il avait été démontré que le recours à des méthodes non létales permettait de suivre les changements temporels et spatiaux dans la structure des stocks», sans apporter d'élément de preuve scientifique à l'appui de cette affirmation<sup>85</sup>. Deux ans plus tard, en 2007, le Japon a présenté au comité scientifique un document scientifique détaillé dans lequel il mettait en relief les avantages et les inconvénients des deux méthodes<sup>86</sup>. Cependant, les mêmes scientifiques opposés aux méthodes létales sont revenus à la charge, en affirmant que «la description qui y était faite des moyens offerts par les méthodes non létales et de leurs limites était très inexacte»<sup>87</sup>, sans pourtant produire le moindre élément probant concernant l'utilisation de ces méthodes pour les petits rorquals<sup>88</sup>. Les scientifiques qui s'opposent à la chasse n'ont pas présenté de propositions concrètes pour atteindre les objectifs de recherche visés par JARPA II dans son ensemble uniquement par des méthodes non létales pouvant être utilisées de manière réaliste.

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<sup>82</sup> *Rep. Int. Whal. Commn* 48, 1998, p. 382 (sommaires dans le rapport du groupe de travail intersessions, annexe H, p. 412).

<sup>83</sup> *Ibid.*

<sup>84</sup> Rapport du groupe de travail intersessions chargé d'examiner les données et les résultats obtenus dans le cadre de la chasse au petit rorqual dans l'Antarctique au titre d'un permis spécial en vue de recherches scientifiques, Tokyo, 12-16 mai 1997, *Rep. Int. Whal. Commn* 48, 1998, SC/49/Rep1, p. 386 (CMJ, annexe 95).

<sup>85</sup> JCRM 8 (Suppl.), 2006, p. 260, annexe O1, appendice 2, p. 261 (CMJ, annexe 108).

<sup>86</sup> SC/59/O2, disponible à l'adresse : <http://www.icrwhale.org/pdf/SC-59-O2.pdf> ; sur JARPN II, voir également SC/J09/JR1(Rev1.), disponible à l'adresse : <http://www.icrwhale.org/pdf/SC-J09-JR1.pdf> ; SC/61/JR1, disponible à l'adresse : <http://iwc.int/index.php?cID=1785&cType=document>

<sup>87</sup> JCRM 10 (Suppl.), 2008, annexe O, p. 343 (onglet n° 53).

<sup>88</sup> *Ibid.*

31. Le refus de l'Australie de reconnaître les efforts d'adaptation du Japon n'est guère étonnant à la lumière de ce que l'Australie a répété au sein de la CBI, à savoir qu'elle s'oppose à toute recherche qui comporte la capture de baleines<sup>89</sup>. Ceci ne laisse d'emblée aucune place pour la discussion.

32. Les débats au sein du comité scientifique sont polarisés, comme M. le professeur Walløe l'a dit hier, quand il s'agit de débat sur les méthodes létales ou non létales, entre les membres qui croient que les baleines ne doivent être tuées sous aucun prétexte et d'autres qui considèrent que l'utilisation durable des baleines est un but légitime. Dans cette situation, l'évaluation de la recherche dépend des positions respectives de chacun par rapport à l'une de ces positions opposées. L'Australie prétend que le Japon n'est pas prêt à ajuster JARPA II en fonction des commentaires et recommandations présentées lors de l'évaluation finale de JARPA en 2006<sup>90</sup> alors même que c'est précisément à cet égard que la bonne foi du Japon et sa volonté d'adaptation se révèlent de façon manifeste. Les scientifiques engagés dans JARPA II ont incorporé les recommandations de ladite évaluation de JARPA<sup>91</sup> dans leur mise en œuvre de JARPA II. Le document figurant sous l'onglet n° 53, pages 349 et suivantes, de vos dossiers est un tableau récapitulatif des recommandations présentées lors de l'évaluation finale de JARPA en 2006, maintenant aussi à l'écran. [Début de la projection n° 10.] Les recommandations ont été sérieusement examinées, des articles scientifiques ont été présentés au comité et publiés dans des revues après examen par des pairs<sup>92</sup>.

33. S'agissant des paramètres biologiques importants de l'échantillonnage légal, deux exemples parmi d'autres illustrent bien le processus de dialogue scientifique : l'épaisseur de la graisse et la structure des stocks. Comme montré à l'écran, sur deux questions essentielles, le dialogue entre le comité scientifique et les spécialistes sur les recommandations — dans les colonnes à gauche — a donné lieu à des mesures concrètes — dans les colonnes à droite. Premièrement, en ce qui concerne l'analyse de l'épaisseur de la graisse — en haut à gauche — qui

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<sup>89</sup> Procès-verbal de la CBI, 1998, p. 131 (onglet n° 52).

<sup>90</sup> MA, par. 5.90-5.91 ; CR 2013/9, p. 36, par. 75 (Sands).

<sup>91</sup> Appendice 3, «Summary of Recommendations from the JARPA Review Workshop», in JCRM 10 (Suppl.), 2008, p. 349-350 (CMJ, annexe 112, onglet n° 53).

<sup>92</sup> CMJ, par. 5.18 ; SC Report 2010 (JCRM 12 (Suppl.), 2011), p. 26.

indique l'état corporel de baleines à partir duquel on peut détecter les changements dans l'écosystème, le comité scientifique a recommandé en 2006 d'inclure dans l'étude des facteurs tels que l'âge et la latitude des prises<sup>93</sup>. L'année suivante, un document a été présenté au comité scientifique lors de sa réunion annuelle<sup>94</sup> et, après un travail de refonte, publié dans une revue à comité de lecture en 2008<sup>95</sup>. Deuxièmement, pour ce qui est de l'information sur la structure des stocks — en bas à gauche —, les scientifiques ont proposé comme hypothèse d'étude deux stocks de petits rorquals antarctiques dans la zone de recherche et une zone mixte<sup>96</sup>. Le comité scientifique a appuyé cette hypothèse et a recommandé l'élaboration d'un modèle spécifique pour étudier d'une manière plus approfondie la zone de transition<sup>97</sup> des deux stocks. Ledit modèle a été présenté à la réunion annuelle du comité scientifique de 2012 ; voilà un exemple récent de mise en œuvre des recommandations du comité scientifique par les responsables scientifiques de JARPA II<sup>98</sup>. [Fin de la projection n° 10.]

34. L'analyse des changements dans l'épaisseur de graisse fut d'ailleurs reconnue comme un élément très important par le groupe de travail sur la modélisation de l'écosystème, car il est utile dans l'interprétation des interactions entre les espèces et l'écosystème de l'océan Antarctique<sup>99</sup>. Les discussions sur ce point continuent au sein du comité scientifique<sup>100</sup>. Ce dernier a noté que le modèle de structure des stocks employé était «simple and potentially powerful» et que, «[a]side from the general relevance of the results to understanding [of] Antarctic minke whale dynamics, it might in the future prove useful in allocating historical catches to stocks<sup>101</sup>».

35. Avec votre indulgence, j'aimerais donner encore un dernier exemple, étant donné son importance dans ce litige. Il s'agit d'une analyse réalisée au moyen de bouchons auriculaires. Une

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<sup>93</sup> JCRM 10, 2008, annexe O, p. 350 (onglet n° 53).

<sup>94</sup> SC/59/010, disponible à l'adresse <http://www.icrwhale.org/pdf/SC-59-O10.pdf>

<sup>95</sup> Konishi, K., Tamura, T., Zenitani, R., Bando, T., Kato, H., et Walloe, L. «Decline in energy storage in the Antarctic minke whale (*Balaenoptera bonaerensis*) in the Southern Ocean», 2008, *Polar Biology*, p. 1518.

<sup>96</sup> SC/59/REP1, disponible à l'adresse <http://iwc.int/index.php?cID=1565&cType=document&download=1>.

<sup>97</sup> JCRM 10, 2008, annexe O, p. 349 (onglet n° 53).

<sup>98</sup> SC/64/IA4, disponible à l'adresse <http://iwc.int/sc64docs>.

<sup>99</sup> JCRM 10 (Suppl.), 2008, annexe K1, p. 299.

<sup>100</sup> SC Report 2013, annexe K1, disponible à l'adresse <http://iwc.int/index.php?cID=3308&cType=document&download=1>.

<sup>101</sup> SC Report 2012, p. 35.



question de compatibilité des données commerciales et des données JARPA concernant l'âge des baleines a été soulevée lors de l'examen de 2006 ; c'est le point 2 des «paramètres biologiques (BP)» sur la même liste des recommandations qui figure dans votre dossier. [Début de la projection n° 11.] Les résultats des expériences menées par la suite ont été communiqués aux scientifiques, qui «welcomes this study as an important advance» et en conclusion «no further experiments or analysis on age reading errors are needed to resolve ageing related problems raised in JARPA review»<sup>102</sup>. Cette année, d'autres travaux de compatibilité des données JARPA II concernant l'âge des baleines avec celles de la chasse commerciale et JARPA<sup>103</sup> ont été présentés au comité scientifique, qui est à nouveau convenu que «the approach and results provide useable input data for ~~Scatch~~ <sup>Statistical Catch</sup> at Age Analysis»<sup>104</sup>. Grâce à ces données, le comité scientifique dispose d'estimations fiables sur le taux de mortalité naturelle et le ratio de rendement maximum de renouvellement. Pour ce qui est de l'utilité de ces analyses pour le comité scientifique, permettez-moi de vous renvoyer à l'explication donnée par M. le professeur Walløe. [Fin de la projection n° 11.]

