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International Court of Justice

LA HAYE

Cour internationale de Justice

THE HAGUE

YEAR 2013

Public sitting

held on Tuesday 9 July 2013, at 4.30 p.m., at the Peace Palace,

President Tomka presiding,

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

VERBATIM RECORD

ANNÉE 2013

Audience publique

tenue le mardi 9 juillet 2013, à 16 h 30, au Palais de la Paix,

sous la présidence de M. Tomka, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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The PRESIDENT: Please be seated. Good afternoon. This sitting is open. The Court meets this afternoon to hear Australia begin the presentation of its second round of oral argument. Thus I shall now give the floor to the Honourable Marc Dreyfus, Attorney-General of Australia. You have the floor, Sir.

Mr. DREYFUS:

AUSTRALIA'S CASE IN REPLY

1. Mr. President, Members of the Court, it is a great honour to represent Australia before you, and to present my country's opening speech in this second round of oral argument.

2. First, let me say that I would very much have liked to have been here for the first round presentation by Australia. Unfortunately it coincided with the last sitting week of the Australian Parliament. Thus my enforced absence from the first round. It will not have escaped the notice of the Court that Australia also had a change of leadership in that same week, with the Honourable Kevin Rudd returning as Prime Minister. It was during his previous tenure that Australia commenced this case, and it goes without saying that the Government he now leads remains fully behind Australia's case.

3. The case is of great importance to the Australian people and the Australian Government. In my role as first law officer of Australia I can personally attest to the importance placed by the Australian Government on upholding the rule of law at the international level and the positive effect that has on international relations. Compliance with international obligations is central to upholding the rule of law. It is in that spirit that Australia has brought this case. This case is founded on maintaining the integrity of the International Convention for the Regulation of Whaling. A judgment of the Court broadly consistent with the orders sought by Australia is essential to ensuring the sound functioning of the organs of the Convention, namely the International Whaling Commission and its Scientific Committee.

4. Mr. President, Members of the Court, our legal dispute with Japan is a disagreement between friends. As noted by the Australian Agent Mr. Campbell at the commencement of the case, the decision of the Court will mark a step forward in what is a close bilateral relationship.

5. That said, Australia and Japan have made their arguments in a forthright way during the last two weeks. The arguments made by Australia have been based on sound legal reasoning with supporting evidence submitted to the Court. Counsel for Japan, by contrast, have made many baseless allegations of no relevance to the dispute before the Court. In what I can only assume is an attempt to deflect attention away from the true nature of the unlawful JARPA II program, Professor Akhavan asserted that this case "is about an emotional anti-whaling moral crusade that in the name of 'zero tolerance', tolerates Sea Shepherd's violent extremism, the politicization of science, [and] the collapse of the IWC"[1]. As well as being a statement completely devoid of legal argument, this is untrue and offensive to Australia. That this was the character of the Japanese response to Australia's legal argument speaks volumes for the weakness of the Japanese case. I wish to set the record straight on a number of these matters.

6. First, it is wholly untrue, and ridiculous, to suggest that Australia has "outsourced Antarctic maritime enforcement to Sea Shepherd"[2]. The fact of the matter is that Australia has called for all vessels in the Southern Ocean, including those of Japan and Sea Shepherd, to comply with international law in their actions[3]. The fact that Sea Shepherd vessels visit Australian ports or may be registered in Australia is not indicative of Australian Government support. It simply reflects the rights available under Australian domestic law to any person or organization. As stated by Professor Crawford, Australia fully complies with its international obligations arising out of events in the Southern Ocean, including search and rescue[4]. Australia does take seriously respect for international law, which is why we have brought our dispute with Japan for determination by this Court.

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[1]CR 2013/12, p. 63, para. 82 (Akhavan).

[2]CR 2013/12, p. 61, para. 77 (Akhavan).

[3]Joint Statement on Whaling and Safety at Sea, "Governments of Australia, the Netherlands, New Zealand and the United States call for responsible behaviour at sea during the 2012/2013 Southern Ocean whaling season" 21 Dec. 2012 (http://www.dfat.gov.au/media/releases/department/2012/dfat-release-20121221.html). Joint Statement on Whaling and Safety at Sea, "Governments of Australia, the Netherlands, New Zealand and the United States call for responsible behaviour at sea during the 2011/2012 Southern Ocean whaling season" 14 Dec. 2011 (http://foreignminister.gov.au/releases/2011/kr_mr_111214.html) Joint Statement on Whaling and Safety at Sea, "Governments of Australia, the Netherlands, New Zealand and the United States call for responsible behaviour at sea during the 2010/2011 Southern Ocean whaling season" 11 Dec. 2010 (http://foreignminister.gov.au/releases/2010/kr_mr_101211a.html).