36. Ces exemples montrent que le Japon a pris en compte les recommandations formulées afin d'observer l'écosystème antarctique et d'élucider les changements temporels et spatiaux intervenus dans la structure des stocks de petits rorquals antarctiques, et que ces efforts ont été hautement appréciés par le comité scientifique<sup>105</sup>.

37. Enfin, l'engagement de bonne foi du Japon se traduit également par son ouverture à la participation de scientifiques d'autres pays à la recherche, dans le cadre du paragraphe 30 c) et par l'accessibilité des données obtenues. A la différence d'un autre programme de chasse scientifique dans le Pacifique Nord, JARPN et JARPN II, auquel des scientifiques coréens et russes ont participé<sup>106</sup>, dans l'océan Antarctique, aucun scientifique autre que ceux de JARPA et JARPA II

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<sup>102</sup> JCRM 12 (Suppl.) 2011, p. 26.

<sup>103</sup> Kitakado, T., Lockyer, C. et Punt, A.E., «A statistical model for quantifying age-reading errors and its application to the Antarctic minke whales», SC/65a/IA04, p. 18 (in review in the JCRM), disponible à l'adresse <http://events.iwc.int/index.php/scientific/SC65a/paper/view/283/274>.

<sup>104</sup> SC Report 2013, p. 39, disponible à l'adresse <http://iwc.int/index.php?cID=3318&cType=document&download=1>.

<sup>105</sup> Pour l'épaisseur de graisse, voir SC Report 2011, annexe K1 (JCRM 13, 2012), p. 259 ; pour la structure de stocks, voir SC Report 2012 (JCRM 14, 2013), p. 26.

<sup>106</sup> SC/55/O7 ; SC/56/O13 ; SC/57/O3 ; SC/58/O8 ; SC/60/O5, disponible à l'adresse <http://www.icrwhale.org/CruiseReportJARPN.html>.

n'a accompagné la mission de recherche, alors que le Japon a lancé la même invitation ouverte aux participants extérieurs, comme le dit le projet de JARPA II<sup>107</sup>. Malgré l'absence de scientifiques extérieurs, les données ont été rendues accessibles en vertu de l'accord sur la disponibilité des données du comité scientifique<sup>108</sup> et ont été utilisées par des scientifiques non japonais<sup>109</sup>.

### Conclusion

38. Monsieur le président, Mesdames et Messieurs de la Cour. En conclusion, [début de la projection n° 12] je voudrais appeler votre attention sur le tableau illustrant le grand nombre de documents scientifiques présentés par des scientifiques engagés dans JARPA. La contribution du Japon est marquée en bleu foncé, celle de l'Australie en jaune, et celle des autres pays en bleu clair. Ces scientifiques participent aussi à différents sous-comités chargés d'études approfondies sur des thèmes spécifiques, pour lesquelles les résultats de JARPA ont été particulièrement importants<sup>110</sup>. C'est là une indication du rôle de premier plan que joue le Japon dans la recherche sur les cétacés et de sa contribution considérable à la conduite et au financement de grands projets de recherche. [Fin de la projection n° 12.]

39. Le comité scientifique a rappelé à maintes reprises que «seules les questions scientifiques, et non les questions d'éthique, devaient être examinées» en vue de la délivrance des permis scientifiques<sup>111</sup>. Mais la tâche du comité est ardue face à des déclarations comme celle qu'a faite, par exemple, la Nouvelle-Zélande devant lui en 1997 :

“Under our Convention science is rightly the province of the Scientific Committee but there are occasions when it is proper for this body [Commission] to give guidance to the Committee on its scope and that is particularly true where scientific research programmes raise moral and ethical questions.”<sup>112</sup>

40. La controverse politique autour de la méthode létale a souvent affaibli le rôle du comité au sein de la CBI. A la différence du comité scientifique, la CBI est clairement un organisme

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<sup>107</sup> JARPA II research plan (SC/57/O1), p. 20 (JCM, annexe 150).

<sup>108</sup> JCRM 6 (Suppl.), 2004, annexe T, p. 406-408 (CMJ, annexe 99).

<sup>109</sup> La liste de recherches scientifiques utilisant les données de JARPA/JARPA II est disponible à l'adresse <http://icrwhale.org/pdf/ScientificContributionJARPA.pdf>.

<sup>110</sup> In particular, subcommittees on Stock Structure, In-depth Assessment, Southern Hemisphere Ecosystem Modeling, Stock Definition, BRG (bowhead, right and grey whales) and Standing working group on environmental concerns.

<sup>111</sup> SC Report 2005 (JCRM 8 (Suppl.), 2006), p. 48. Procès-verbal de la CBI, 1997, Nouvelle-Zélande, p. 133.

<sup>112</sup> Procès-verbal de la CBI, 1997, p. 133.

politique<sup>113</sup>. Ainsi, malgré le fait que la convention exige que les décisions de l'organisation soient basées sur des connaissances scientifiques, certains Etats membres s'en désintéressent en faveur de résolutions politisées<sup>114</sup>. [Début de la projection n° 13.] Le comité scientifique n'est jamais parvenu à un consensus pour dénoncer JARPA et JARPA II. Les résolutions de la CBI sur lesquelles l'Australie et la Nouvelle-Zélande s'appuient tant sont éloignées de toute considération scientifique. Elles ne reflètent certainement pas les vues du comité scientifique dans son ensemble. Elles ne reflètent pas non plus celles d'un grand nombre d'Etats qui ne sont pas catégoriquement opposés à la chasse à la baleine. Ces résolutions ne sauraient manifestement pas être assimilées à «l'expression claire des attentes des gouvernements contractants», comme le laissent entendre l'Australie et la Nouvelle-Zélande<sup>115</sup>. [Fin de la projection n° 13.]

41. Monsieur le président, l'on ne saurait raisonnablement interpréter le processus d'examen et de commentaires prévu par le paragraphe 30 comme équivalant à une obligation d'accepter inconditionnellement les vues des autres gouvernements contractants. Selon l'Australie et la Nouvelle-Zélande, si le Japon ne modifie pas ses propositions de recherche pour tenir compte des vues exprimées par certains membres du comité scientifique qui correspondent à leur politique d'opposition systématique à la chasse à la baleine, le Japon agit au mépris du comité. Ceci est fort éloigné de ce qu'envisage le paragraphe 30<sup>116</sup>.

42. Il ne peut y avoir de doute que le Japon respecte pleinement le paragraphe 30 et qu'il est allé bien au-delà des exigences minimales de cette disposition, pour contribuer de manière importante à un dialogue scientifique continu. Monsieur le président, Mesdames et Messieurs les juges, je vous remercie très sincèrement de votre attention. Mr. President, may I ask you to give the floor to Professor Boyle or maybe you would prefer to have a break now.

The PRESIDENT: Thank you very much. I think it is time for a pause of 15 minutes. Afterwards I will give the floor to Professor Boyle. Thank you very much.

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<sup>113</sup> CMJ, par. 4.31. Propos de la France dans le procès-verbal de la CBI (12-16 juin 1989), p. 116 (CMJ, annexe 36).

<sup>114</sup> Voir, par exemple, résolutions CBI 1987-4 (MA, annexe 10); 1989-3 (MA, annexe 16); 1990-2 (MA, annexe 18); 1991-2 (MA, annexe 19); 1994-10 (MA, annexe 25); 1996-7 (MA, annexe 28); 1997-5 (MA, annexe 29); 2003-3 (MA, annexe 39).

<sup>115</sup> OEN, par. 31, 98.

<sup>116</sup> OEJ, par. 42.

The hearing is suspended for 15 minutes.

*The Court is adjourned from 11.25 a.m. to 11.40 a.m.*

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

Mr. BOYLE: Thank you, Mr. President.

**JARPA II IS CONDUCTED “FOR PURPOSES OF SCIENTIFIC RESEARCH”**

1. Mr. President, Members of the Court, my task today is to explain to the Court why JARPA II is a program of scientific research carried out under Article VIII of the Whaling Convention. Australia’s arguments to the contrary, in our view, lack substance and they are not founded in the applicable law or in common sense. They are also wrong in certain respects. I will address five matters.

2. Firstly, I will deal with the question what is meant by scientific research. I will explain to the Court that this is not a matter to be answered by reference to expert scientific evidence from eminent scientists. It can only be answered by looking at the specific context of the Whaling Convention and at the guidelines for special permits laid down by that Convention.

3. Secondly, I will explain why, contrary to Australia’s insistence last week, JARPA II is indeed a program of scientific research. For that purpose I will take the Court through the 2005 JARPA II research plan submitted to the IWC Scientific Committee by the Government of Japan. In doing so, I will underline the point made by Professor Hamamoto that JARPA II has legitimate research objectives that are relevant to the conservation and management of Antarctic whale stocks, to the implementation of the Revised Management Procedure (RMP), and to the future development and improvement of the RMP. These objectives are materially different from the previous program JARPA, and they explain the difference in sample sizes between the two programs. It is not right, as I think I will demonstrate, to characterize JARPA II as simply a seamless continuation of the earlier program.

4. Perhaps I might seize this moment to point out that the 2005 research plan is the key document in these proceedings, not the special permit issued by the government and to which

Australia drew your attention last week. The permit merely authorizes what is in the plan, nothing more.

5. Thirdly, I will take you to the applicable guidelines in order to show you the basis on which the Scientific Committee reviews and comments on proposals for special permits. Ms Takashiba has already explained that procedure, but I need to look at the details of the guidelines. The JARPA II research plan was reviewed by the Scientific Committee in 2005. Contrary to Australia's assertions it met all of the agreed guidelines at that point and, in our view, it continues to do so. For that purpose it will be necessary to look in particular at Annex P, adopted by consensus in the Scientific Committee and endorsed by the Commission in 2008<sup>117</sup>. And it is here, in Annex P, that the parties to the Convention have set out what information they agree should be provided when special permit proposals are reviewed by the Committee. And it replaces all of the highly controversial resolutions and guidelines adopted in the 1980s and 1990s and on which Australia has rather pointlessly sought to rely. In our view these resolutions are no longer relevant.

6. Fourthly, I will explain why some lethal research is a necessary component of JARPA II and why Japan concluded that no harmful effects on whale stocks were likely to result from a very modest catch level far below the many thousands of minke whales and other whales taken annually by commercial whaling operations more than 30 years ago.

7. Fifthly, I will also explain how the sample sizes were determined. It is probably worth saying at this point that sample size was not determined by the capacity of the ship as suggested by Professor Sands last week. While it is true that the capacity of the *Nisshin-Maru* is indeed 3,200 cubic metres, that does not translate into 3,200 tonnes of whale meat. Once the meat is packed in containers and placed in freezers with appropriate space between the containers, the actual capacity is closer to 1,650 tonnes — which is equivalent to approximately 400 minke

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<sup>117</sup>“Revised Annex P, Process for the Review of Special Permit Proposals and Research Results from Existing and Completed Permits”, attached to the Circular Communication to Members of the Scientific Committee IWC.SC.169, 11 Oct. 2012 (hereafter “Revised Annex P (2012)”). This latest version is the one up-dated by the Secretariat.

whales<sup>118</sup>. To transport 850 minke whales would require two ships or two voyages. So the inference drawn by Professor Sands about the sample size is very neat — and very wrong<sup>119</sup>.

8. Finally, I will draw your attention to a few of the favourable comments made by the Scientific Committee on the utility of JARPA and JARPA II, in order to demonstrate that Australia has in this respect painted a misleading picture of Japanese research. Far from constituting a program to accumulate body parts over 26 years, JARPA and JARPA II have contributed significant scientific data that has informed, and will continue to inform, Antarctic research over many years.

I should say that I have also been asked to respond to Judge Donoghue's two questions and to one of Judge Bhandari's questions and I will do that, with your permission, Mr. President, at the end.

9. You have also heard a lot about peer review, I will come back to that, but in our view the only peer review that matters in the context of the Whaling Convention is review by the Scientific Committee. It is the body empowered to review and comment on special permit research and it will conduct its first review of the results of JARPA II next year. Until then, ~~in our view,~~ it is frankly premature even to be considering the utility of JARPA II. It is that process which Australia, for reasons best known to itself, seeks to circumvent in these proceedings.

10. I hope the conclusion at the end of my speech will be obvious: however controversial it may be, and clearly it has been controversial, JARPA II is a legitimate program of scientific research according to the guidelines for such programs agreed by the Scientific Committee. As such, JARPA II cannot be regarded as commercial whaling in violation of the Southern Ocean Sanctuary, the factory ship moratorium, or the moratorium on commercial whaling. And if you are still in need of further persuasion by the time I finish, Professor Iwasawa will show you this afternoon what a genuine programme of commercial whaling would look like. It bears little resemblance to JARPA II.

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<sup>118</sup>Written response from the President of Kyodo Senpaku, Ltd. to an enquiry by the Agent of Japan, 1 July 2013.

<sup>119</sup>CR 2013/8, p. 59, para. 10 (Sands). No authority is given for the carrying capacity of 3,200 tonnes of "edible product" taken from the whales.

## I. Scientific research

11. Turning first to scientific research, let me begin by recalling the question the Court has to decide is whether JARPA II is, as Japan argues, a program conducted in accordance with Article VIII for “purposes of scientific research”, or whether, as Australia argued last week, it is simply commercial whaling disguised as science.

12. The Whaling Convention does not define what is meant by “scientific research”. This is a question to which both Parties have clearly given very rather different answers. Australia’s view is academic, involving testable hypotheses, independent peer review, and appropriate methodology<sup>120</sup>. It was evident from Professor Mangel’s testimony<sup>121</sup> that — not surprisingly — he answered the question from the perspective of a university professor who has edited peer-reviewed academic journals and is used to making grant applications to academic research funding bodies. He did not actually mention winning Nobel prizes, but listening to him one might easily have concluded that that was the level at which he was accustomed to considering what it means to do worthwhile science. And rightly so: he is a university professor.

13. Professor Mangel also admitted that he has never been a member of the IWC Scientific Committee. He very properly accepted that “[he] certainly did not think of the legal interpretation of what [he] was trying to do as a scientist . . .”<sup>122</sup>. He was not asked by Australia to consider what “scientific research” might mean in the context of the Whaling Convention. So his seminar on the meaning of science was a very interesting diversion, but is it relevant? The question the Court has to answer is whether JARPA II constitutes “scientific research” for the purposes of the Whaling Convention, not whether it might win Nobel prizes or research grants from major research funding bodies. That is a question the good professor has never thought about. He could give you a hypothesis, but he couldn’t give you an answer.

14. Japan’s interpretation of “scientific research” takes a more practical approach, it is focused on applied research of the kind that would be familiar to the Food and Agriculture Organization or a regional fisheries commission. Biological data<sup>an</sup> clearly indispensable to the x long-term management of whales, or indeed the management of fish stocks, or any other living

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<sup>120</sup>CR 2013/9, p. 15, paras. 4-7 (Sands).

<sup>121</sup>CR 2013/9, pp. 38-71.

<sup>122</sup>CR 2013/9, p. 54 (Mangel).

species. Australia says that JARPA II is simply a program of data collection. But data collection is important when estimating the sustainable yield of whale stocks or modelling an ecosystem. It is important when taking any decisions about the management of natural resources.

15. You will recall my references yesterday to the role of “best scientific evidence” in other conservation treaties, including the Law of the Sea Convention. You will also recall what IUCN’s commentary on the Biological Diversity Convention said about scientific research — and I am hoping that is going to come up on the screen [Slide 1]. I will not read it again but you will recall the points that I made there [Tab 54-1]<sup>123</sup>. That is one reason why Japan continues to carry out special permit whaling for scientific researches pending an end to the moratorium on commercial whaling. You heard Professor Walløe testify yesterday that JARPA II is “definitely a scientific research program”<sup>124</sup>.

16. Mr. President, commercial whaling as practised for much of the twentieth century was obviously unsustainable, partly for lack of adequate data. The lack of data was a key reason for adopting the moratorium on commercial whaling in 1982, as Japan has explained in Chapter 3 of its Counter-Memorial. It was also a reason for starting JARPA. The Revised Management Procedure adopted by the Whaling Commission in 1994 is intended to ensure that any future commercial whaling will be sustainable, but it can work effectively only if it is supported by adequate data, and that data must be kept up-to-date in accordance with Article VIII of the Convention.

17. Does this kind of scientific research need hypotheses? I hope that is the last time that we talk about hypotheses. What kind of hypothesis does a conservation scientist need to have in order to give advice on catch limits, maximum sustainable yield, or the recovery of stocks? This is not science at the grand level of Professor Mangel. It is nuts and bolts, it is not  $E=mc^2$ . At most, the only testable hypothesis required is that catching X fish, Y whales or Z rabbits for W years is sustainable given the data we have now. Of course, with more data we might conclude that it is

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<sup>123</sup> “[a]ccurate information is the foundation upon which decision-making is premised. Therefore, as a pre-condition to adopting appropriate sustainable use measures, Parties need generally to gather information on species and ecosystems, their relationships, their uses and the social, cultural and economic factors affecting their use.” (L. Glowka et al., *A Guide to the Convention on Biological Diversity*, IUCN Environmental Policy and Law Paper No. 30 (IUCN, 1994), p. 58 <<http://data.iucn.org/dbtw-wpd/edocs/EPLP-no.030.pdf>> accessed 1 July 2013.

<sup>124</sup> CR 2013/14, p. 22.



less than could have been sustained, that we could take more rabbits. But without the data, we can conclude nothing, however many hypotheses we invent.

18. You will also recall the questions put to Professor Mangel, including his discussion with Judge Donoghue about the human genome. Even Professor Mangel accepted that there is at least one hypothesis in JARPA II, together with eight sub-hypotheses.<sup>125</sup> How many hypotheses and sub-hypotheses does a scientific research program require? Even Galileo only had one hypothesis about the Earth and the Sun. And what is wrong with the krill surplus hypothesis? Given the availability of more krill, do we have more minke whales or fewer minke whales? Does the population go up or go down?