[4]CR 2013/11, p. 20, para. 67 (Crawford).

7. I would also like to address squarely Japan's accusation that Australia brings this case in the spirit of cultural imperialism. That is simply not true. Professor Akhavan has told you "that the days of civilizing missions and moral crusades are over"[5].

8. This case is not about civilizing missions or whether the Australian Government or the Australian public like or dislike the consumption of whale meat. Nor is this case about Australia's strongly-held policy position of opposing commercial whaling. This case is about the failure of one country to comply with its international legal obligations not to conduct commercial whaling, an obligation which that country accepted voluntarily but then immediately began to subvert. Specifically, this case is about Japan's failure to abide by its clear obligations under the Convention not to conduct any form of commercial whaling and, I will repeat again, the unlawful misuse of the scientific exception under Article VIII of the Convention as a means of continuing its commercial whaling activities. Australia will not be dissuaded from pursuing what it regards as a clear breach of international law by unfounded and untrue statements that it is seeking to impose Australian culture on Japan.

9. Japan's allegations also extend to asserting that Australia colluded with New Zealand in the bringing of this case[6]. While Australia and New Zealand are both located in the southern hemisphere and have a similar interest in stopping Japan's illegal whaling in the Southern Ocean, New Zealand has made a decision to exercise its legal right as a sovereign nation, and as a Contracting Government to the Convention, to intervene in this case and give its views on the interpretation of the Convention. The observations of New Zealand are not identical to Australia's but they do complement Australia's position and lead to the same conclusion — that Article VIII is not self-judging and that it is a matter for this Court to determine objectively whether JARPA II is a program for the purpose of scientific research pursuant to Article VIII. This was confirmed yesterday in New Zealand's oral observations on its intervention. Intervening in this case in order to put its views before the Court was a proper process for New Zealand to follow.

10. In stark contrast to this approach, Japan on no less than six occasions has quoted from a statement expressing the view of a State that has chosen not to intervene in these proceedings and

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[5]CR 2013/12, p. 63, para. 84 (Akhavan).

[6]Written Observations of Japan on the Declaration of Intervention of New Zealand (WOJ), para. 9, 21 Dec. 2012.

thus be bound by the Court's interpretation of Article VIII[7]. That statement, so convenient for Japan as it is in both timing and content, has no legal significance whatsoever. It is a self-serving statement issued the week before oral arguments in the case began, by a State which shares a close policy position with that of Japan in relation to whaling.

11. Before moving to the substance — which I will do next — I need to address one matter which has no substance at all. That is what might seem at first glance to be an extensive and unfounded derogatory attack upon Australia by Professor Pellet in Japan's closing speech last Thursday. In reality it is an attack on the integrity of any country or person who opposes Japan's unlawful whaling practices. An example is the innumerable references to the alleged persecution of the minority by the majority of nations in the forum of the International Whaling Commission[8]. The fact of the matter is that all votes on key matters have been in accordance with the democratic processes of the Convention. The positions taken on those votes have been those of sovereign governments. Yet Professor Pellet portrays those countries voting against Japan's preferred position, as puppets of Australia. He does not identify those countries, nor does he provide any evidence to support his unfounded allegations imputing bad faith on their part. Let me give an example of the countries Professor Pellet puts into this category. The draft Resolution introduced by Australia on JARPA II at the 57th Annual meeting of the Commission in 2005 was co-sponsored by: Argentina, Austria, Belgium, Brazil, the Czech Republic, Finland, France, Germany, Hungary, Ireland, Italy, Luxembourg, the Netherlands, New Zealand, Mexico, Monaco, Portugal, San Marino, the Slovak Republic, South Africa, Spain, Sweden, Switzerland, the United Kingdom and the United States of America. Does Japan really believe that all those countries were puppets of Australia acting in bad faith? Having personally interacted with many of those countries on important matters, including climate change, I do not think so.

12. Professor Pellet also unjustly impugns the integrity of scientists opposing Japan's program in a similar manner. As described in the evidence of Dr. Gales, many scientists are

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[7]CR 2013/12, p. 18, para. 19 (Tsuroka); CR 2013/13, pp. 62-63, para. 7 (Pellet); CR 2013/14, pp. 62-63, para. 44 (Pellet); CR 2013/15, p. 31, para. 13 (Takashiba); CR 2013/15 p. 35, para. 25 (Takashiba); CR 2013/16, p. 53, para. 41 (Pellet).