19. Mr. President, Members of the Court, I think I have probably said enough about science. As I indicated at the beginning, this is a question that can only be answered in the specific context of the Whaling Convention by reference to the Guidelines for Special Permits laid down by the Scientific Committee. I will come to those Guidelines in a moment but, before we do, it is now time, I think, to have a closer look at the 2005 JARPA II research plan<sup>126</sup>. You will find this document, with its accompanying appendices at tabs 4 to 13 in your bundles; the research plan is itself at tab 4. It is also Annex 150 in the Counter-Memorial. I am certainly not going to take you through all of it, but we can look at some of the highlights. I would suggest the full document does repay careful attention.

## **II. 2005 JARPA II Research Plan**

20. Japan established JARPA II because its four research objectives and the data which will be gathered are directly relevant to the rational management and conservation of whales, to the implementation of the Revised Management Procedure, to the future development and improvement of the RMP, and to other related research needs. The details are all set out in the research plan, and that is the plan that was reviewed by the Scientific Committee, and commented upon, in 2005. This 99-page document including nine appendices gives a comprehensive account

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<sup>125</sup>CR 2013/9, p. 61 (Mangel).

<sup>126</sup>Government of Japan, "Plan for the Second Phase of the Japanese Whale Research, Program under Special Permit in the Antarctic (JARPA II) - Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources" (2005) IWC SC/57/O1, and Appendices 1-9 (hereafter "JARPA II Research Plan (2005) IWC SC/57/O1") (CMJ, Ann. 150).

of JARPA II's research objectives and methodology, sample size, and an assessment of the effect on whale stocks.

21. Section II of the plan begins by outlining the results of the previous research program, JARPA, and it summarizes the interim review conducted by the Scientific Committee in 1997. You will see excerpts from the Committee's report at pages 7 and 8 of the JARPA research plan. The key point here is the Committee's recognition that the science of JARPA was valuable and that more research was needed. Here are some of those comments: [Tab 54-2/Slide 2]

- (i) "JARPA has already made a major contribution to understanding . . . biological parameters."
- (ii) "Data on the status of minke whale stocks "are likely to be useful in testing various hypotheses . . . the 'krill surplus' model."
- (iii) "More effort is needed to develop meso-scale studies to integrate physical and biological oceanography and prey distribution with minke whale studies."<sup>127</sup>

22. At page 8 the plan then explains why it was thought desirable to embark on a new study of the impact of global environmental changes on the Antarctic. That is one of the new features of JARPA II. It notes that "major environmental changes such as global warming may greatly affect krill reproduction in the Antarctic Ocean and thus change the carrying capacity of cetacean species". It also addresses the need to improve management procedures for minke whales, including multi-species management. There are research questions here, possibly even latent hypotheses. The most obvious point is the underlying hypothesis that the research is relevant to conservation and management of whales. That relevance is disputed by Australia and its experts. But Australia's experts are very clearly contradicted by Professor Walløe in his Written Statement and in his testimony yesterday<sup>128</sup>.

23. The four research objectives have been outlined for you by Professor Hamamoto and they are set out in Section III — and I will not go through those again in any detail — and you can see those on the screen at tab 54-3. [Slide 3]

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<sup>127</sup>JARPA II Research Plan (2005) IWC SC/57/O1, pp. 7-8.

<sup>128</sup>Lars Walløe, "Scientific review of issues raised by the Memorial of Australia including its two Appendices", 9 April 2013, pp. 11-12, (hereafter "Walløe, Expert Statement"); CR 2013/14, pp. 18-19.

24. Section IV of the research plan then describes the research methods and other parameters. Australia told you that the research plan had no end date. In reality the plan explains at page 13 under the heading "Research period" that JARPA II will start in the 2005/2006; that the first two years are a feasibility study; that full-scale research will commence from 2007/2008; and that "*a period of six years... has been established as the research phase*". So it will last for six years and, at the end of that period, "a review will be held and revisions [will be] made to the program if required". That review, as I have indicated, has been scheduled to take place in 2014.

25. That does not mean that JARPA II will not be extended thereafter, but it is plainly wrong to say that it will inevitably go on indefinitely or that it was designed to do so.

26. You will also see in Section IV of the plan how the four research objectives are to be addressed. There is particular emphasis on whale abundance trends and biological parameters, krill abundance and the feeding ecology of whales, the effects of contaminants on cetaceans, a model of competition among whales, restoration of the cetacean ecosystem and other new management objectives. Australia says these are all too broad and poorly defined to constitute real science, but pages 14-17 of the plan cannot be dismissed in that way. If the criticism had any validity it would surely be apparent in the Scientific Committee's review of the JARPA II proposal in 2005. No such critique was offered.

27. I will discuss sample sizes and the effects on the whale stock in more detail later, but I will simply draw to your attention that at pages 17 and 19 of the plan you will see the methodology explained. Both matters are more fully dealt with in Appendices 4, 6, 7, 8 and 9. You will find those beginning at tab 8 in your folder. But I will come back to those issues shortly.

28. Moving on, however, it is also worth, I think, pausing just to look briefly at the subjects that are covered in the appendices.

(i) Appendix 1 at tab 5: Deals with the composition of baleen whale species in the JARPA research area. The appendix explains some of the findings of JARPA and gives distribution and abundance estimates for minke, humpback, blue and fin whales in the Antarctic.

(ii) Appendix 2 at tab 6: Deals with what has happened to the Antarctic minke whale stocks. It gives a further interpretation of results from JARPA and the summary notes that the

paper “rearranges the results reflecting possible changes in the Antarctic minke whale stocks, examines what has happened to these stocks, and predicts possible future changes” (p. 37). To my reading it sets out a series of hypotheses about the stock. Appendix 3 at tab 7 pursues the same line of enquiry.

- (iii) Appendix 4 at tab 8: Covers the monitoring of environmental pollutants in cetaceans and in the marine ecosystem. It also deals with organochlorine compounds, heavy metals and chemicals. This part of the research also links in with the JARPAN II program in the North Pacific.
- (iv) Appendix 5 at tab 9: There, hypotheses on abundance changes of krill predators in the Antarctic ecosystem.
- (v) Appendix 6 at tab 10: Deals with sample sizes for trends in biological parameters. Appendices 7 and 8 at tabs 11 and 12 do the same for the monitoring of blubber thickness and genetic marking. And, finally,
- (vi) Appendix 9 at tab 13: This provides an analysis of effects on the whale stock of catches during JARPA II. At the bottom of page 82 you will see that for minke whales, “it can be concluded that there would be no negative effect on the minke whale stocks of these future catches”. You will recall that Professor Mangel agreed in his oral evidence<sup>129</sup>. Over the page the same conclusion is reached for humpback whales.

29. Now I will come back to some of those issues but, Mr. President, Members of the Court, I have probably tried your patience by taking you through all this material that is not immediately appealing to lawyers. But it is important to show you that JARPA II was not a back-of-the-envelope, ill-conceived, exercise in mere data collection. This is a serious research plan, which builds on JARPA’s incomplete results, but extends that research into new dimensions involving broader questions about global environmental change and ecosystem modelling. Of necessity this requires consistent, reasonably long term, data collection and analysis.

30. In concluding this part, let me draw your attention once again to the quotation that I referred you to yesterday from the Code of Conduct on Responsible Fisheries, and you will find

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<sup>129</sup>CR 2013/9, p. 63 (Mangel).

that at tab 54-4, and hopefully it is about to come up on the screen<sup>130</sup>. The JARPA II plan does not do everything that this commentary refers to, but it seems to do quite a lot. I will simply leave that on the screen. [Tab/slide 54-4]

### **III. Preliminary review by the Scientific Committee**

31. Let me now come to the preliminary review of the JARPA II research plan by the Scientific Committee. It is clear from what Ms Takashiba said this morning that that review did indeed take place, but I also need to say something about the applicable guidelines used by the Committee.

32. First, let us recall that point. The JARPA II research plan was submitted to the Scientific Committee for preliminary review as required by paragraph 30 and Ms Takashiba has dealt with that.

33. Second, the applicable guidelines in 2005, when Japan submitted the JARPA II research plan to the Scientific Committee, are set out in Annex Y. Let me invite you to take a quick look at this document. You will find it at tab 55. It is very short; it is just one page. You will see that Annex Y is simply a compendium of non-binding Whaling Commission resolutions on special permits compiled by one author. Some of those resolutions were, of course, opposed by Japan.

34. Third, it is clear that the Scientific Committee did indeed review the research plan as submitted by Japan. And if you can look at their report, which you will find at tab 56 in your folder: this is the Report of the Scientific Committee, a meeting at which the JARPA II plan was reviewed<sup>131</sup>. The review starts at paragraph 16.2. Now, if you read it, obviously there was dissent in the Committee about whether to proceed with the review. There were 63 scientists who took the view that it should not go ahead and you have heard from Ms Takashiba the outcome of that dispute. Nevertheless, without 63 scientists, the remainder of the Committee, still a lot of scientists, undertook the review. The review went ahead, and you will see the comments made by

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<sup>130</sup> “States should recognize that responsible fisheries require the availability of a sound scientific basis to assist fisheries managers and other interested parties in making decisions. Therefore, States should ensure that appropriate research is conducted into all aspects of fisheries including biology, ecology, technology, environmental science, economics, social science, aquaculture and nutritional science.” (Paragraph 12.1, FAO, Code of Conduct for Responsible Fisheries, Rome, FAO, 1995 <[ftp://ftp.fao.org/docrep/fao/005/v9878c/v9878c00.pdf](http://ftp.fao.org/docrep/fao/005/v9878c/v9878c00.pdf)> accessed 1 July 2013.)

<sup>131</sup> “Report of the Scientific Committee”, *J. Cetacean Res. Manage.* 8 (Suppl.) 2006, pp. 48-52.

those members at page 50. They include the following comments; hopefully those are coming up on the screen [tab 54-5/slide 5]:

- (i) “They stressed the importance of preserving the continuity of the research programme . . .”
- (ii) “Some other members stressed the importance of JARPA II as an approach towards ecosystem management of the Antarctic.”
- (iii) “One member also expressed the view that . . . large parts of the proposed JARPA II have objectives that are virtually independent of the JARPA objectives and results.”<sup>132</sup>

35. Well, those seem fairly positive comments. Clearly it was discussed. You will also see if you read the document that, after discussion, the Committee offered its comments on the proposal and that was all. As far as we can tell they were satisfied that Annex Y had been complied with.

#### **IV. Annex P**

36. I now come to Annex P. Annex P is the currently applicable set of guidelines. It was adopted in 2008 by the Scientific Committee and it was revised in 2012. You will see that there is an extensive list of matters set out there that have to be considered by the Committee during its review of special permit proposals<sup>133</sup>. The fact that Annex P was agreed by consensus in the Scientific Committee and then endorsed by the IWC itself<sup>134</sup> is a significant indication of agreement on what a scientific research program submitted pursuant to the Schedule must address. Unlike earlier resolutions, and unlike Annex Y, that agreement includes Japan, Australia and New Zealand. You will find a copy of Annex P at tab 3 in your folder.

37. Now, in so far as it sets out the matters to be addressed in a special permit proposal pursuant to paragraph 30 of the Schedule, Annex P replaces the more controversial elements of the Commission resolutions adopted in the 1980s and 1990s, on which Australia relied in its Memorial

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<sup>132</sup>*Ibid.*, p. 50.

<sup>133</sup>Revised Annex P (2012).

<sup>134</sup>“Chair’s Report of the 60th Annual Meeting”, *Annual Report of the International Whaling Commission 2008*, p. 26.

and in its oral arguments<sup>135</sup>. These non-binding resolutions were opposed at the time and consistently thereafter by Japan and a number of other States<sup>136</sup>.

38. The equally non-binding Annex P thus represents a deliberate and considered attempt by the Scientific Committee to move beyond the disagreements that had surrounded earlier IWC recommendations by finding a formulation that commanded support from all member States, including Japan and Australia. Once Annex P was adopted by consensus and endorsed by the IWC, the older resolutions and guidelines ceased to be relevant.

39. Japan's position is that it is for the Scientific Committee to review and comment on whether JARPA II complies with Annex P in 2014, and that it is inappropriate for Australia to bring its allegations of non-compliance before this Court. Nevertheless, Japan sees no difficulty in demonstrating that JARPA II is indeed consistent with the letter and spirit of Annex P.

40. Let me therefore spend a little bit of time focusing on that Annex because it gives a good sense of what the Scientific Committee currently expects to see in a programme of scientific research under Article VIII. In its Written Observations, I should perhaps point out, New Zealand quotes a summary of Annex P taken from the IWC website<sup>137</sup>, but I think we should probably refer to the actual terms of the Annex as adopted by the Scientific Committee.

41. Annex P stipulates that research *objectives* — and you will see them coming up there — are to be “quantified to the extent possible” and should briefly indicate how far the research will, and it sets out there the various objectives [tab 54-6/slide 6]:

- (i) “improve the conservation and management of whale stocks,”
- (ii) “improve the conservation and management of other living marine resources or the ecosystem of which the whale stocks are an integral part or”,
- (iii) “test hypotheses not directly related to the management of living marine resources”. [End slide 6]

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<sup>135</sup>Resolution 1987-1, Resolution 1995-9 and Resolution 1999-2.

<sup>136</sup>Resolution 1987-1 was adopted by 19 votes in favour, 6 against, 7 abstentions (*Rep. int. Whal. Commn.* 38, 998, p. 26); Resolution 1995-9 was adopted by 23 votes in favour, 5 against, 2 abstentions (*Rep. Whal. Commn.* 46, 1996, p. 30) and Resolution 199-2 was adopted without vote “by a majority, noting the views expressed” (*Annual Report of the International Whaling Commission 1999*, p. 28).

<sup>137</sup>New Zealand Written Observations (WON), para. 59.

Obvious point there, it does not have to be all concerned with conservation and management of whales.

42. Research *plans* should also indicate how far they will contribute to — and you can see that coming up on the screen [tab 54-7/slide 7]:

- (i) “past recommendations of the Scientific Committee”,
- (ii) “completion of the Comprehensive Assessment or in-depth assessments in progress or expected to occur in the future”,
- (iii) “the carrying out of *Implementations* or *Implementation Reviews* of the RMP”,
- (iv) “improved understanding of other priority issues identified by the Scientific Committee”,
- (v) “recommendations of other intergovernmental organisations”. [End slide 7]

[Revert to tab 54-6/slide 6]

43. Mr. President, there are, I think, five important points I would like to make with respect to Annex P. First, there is no requirement to specify research objectives in great detail — they need be, as it says, quantified only “to the extent possible”. Japan’s submission is that the JARPA II research plan does exactly that.

44. Second, as you can see from this list, improving conservation and the management of whales is an important possible objective, but not the only one. Japan’s submission therefore is that while JARPA II research is relevant to conservation and management of whales it need not be *necessary* for that purpose, and it need not all be directed at that purpose.

45. Third, research can include other marine living resources or the marine ecosystem with which the whales interact. As you will have seen from JARPA II, the plan plainly does include research of that kind.

46. Fourth, the research may be related to the work of the Scientific Committee or of other intergovernmental organizations, but it could also cover other general scientific issues. That was a point that Professor Walløe emphasized yesterday. Again, it will be apparent from the research plan that JARPA II does all of those things.

47. Fifth, the research can be related to the resumption of commercial whaling: because carrying out *Implementations* or *Implementation Reviews* of the RMP cannot be understood in any other way. The RMP’s sole purpose is to allow sustainable catch limits to be calculated.



Professor Hamamoto and Professor Walløe have both shown that JARPA II is directly related to this objective and to the further objective of refining and improving the RMP by improving the information on which it is based. [End slide 6]

48. Nowhere is it suggested in Annex P that any research programme must address all of these objectives or that it may only be for a limited period. Nowhere is it suggested in Annex P that the research must be publishable or must address some academically interesting hypothesis. Rather the context and wording suggests applied research, focused *inter alia* on improved management or assessment of whale stocks, or other relevant scientific issues — serving in other words the objects and purposes of the Convention.

49. The Whaling Commission has endorsed Annex P and those are the criteria by which JARPA II will be evaluated in 2014. Now Professor Mangel and Professor Gales have given the Court their own views on what constitutes scientific research for the purposes of Article VIII but, with all due respect to these eminent scientists, the “essential characteristics” they advocate go beyond the paragraph 30 of the Schedule and of Annex P.

50. To give you a few examples, nowhere in Annex P is it necessary to show that “the objectives of the research cannot be achieved by other means” — and I will come back to lethal means in a moment. New Zealand makes the same erroneous assertion<sup>138</sup>. Professor Mangel says that sample sizes must be set using “accepted statistical methodology”, but if you look at Section 1, paragraph (2), of Annex P, it refers only to the need to include a “sampling protocol for lethal aspects of the proposal” — something slightly different. The methods used by JARPA II must, in Professor Mangel’s words, be “designed to avoid adverse effects on the stocks being studied”, but if you look again at Annex P, Section 1, paragraph (3), this requires instead that there should be an “assessment of potential effects of catches on the stocks involved” — not quite the same. So there are some subtle differences here, and they are rather important, but they are obviously not something Professor Mangel was ever asked to consider by Australia<sup>139</sup>.

51. In Japan’s submission JARPA II is consistent with Article VIII of the Convention, with paragraph 30 of the Schedule, and with Annex P. These texts provide the only relevant criteria

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<sup>138</sup>WON, para. 79.

<sup>139</sup>CR 2013/9, p. 52 (Mangel).

when determining whether a special permit is for the “purposes of scientific research” in accordance with Article VIII.

#### V. JARPA II research objectives comply with Annex P

52. Let me then say something very briefly about JARPA II research objectives, and their compliance with Annex P. The research objectives that are set out in JARPA II, in Japan’s submission, conform to the guidance given in Annex P. I will not go through all of them, I will simply highlight the main points.

53. JARPA II is obviously relevant to improving the conservation and management of whales, of other living resources or ecosystems, in the various ways that are set out at pages 10 to 17 of the research plan.

54. JARPA II contributes to past recommendations of the Scientific Committee, in particular through Objective 1: for example the Scientific Committee has also sponsored catch-at-age based analyses, and has actually recommended the use of age data from JARPA II<sup>140</sup>. That analysis has been done and it has been presented to the Scientific Committee and you can read details of that in this year’s Scientific Committee report.