[8]CMJ, para. 8.101; CR 2013/11, p. 28, para. 12 (Gleeson); CR 2013/12, p. 55, para. 57 (Akhavan); CR 2013/16, p. 61, para. 58 (Pellet).

successfully exploring non-lethal techniques which, in contrast to JARPA II, have been applauded by the Scientific Committee[9]. The Court saw a photograph on the screen last week of Australian expert Dr. Gales attaching a satellite tag to a minke whale. This activity, which took place in the Southern Ocean earlier this year, formed part of the broader Southern Ocean Research Partnership. This is a regional whale research partnership which uses modern, non-lethal, scientific methods to provide the information necessary to conserve and manage whales. Australia was also a key participant in the Southern Ocean Whale and Ecosystem Research program, another non-lethal program overseen by the Scientific Committee involving sighting surveys which was an important source for current estimation of Antarctic baleen whale numbers.

13. Of course, Professor Pellet has adopted the old tactic that the best form of defence is offence — in both senses of the meaning of that word. The tone, content and extent of these attacks on the integrity of those opposed to JARPA II and similar programs is a transparent attempt to mask the lack of legal and scientific substance in Japan's own case.

14. I will now move to the substance of Australia's arguments in the second round and identify the key points of Australia's case.

15. First, there is no doubt that the Court has jurisdiction in this case. Neither the words nor the intent of the reservation contained in paragraph *(b)* of Australia's Declaration made under Article 36 (2) of the Statute of the Court can be interpreted in the way asserted by Japan. As Australia demonstrated in its first round, and will show again, the reservation only operates in relation to disputes between Australia and another country with a maritime claim that overlaps with that of Australia — that is, a situation of delimitation. Australia has no delimitation with Japan and hence the paragraph *(b)* reservation can have no operation.

16. Secondly, the letter and spirit of the Preamble of the Convention, as well as the practice of the IWC and the evolution of general international law confirm that the object and purpose of the Convention is conservation and recovery of whale stocks. Australia accepts that the orderly development of the whaling industry is referred to in the Preamble of the Convention. But

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[9] "Report of the Sub-Committee on In-depth Assessments", Annex G to "Report of the Scientific Committee Annual Meeting 2013", p. 5 (available at: http://iwc.int/screport). See also, Report of the Scientific Committee (2009) *J. Cetacean Res. Manage 11 (Suppl. 2), 2010*, pp. 81-82; Report of the Scientific Committee (2010) *J. Cetacean Res. Manage 12 (Suppl.), 2011*, pp. 58-59; "Report of the Scientific Committee" (2012), *J. Cetacean Res. Manage. 14 (Suppl.), 2013*, p. 67 (available at: http://iwc.int/scientifc-committee-reports).

conservation is an end in itself within the régime of the Convention, and not merely a means to promote orderly development of the whaling industry. The conservation and recovery of whales is a common interest of "all the nations of the world", to use the words of the Preamble to the Convention. The nations which are parties to the Convention have a particular interest in ensuring its integrity, implementation and effectiveness. The strengthening of the conservation objective of the Convention is also evidenced by the continuing shift in the IWC's focus to non-consumptive uses of whales, such as whale-watching as noted in Australia's Memorial[10]. In a display of Japan's usual unco-operative approach within the IWC, Japan issues an annual statement at each IWC meeting refusing to participate in discussions on whale-watching[11].

17. Thirdly, the JARPA II program is not being conducted "for purposes of scientific research" as required by Article VIII of the Convention. This has become particularly clear in the light of the expert evidence received by the Court — and no more so than in the thoroughly pre-emptive manner of the transition from JARPA to JARPA II that evidenced a number of fatal flaws in Japan's argument. This commencement of JARPA II before completion of the review of JARPA smacks of avoidance of proper scrutiny. Yet Japan has the temerity to criticize the reputation of 63 scientists whose proper regard to the ethics of science precluded their participation in such a flawed process. Japan also has the temerity to rely upon the outcomes of that flawed process. There has been simply no justification that it was scientifically necessary for Japan to embark upon phase II of their program, in lieu of making use of the data already obtained from the 18 years of the original JARPA program, itself flawed as Japan's own expert accepted[12]; nor is there any credible justification in that transition for adding in JARPA II two extra species — that is, fin and humpback whales — to the original JARPA catch of minke whales. Any purported rationale for the humpback and fin element of the program evaporated following the evidence of Japan's own expert, Professor Lars Walløe. No *scientific* justification was given for the doubling of the take of minke whales. Similarly, on the subject of Japan's flawed sample sizes, the variance between the take authorized by the permit and the actual take has no scientific justification. In

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[10]MA, para. 2.97.