55. Professor Walløe’s evidence is that JARPA II is relevant to the carrying out of *Implementations or Implementation Reviews* of the RMP<sup>141</sup>. The explanation for that is actually set out in the research plan. Again you will see this coming up on the screen. It says [tab 54-8/slide 8]:

“The RMP, which has been developed as a management procedure, is based on a single species management model, although it is supposedly applicable even when carrying capacity increases twofold or declines to half. However, [it goes on to say] the need to allow for such a wide range of uncertainty renders the RMP overly conservative in its utilization of whale resources, and this could be improved if good multi-whale-species models were developed as a basis on which to create a better RMP.”<sup>142</sup>

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<sup>140</sup>“Report of the Scientific Committee”, *J. Cetacean Res. Manage.* 14 (Suppl.), 2013, p. 29.

<sup>141</sup>Walløe, Expert Statement, pp. 11-12.

<sup>142</sup>*Ibid.*

56. Mr. President, Members of the Court, that is probably all I want to say about the review of Annex P. We can now turn our attention to the need for lethal whaling and the setting of sample sizes.

#### **VI. Why lethal research is necessary**

57. Why then is it necessary to conduct lethal research? The primary reason is to facilitate an understanding of minke whale population dynamics, in the same way that fisheries scientists use such information to improve the advice they give on sustainable catch levels. Lethal research supplements and strengthens the collection of biological data that was previously collected through commercial whaling. You heard Professor Walløe explain yesterday that it is a necessary element of the JARPA II program because much of the information it provides cannot be obtained in any other way, or because it is impractical to use non-lethal methods. Even Professor Mangel accepted in his evidence that: “There will be cases in which lethal methods are necessary.”<sup>143</sup>

58. When the JARPA II research plan was first reviewed by the Scientific Committee, the members — and I will quote the report verbatim — “agreed that while some biological data could be collected using non-lethal methods, the overall objectives would require lethal sampling”<sup>144</sup>. You will find that document at tab 56 in your folder. Dr. Gales gave evidence to the contrary, but that is not the point. What matters is that this issue was discussed by the Scientific Committee and you can now see their view. Japan cannot be criticized for doing what the appropriate expert body — the IWC Scientific Committee — regards as necessary.

59. More recently the report of the 2009 expert workshop on special permit whaling in the North Pacific — known as JARPN II — concludes: “The Panel recognises that at present, certain data, primarily stomach content data, are only available via lethal sampling.”<sup>145</sup> As Professor Walløe testified, stomach content data is essential for building ecosystem models<sup>146</sup>.

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<sup>143</sup>CR 2013/9, p. 65.

<sup>144</sup>“Report of the Scientific Committee”, *J. Cetacean Res. Manage.* 8 (Suppl.), 2006, p. 51.

<sup>145</sup>“Report of the Expert Workshop to Review the Ongoing JARPN II Programme”, *J. Cetacean Res. Manage.* 11, (Suppl. 2), 2010, p. 426, available at: <http://www.icrwhale.org/pdf/workshop2.pdf>, accessed 1 July 2013.

<sup>146</sup>Walløe, Expert Statement, p. 7.

60. The IWC Scientific Committee's own reports<sup>147</sup> show that understanding population dynamics is fundamental to implementation and improvement of the RMP<sup>148</sup>. Sighting surveys alone will not provide sufficient data for this purpose. They merely measure the abundance of whales at a particular time and in a particular place. They tell us nothing about the existence of different whale stocks, or the age structure of each stock, or future population dynamics. Minke whale natural mortality rates and detailed population trends over an extended period of time can only be estimated if age data are also used. Again, Professor Walløe gave evidence on that.

61. At its most recent meeting, held only last month, the Scientific Committee unanimously recommended using age data from JARPA II for the minke whale population dynamics model it is investigating<sup>149</sup>. This data is derived from analysis of minke whale earplugs, and you have heard about that. The only way to obtain earplugs from whales is by lethal sampling. Even Professor Mangel concedes that "there are still no effective non-lethal means of aging whales, so if age information is absolutely required, then lethal take is also required"<sup>150</sup>. And the Scientific Committee has confirmed that all of the technical problems previously suggested regarding this age data has been resolved<sup>151</sup>. Australia's references to 7,000 allegedly failed earplugs have to be seen in that context<sup>152</sup>.

62. Once again Australia is trying to condemn Japan for using methods which the Scientific Committee itself evidently found appropriate and reliable. And Japan is supposed to listen to the Scientific Committee.

63. Australia and New Zealand both take the view that lethal methods are permissible only where the research could not be carried out in any other way<sup>153</sup>. They say that all the necessary

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<sup>147</sup>For example, "Draft Specification for the Calculation of Catch Limits in a Revised Management Procedure (RMP) for Baleen Whales", Annex H, Report of the Scientific Committee, *Rep. Int. Whal. Commn.*43, 1993, p. 148, para. 3.2.

<sup>148</sup>*Ibid.*

<sup>149</sup>"Report of the Scientific Committee", *J. Cetacean Res. Manage.* 14 (Suppl.), 2013, p. 26.

<sup>150</sup>Mangel, Expert Opinion, MA, App. 2, para. 4.34.

<sup>151</sup>"Report of the Scientific Committee", *J. Cetacean Res. Manage.* 14(Suppl.), 2012, p. 29.

<sup>152</sup>CR 2013/10, p. 19.

<sup>153</sup>AM, paras. 4.93, 4.102, 4.119, 5.51, 5.65; WON, para. 79.

information can be obtained through biopsies and satellite tagging. It is obviously not the view of the expert reports I have just cited, and it is clearly contradicted by Professor Walløe's evidence<sup>154</sup>.

64. As Professor Walløe explained yesterday, some essential data can only be obtained through lethal methods<sup>155</sup>. Other data could be obtained by non-lethal means, in some cases, but it would not be of the same quality or reliability, or it would take an unrealistic amount of time and expense to collect. Lethal research therefore might not always be "necessary", but it would in some situations be impractical, as Professor Walløe demonstrated, to use other methods. For that reason, it seems to Japan that necessity is not the right standard here: lethal whaling is appropriate where it would be impractical to use other methods, so long as catches are within sustainable limits and hence cause no harm to the stock. And in Japan's view it would be impractical to carry out JARPA II without some lethal research, used in conjunction, of course, with non-lethal methods where appropriate and available.

65. And Japan has put much effort into non-lethal research methods. Its scientists have even had some success with biopsy sampling and satellite tagging of large, slow-moving whale species such as the humpback<sup>156</sup>. ~~But obtaining~~ <sup>o</sup> obtaining biopsy samples or attaching satellite tags from minke whales in the Antarctic ~~is~~ <sup>is</sup> is not impossible. But the Japanese scientists have found that it has a very low success rate, because the whales are swift and agile and the waters of the Antarctic Ocean are far from calm<sup>157</sup>. And it is even more difficult to attach a sufficient number of tags or obtain enough biopsy samples to be statistically representative<sup>158</sup>. But, even in the unlikely case of obtaining a large number of biopsies and tagging many minke whales, that information simply will not respond to all of the key scientific questions from JARPA II, and again you have Professor Walløe's evidence to support that proposition.

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<sup>154</sup>Walløe, Expert Statement, pp. 10-12.

<sup>155</sup>CR 2013/14, pp. 18- 19.

<sup>156</sup>See, e.g., "Cruise Report of the Japanese Whale Research Program under Special Permit in the Antarctic - Second Phase (JARPAII) in 2009/2010", SC/62/O3, table 6, p. 9, available at <http://www.icrwhale.org/CruiseReportJARPA.html>, accessed 1 July, 2013.

<sup>157</sup>CMJ, para. 4.75; Walløe, Expert Statement, p. 11.

<sup>158</sup>For the sample size estimated as required to find significant differences in mixing proportion, see App. 3, JARPA II Research Plan (2005), IWC SC/57/O1, p. 55.

66. Australia may have used these techniques successfully in calmer coastal waters to tag or biopsy less than two dozen whales, and we have seen the pictures, but they do not tell us what the failure rate is or would be in the far rougher waters of the open ocean. Dr. Gales actually admitted that the weather matters<sup>159</sup>. And to show that a technique can work for a limited number of whales when the conditions are just right is not the same as showing that it is a practical or effective way to carry out a research programme on the scale of JARPA II.

### VII. Sample sizes are determined using established methodology

67. I now come to sample sizes. When taking whales for research purposes the sample size obviously has to be large enough to meet the objectives of the research program and to ensure that the results of the analysis are sufficiently accurate. Professor Mangel says that the sample sizes for lethal research must be set using “accepted statistical methodology”<sup>160</sup>. But, as I pointed out earlier, that is not what Annex P, section 1, paragraph (2), actually says. It only refers to the need to include a “sampling protocol for lethal aspects of the proposal”. The JARPA II plan does that in Appendices 6-8<sup>161</sup>.

68. Notwithstanding all this, it is in any event clear, when we look at JARPA II, at the research plan, that it does set out in detail how the sample size was calculated using “accepted statistical methodology”, and the evidence is there in black and white in the appendices<sup>162</sup>. Perhaps it could have been explained more clearly, or at greater length, that is possible. But it is there, and as Professor Walløe suggested, a standard textbook <sup>was used</sup> and I actually have a copy of the book here. It is called Devore and Berk, *Modern Mathematical Statistics with Applications*, second edition<sup>163</sup> — it’s a heavy tome — and is the one that was actually used by the scientists at the Institute of Cetacean Research when calculating the sample size.

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<sup>159</sup>“Report of the Sub-Committee on In-Depth Assessments”, Ann. G, Report of the Scientific Committee, IWC/65a/Rep1, (2013), pp. 5-6 <<http://iwc.int/cache/downloads/dfk3x3g3hy0ckww8k4ogw0kgo/AnnexG.pdf>> accessed 2 July 2013.

<sup>160</sup>Mangel, Expert Opinion, MA, App. 2, para. 4.39.

<sup>161</sup>JARPA II Research Plan (2005) IWC SC/57/O1, Apps. 6-8.

<sup>162</sup>*Ibid.*, App. 6, App., “Estimation of sample size”, pp.73-74, CMJ, Ann. 150.

<sup>163</sup>J. L. Devore and K. N. Berk, *Modern Mathematical Statistics with Applications* (Second Edition, Springer Science+Business Media, LLC 2012).

69. And here is the formula, reproduced in the Appendix to Appendix VI of the JARPA plan [Tab 54-9/Slide 9]. Now, Mr. President, I haven't the foggiest idea what that means, but that is the formula. Mathematics was never my strong point. I would never have managed  $E=mc^2$ .

70. But let us take this problem a little further. In his oral evidence Professor Mangel did not explain why a figure of 850 minke whales is unjustifiable. That was the word he used, "unjustifiable", but he gave no explanation. And in his written report he merely says the sample sizes are "not based on solid statistical reasoning"<sup>164</sup>. Well you can judge for yourselves, it is certainly there in the report, there is solid statistical reasoning. And we have set it out. Yet the rationale for the sample size can be explained. JARPA II needs to catch whales in order to measure biological and demographic changes in the relevant whale stocks over time. In order to be confident that the data collected gives results that are accurate within acceptable limits, we need a large enough sample. Now, how large is going to depend on three things It's going to depend on:

- (i) the level of accuracy we're interested in;
- (ii) the extent of the biological changes we want to detect; and
- (iii) the period of time within which we wish to detect those changes.

71. Determining "the extent of the biological and demographic changes that we want to detect" is a scientific judgment. So is the level of accuracy that we are prepared to accept. A larger sample would give greater accuracy. But if we conduct the research over a longer time or are willing to accept a lower degree of accuracy then a smaller sample size will also give viable results, but it might delay the ability to detect potentially important changes in a stock's dynamics.

72. Now when questioning Professor Walløe yesterday, Mr. Gleeson tried to decry as implausibly large the change of 36 per cent in the pregnancy rate of humpback whales over 12 years used by Japanese scientists in calculating a sample size for humpback whales. But, in fact, as our scientists have shown, these whales have been increasing at about 10 per cent per annum for some time, and last month's IWC Scientific Committee Report shows that the stock that breeds off Western Australia is expected to stabilize at its original size very soon<sup>165</sup>. It's reasonable

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<sup>164</sup>Mangel, Expert Opinion, MA, App. 2, para. 5.2.

<sup>165</sup>"Report of the Sub-Committee on Other Southern Hemisphere Whale Stocks", Ann. II, Report of the Scientific Committee, IWC/65A/Rep I, p. 4.

to hypothesize, in those circumstances, that this drop in the growth rate will be accompanied by a very large percentage change in a biological parameter such as the pregnancy rate. So Japan's scientists regard their judgement on this question as entirely reasonable and wholly defensible, and they do not accept Mr. Gleeson's criticisms.

73. The figure of 850 minke whales, and 50 of each of the other species, which was adopted as the JARPA II sample size, obviously represents a compromise between the different parameters, chosen because it satisfies the statistical conditions for most of the research items, and because catches at that level will cause no harm to the stock.

74. Given the range of variables there is inevitably a range of possible sample sizes. What that range may be was established using the accepted statistical formula referred to above — that none of us understands — and also the 5 per cent level of accuracy which is the norm employed by the IWC Scientific Committee, and the 6-year period chosen by the Committee between JARPA II reviews. Mr. Gleeson cannot have it both ways: he was arguing yesterday that 6 years is too short a period over which to calculate sample sizes. But, last week Australia argued that JARPA and JARPA II had gone on for far too long.

75. Different scientists could quite reasonably come to different conclusions about any of these numbers but most importantly in two of the three respects where this is possible, JARPA II has adopted the norms used by the Scientific Committee.

76. Mr. President, we are all lawyers, and I am sure that many of you, like me, do not understand mathematical equations, but the scientists do — you do not want to hear me attempting any further to explain mathematics. But there are fuller accounts of those sample size calculations set out, in detail, in the JARPA II research plan and in its Appendices 3 to 8, and those are what was submitted to and reviewed by the Scientific Committee in 2005. Professor Mangel obviously starts from different assumptions about the objectives of the research, so it is not surprising that he comes to different conclusions.

77. But let me emphasize this: at no point has the Scientific Committee expressed any specific concern about the JARPA II sample size or its impact on the stock. Once again, it really is not for Australia or its experts to come to this Court to criticize what the Scientific Committee has found acceptable.



78. Moreover, it is worth noticing that New Zealand says nothing about the methodology of calculating sample sizes. Its main point is that the number of whales taken under a special permit must be “necessary and proportionate” to the objectives of the research. Japan does not disagree, but it maintains — for all the reasons set out, in my speech and in earlier speeches — that the number of whales taken under JARPA II is both necessary and proportionate.

79. True, as New Zealand observes, more whales are now taken under JARPA II than were taken under special permits issued before 1985, but of course before the 1982 moratorium came into force most scientific research could be carried out on carcasses taken during commercial whaling operations. Special permits were not necessary at that point. They are necessary now, because there is a moratorium on commercial whaling.

#### **VIII. There are no adverse effects on whale stocks**

80. Mr. President, we can now come to the question of adverse effects on whale stocks. Australia’s Memorial claims that “Japan has not properly assessed the possible adverse effects of its ‘research’ on the targeted stocks” and it says that “as a result JARPA II was not designed to avoid such adverse impacts”<sup>166</sup>. You will note that Australia does not allege *actual* adverse impacts. In fact, possible effects on whale stocks of JARPA II catches were analysed in the research plan — and this was submitted to the IWC Scientific Committee in 2005<sup>167</sup>. I have already referred you to Appendix 9 of the research plan which evaluates this question in depth, and to the Scientific Committee’s satisfaction.

81. That evaluation shows that capture for research will have no deleterious effect on any cetacean stock: using extremely conservative sustainable yield assumptions, a minke whale growth trend would continue, and the stock could be maintained at a level close to environmental carrying capacity.

82. In the case of humpback whales, they are included in the research plan but they have, as you know, never been taken in practice. The assessment summarized in Appendix 9 of the research

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<sup>166</sup>MA, paras. 5.99-5.104.

<sup>167</sup>JARPA II Research Plan (2005) IWC SC/57/O1, App. 9; CMJ Ann. 150.

plan indicates that the humpback whale population has been showing a rapid recovery, and the impact of taking 50 whales was studied and showed virtually no effect on that recovery.

83. With regard to fin whales, the abundance estimate referred to in the Memorial of Australia<sup>168</sup> does not cover the entire distribution area so it is likely to be an underestimate<sup>169</sup>. The details of the assessment undertaken by Japan are in the research plan at Appendix 1. The catch figure of 50 whales taken alternately from the Indian Ocean population and the Pacific Ocean population is less than 1 per cent of their underestimated abundance. Again, the Appendix concludes that a reasonable scientific judgment would be that this catch has no adverse effect. Clearly, possible effects were assessed and avoided.

84. The 2012 IWC Report also contains the following paragraph, which might be interesting to draw to your attention. It says:

“In the 2011 season 174 minke whales were landed in West Greenland and 6 were struck and lost . . . Based on a negatively biased estimate of abundance . . . and [the] application of . . . [an] interim approach, the Committee repeated its advice of last year that an annual strike limit of 178 will not harm the stock.”<sup>170</sup>

Now of course this report is not about Japanese research whaling, but it puts JARPA II in some perspective.

85. The recently agreed population estimate for Antarctic minke whales in Areas IV and V, which are only part of the region from which JARPA II samples whales, is 244,000<sup>171</sup> — over 10 times greater than West Greenland. The sample size under JARPA II is 850: only five times more than the West Greenland catch limit. So that would seem to suggest that a catch limit of 850 in the Antarctic is more than safe.

### **IX. New Zealand’s interpretation of Annex P**

86. Now let me come to New Zealand’s interpretation of Annex P. I am sure we all look forward to hearing something from New Zealand next week. New Zealand’s reading of Annex P

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<sup>168</sup>MA, App. 1, para. 4.11.

<sup>169</sup>JARPA II Research Plan (2005) IWC SC/57/O1, App. 1, Fig. 8, p. 34; CMJ Ann. 150.

<sup>170</sup>Chair’s Report of the 64th Annual Meeting, *Annual Report of the International Whaling Commission*, 2012, para. 7.4.1.3.

<sup>171</sup>“Report of the Scientific Committee”, *J. Cetacean Res. Manage. 14 (Suppl.)*, 2013, table 9, p. 27.

differs from Australia's, but since it relies on a website summary it is not entirely accurate. Briefly, New Zealand says that special permit research must<sup>172</sup>:

- (i) "be specifically defined",
- (ii) "be essential for rational management under the Convention",
- (iii) "be likely to provide reliable answers",
- (iv) "avoid lethal methods where possible",
- (v) "have no adverse effect on the stock".