[11]"Statements on the Agenda", Ann. S to "Report of the Scientific Committee Annual Meeting 2013", p. 1 (available at http://iwc.int/screport).

[12]CR 2013/14, pp. 48-49 (Walløe).

answer to a question from this Court Japan has admitted that it has not considered, in the context of JARPA II, whether non-lethal methods were available in order to take this into account in setting sample sizes[13]. Finally, Japan's purported plan for a grand ecosystem model is an illusion and bears no relation to what Japan is actually doing.

18. Japan has failed to dent in any way the credibility of the standard criteria identified by Professor Mangel, which are reflected both in general scientific practice and in the Guidelines for review of special permits adopted by the IWC Scientific Committee. Japan has been unable to produce any alternative criteria in which to cloak JARPA II with even a vestige of scientific credibility. The equation referred to by Professor Boyle, which he acknowledged he did not understand, was an effort to resolve one of the most hotly contested issues in this case, the credibility of the basis for choosing to kill up to 935 minke whales rather than 300, eight, or none[14]. Japan's misrepresentations before this Court as to the extent of endorsement of the program by the IWC Scientific Committee will also bear further discussion in this second round.

19. Japan spent a great deal of time last week attributing to Australia propositions or arguments which Australia did not make and then refuting those arguments. To take just two examples of this straw man argumentation, Australia has never suggested that this Court should substitute itself for the Scientific Committee, or that the Convention is one for the elimination of whaling.

20. This brings me to my fourth point — the question of the correct interpretation of Article VIII. Japan in effect says that it can do what it likes under Article VIII, provided it has not been shown to be acting in bad faith. But the core question is one of treaty interpretation, under well-established principles of international law. Australia rejects Japan's minimalist interpretation of the substantive provisions of the Convention other than Article VIII, and rejects Japan's exaggeration of the scope and purpose of Article VIII. More generally, Japan's interpretation conflicts with basic principles of treaty interpretation, in particular the principle of effectiveness. Japan reduces what was intended to be a substantial discipline that should be respected in the grant

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[13]CR 2013/15, p. 69, paras. 94-97 (Boyle).

[14]*Ibid.*, p. 63, para. 69 (Boyle).

of special permits under Article VIII to a rubber stamp designed to authorize continued commercial whaling.

21. The fifth key point is the application of Article VIII, and what Australia says is the proper standard of review to the facts of this case. Consistently with what I have just said, Australia does not ask this Court to determine Japanese policy with regard to all whaling for the future. It simply asks you to hold that Japan's continuing program of special permit whaling is commercial, and not for scientific purposes within the meaning of Article VIII. It is commercial whaling pure and simple.

22. The sixth key argument of Australia in this second round is that of good faith and abuse of right. Japan has failed to act in good faith in the issuing of permit after permit, year after year, without giving any attention to details such as how many whales should be caught or turning its mind to resolutions which have been adopted by the IWC itself. Also, notwithstanding its statement to the contrary[15], Japan has failed to comply with its obligation under paragraph 30 of the Schedule to provide the IWC with *proposed* special permits before they are issued. Furthermore, the evidence presented to the Court demonstrates unequivocally that the purposes for which Japan is granting permits allegedly pursuant to Article VIII are inconsistent with those for which the provision was intended and amount to an abuse of right.

23. These six key points to be explained in more detail by Australia's counsel in the course of this second round will establish, without a doubt, Japan's failure to abide by international law in the conduct of its whaling program in the Southern Ocean.

24. I thank the Court for its attention and would ask you, Mr. President, to give the floor to Mr. Burmester who will deal with the jurisdiction of the Court.

The PRESIDENT: I thank the Attorney-General of Australia for his opening speech in the second round of oral argument of Australia and I pass the floor to Mr. Burmester. You have the floor, Sir.

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[15]CR 2013/15, p. 15, para. 9 (Takashiba).

Mr. BURMESTER: Thank you.

JURISDICTION

1. Mr. President, Members of the Court, in this presentation I will respond to the arguments made by Japan orally on jurisdiction. The Japanese argument is now much clearer than it was in the Counter-Memorial and simpler — but it is still wrong. The dispute before this Court, as is now very evident, is all about the proper interpretation and application of the 1946 Convention. Japan fails to show how this dispute fits within the terms of Australia's reservation on which they seek to rely. In particular, this is not a dispute about overlapping claims to sovereign rights. Yet this is the common component that is required under either limb of the reservation. That is so, whether the dispute manifests itself in an argument about where to draw a line — the first limb — or as an argument over exploitation of resources in the area of overlapping claims — the second limb. That alone is what Australia's reservation is about.