87. As I think I have shown this morning, Japan has more than adequately defined the research objectives of JARPA II; whether that research has provided reliable answers will be reviewed by the Scientific Committee next year; lethal methods are only used where non-lethal methods are impractical or unavailable; and there has been and will be no adverse effect on the population of any of the whale species.

88. Japan does not accept that special permit research must necessarily be "essential for rational management under the Convention" — as I have shown, there is no such requirement in Annex P or in paragraph 30 of the Schedule. On the contrary, Annex P provides expressly that a special permit may be issued in order to "test hypotheses not directly related to the management of living marine resources"<sup>173</sup>. And as Professor Hamamoto showed in his speech, however, JARPA II research *is* directly relevant to the conservation and management of Antarctic whale stocks and some of its data are essential for implementing the RMP. And as Japan pointed out in its response to New Zealand's Written Observations, "the important question is whether or not the use of lethal methods can enable a better understanding . . ." of the relevant whale stocks<sup>174</sup>. In Japan's view, the evidence shows that it can.

## X. Review of JARPA II

89. Mr. President, I have only two more issues to deal with — I think we are within sight of the end. Let me deal now with the review of JARPA II, you have already heard something on that but I want to deal with it in the context of peer review. Australia says that there must be a system

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<sup>172</sup>WON, para. 60.

<sup>173</sup>Revised Annex P (2012), para. 1 (1) (iii).

<sup>174</sup>Written Observation of Japan on New Zealand's Written Observations, para. 64.

of independent peer review for JARPA II. But it seems to forget that a system of peer review is already provided for in paragraph 30 of the Schedule, and Ms Takashiba has dealt with that in depth this morning. Australia agreed to that system, as did Japan. Australia cannot turn round now and demand something else. We are not here to debate the merits of that system or the alternatives you might put in place. The only relevant point for the Court is that JARPA II has already been scrutinized once by the Scientific Committee — in 2005 — and that it will be reviewed again next year. Japan has complied with the requirements of paragraph 30 and it will go on complying with the requirements of paragraph 30 of the Schedule. That, with respect, is all that needs to be said on the matter.

90. But in any event, as Professor Hamamoto showed, the Scientific Committee has already recognized the value of data from JARPA II, especially with regard to the sighting survey<sup>175</sup>, genetic data and age data derived from lethal whaling<sup>176</sup>. The fact that the Committee is using data from JARPA and JARPA II is proof of the scientific value of these programs. JARPA II is not only about lethal whaling: much of the research uses other methods, including sighting surveys. The IWC itself recognizes that “these surveys now provide the only dedicated cetacean sighting data in this region and are *extremely valuable to the work of the Committee*”<sup>177</sup>.

91. But the Scientific Committee also makes use of the genetic and other biological data derived from lethal whaling for studies on stock structure, age and abundance data for population dynamics models<sup>178</sup>. The Committee, including Dr. Gales, has unanimously agreed on the importance of evidence of changes in the body condition of minke whales for the Committee’s work<sup>179</sup>. All of these data will allow trends in whale populations to be identified and thus provide a basis for estimating sustainable yield. As Professor Walløe has testified, both are important pieces of information for implementation of the RMP<sup>180</sup>.

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<sup>175</sup>“Report of the Scientific Committee”, *J. Cetacean Res. Manage.* 12 (Suppl.), 2011, p. 34.

<sup>176</sup>*Ibid.*, p. 26.

<sup>177</sup>CMJ, p. 279, para. 5.101.

<sup>178</sup>See e.g., “Report of the Sub-Committee on In-depth Assessments”, Ann. G, Report of the Scientific Committee, IWC/65a/Rep1 (2013), where there are various references to the use of data from JARPA and JARPA II <<http://iwc.int/cache/downloads/dfk3x3g3hy0ckww8k4ogw0kgo/AnnexG.pdf>> accessed 1 July 2013.

<sup>179</sup>“Report of the Scientific Committee”, *J. Cetacean Res. Manage.* 13 (Suppl.), 2012, p. 40.

<sup>180</sup>Walløe, Expert Statement, pp. 7 and 12.

92. Professor Mangel had a lot to say about the supposed lack of peer-reviewed publications arising out of JARPA. In his second statement he claims that 12 out of 15 JARPA/JARPA II peer-reviewed papers published between 2010 and 2012 are “inaccessible to the scientific community” because they are in Japanese<sup>181</sup>. He accepts that there are at least 15 reviewed papers, but he misses the obvious point: the IWC Scientific Committee is the most relevant and appropriate peer group to review this research, not peer-reviewed academic journals.

93. Mr. President, there are several Members on the Bench today — and some counsel also in this room — who have served as special rapporteurs of the International Law Commission and who in that context have written some outstanding and excellent reports for that body. These reports are not published in academic journals nor are they peer-reviewed in Professor Mangel’s sense. Are they therefore not legal research? Do they have no value? And what would be the most relevant peer-group in that context? Would it perhaps not be the Sixth Committee of the General Assembly of the United Nations? There are sometimes better ways of testing the quality and acceptability of research than sending it to academic journals.

#### **XI. Questions from the Court**

94. Now, Mr. President, I can come to my last section, which is an attempt to respond to the questions from Judge Donoghue, and one of Judge Bhandari’s questions.

95. Judge Donoghue’s questions are — I think her first question~~s~~ is:

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

And, her second question,

(ii) How did such analysis bear on those sample sizes?

96. Well, as best we can, here is the answer to question (i): the feasibility of using non-lethal methods was first reviewed by a Scientific Committee working group during the 1997 JARPA interim review. Annex H of their report contains their analysis; and you will find Annex H, together with the first page of the report, at tab 57 in your bundle. That review formed the basis of section IX of the 2005 JARPA II Research Plan which deals with the use of lethal methods and

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<sup>181</sup>Mangel, 2nd Statement, paras. 3.37, 3.39.

which also contains a review of the literature, or at least a statement of the literature that had been reviewed<sup>182</sup>. Of course, a further review of the use of lethal methods — a further review of all aspects of JARPA II — will be due in 2014.

97. The answer to question (ii): our scientists were not quite sure what this question meant. So, their tentative answer is that the analysis showed that for certain kinds of data lethal methods were justified for reasons of necessity or practicality. Sample sizes were then determined in the manner I have explained. It may help, perhaps, if I try to put it this way. The plan sought various items of data — for example pregnancy rates, blubber thickness, age data and so on. Taken one by one, the required sample size for each item of data would be different. The final figure — in this case 850 — therefore represented, as I explained, a compromise, a figure that would be large enough to give a reasonable level of statistical accuracy overall but small enough to cause no harm to the stock. You will recall that Professor Walløe testified that for some of those questions, even larger sample sizes would be necessary. That is at page 46 of yesterday's transcript.

98. Judge Bhandari's question, which was: before launching JARPA II, did Japan establish that it is carrying out lethal scientific research on such large scale because it is critical and there is no other available method.

x 99. Well, here is the answer. ~~I think~~ Let me say first, it is not clear to us that the research can properly be described as large scale. Compared to the large scale of previous commercial whaling, JARPA II's lethal take is tiny. Professor Walløe indicated in his evidence that the sample size for the original JARPA program was too small. He also pointed out that how many whales you have  
x to kill depends on the questions you are asking. And ~~I think~~ my second qualification is that the phrase "critical research need" appears in Annex Y but not in Annex P. It was one of those controversial elements of earlier non-binding IWC resolutions that Japan opposed. Annex P refers to other priority issues of the Scientific Committee. But as my answer to Judge Donoghue's question indicates, JARPA II includes lethal whaling because, for certain critical items of data, no other method was available or was practical in the circumstances of Antarctica.

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<sup>182</sup>JARPA II Research Plan (2005) IWC SC/57/O1, p. 20.

## **XII. Conclusions**

100. Mr. President, I hope the Court will now understand why Japan did not consider it appropriate to include an expert scientific report in the Counter-Memorial. The relevant expertise for the purpose of reviewing and commenting on special permit research proposals is the expertise of the Scientific Committee. That is the body empowered to do the job by the parties to the Whaling Convention. And they should be allowed to get on with their planned review in 2014, without interference from Australia.

101. To sum up: JARPA II is not simply more of the same: it is markedly different from, and more sophisticated than, JARPA. JARPA II was reviewed by the Scientific Committee in 2005 without adverse comment. It met the applicable guidelines at the time, and it meets the revised consensus guidelines that apply now. The research undertaken in JARPA II is relevant to the conservation, management and sustainable use of whales in the Antarctic, to the modelling of the Antarctic ecosystem, and to the implementation and improvement of the RMP and other relevant research questions. Now, those who are qualified to make this judgment have done so, and in unambiguous terms. On that basis it cannot plausibly be said that JARPA II is not for the purposes of scientific research pursuant to Article VIII.

102. Mr. President, Members of the Court, I have probably detained you for far too long this morning. I thank you for your patience and your courteous attention.

The PRESIDENT: Thank you very much, Professor Boyle. This concludes this morning's hearing. The Court will meet this afternoon between 3.00 and 6.00 p.m. to hear the conclusion of Japan's first round of oral argument. Thank you, this hearing is adjourned.

*The Court rose at 12.50 p.m.*

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