2. Japan purports to divide the reservation into two separate and unrelated parts. In their view, the first part covers disputes in relation to delimitation itself. The second part, in their view, covers disputes arising out of, concerning or relating to exploitation, regardless of whether they are disputes about exploitation connected to an unresolved maritime delimitation between Australia and another country. Japan sees these two parts of the reservation as relating to two separate and unconnected worlds.

3. For the reasons given in my first round presentation, such a reading blatantly ignores Australia's intent and is not the natural or reasonable interpretation of the words in light of that intent. It also fails dismally in the requirement that the declaration be read as a whole.

4. As I said in the first round,

> "all the reservation was designed to cover and all that it does cover is pending maritime delimitation situations . . . No such situation arises between Japan and Australia. In particular, the reservation does not cover a dispute concerning the validity, or otherwise, under the 1946 Convention of Japan's JARPA II program."[16]

5. Mr. President, when I refer to "delimitation situations" I am not suggesting that the second part of the reservation has no additional work to do. It clearly does. The first part covers disputes

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[16]CR 2013/11, p. 42, para. 10 (Burmester).

relating to maritime delimitation per se. However, as the words of the second part read in context confirm, it covers disputes connected with exploitation in a delimitation situation. [Text on screen] I will not repeat what I have already said in the first round about the importance of the words "such" and the words "pending its delimitation" in showing the need for this connection with a delimitation situation. It is all very well for Professor Pellet to emphasize the multiple use of the word "or", particularly where it occurs the second time — and I have it right this time. This does indicate that the reservation applies to more than one delimitation situation. It does not mean, however, that the two parts of reservation *(b)* operate in self-contained worlds. As I said in the first round, the words and intent show they are closely connected[17].

6. As I also said in the first round, delimitation has a well understood meaning relating solely to disputes between opposite and adjacent States[18]. Japan ignores this. An interpretation that extends the reservation to exploitation disputes unconnected with delimitation would require this Court to enquire into maritime boundary disputes of no relevance to the particular exploitation dispute and in the absence of the other party to the unresolved delimitation dispute. As Professor Pellet knows well, from our time as counsel in the *East Timor* case, the absence of a third State can complicate the resolution of a dispute before this Court[19]. Yet the interpretation of the reservation he advocates seems inevitably to require this Court to enquire into the area of overlapping claims, and to determine what areas are adjacent to those claims, in the absence of one of the parties to a pending delimitation. This is a further reason why the construction contended for by Japan should be rejected.

7. Mr. President, it is not too difficult to think of examples of disputes that would fall within the second part of the reservation as interpreted by Australia.

8. Take for instance a provisional arrangement of a practical nature, as envisaged under Article 83 (3) of the Law of the Sea Convention. Such an arrangement may allow some form of exploitation on certain limited terms pending agreement on a final delimitation of relevant maritime boundaries. If a dispute arose between the two parties to the arrangement as to

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[17]CR 2013/11, pp. 44-47 (Burmester).

[18]*Ibid.*, p. 51, para. 43 (Burmester).

[19]*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90.

compliance with the terms of the arrangement that would clearly be a dispute arising out of, concerning or relating to the exploitation of a disputed maritime area pending its delimitation. [Screen off]

9. As I mentioned in my previous presentation, the situation faced with Timor-Leste, a State with an opposing coastline to Australia, is very pertinent when considering the intent and words of the reservation. Professor Pellet repeated my reference to petroleum companies encouraging Timor-Leste to expand their claims into areas already being exploited by Australia[20] and sought to argue that Australia seeks an interpretation that excludes disputes over petroleum but not whales. The fundamental difference not addressed by Professor Pellet is that Australia and Timor-Leste are in a delimitation situation with each other — there are overlapping claims. That is not the case with Japan.

10. With respect to Timor-Leste and Australia, the two States have reached no final delimitation agreement and have instead agreed to freeze their respective claims for 50 years[21]. In this context, as I mentioned in the first round, there are a number of agreements presently governing exploitation of the area between Timor-Leste and Australia[22]. One treaty creates a Joint Petroleum Development Area[23]. A separate agreement deals with unitization arrangements covering petroleum deposits falling both within and outside the Joint Zone[24]. These are precisely the types of examples of the provisional arrangements which, pending delimitation, could give rise to disputes about exploitation of areas in dispute between Australia and another country within the meaning of reservation *(b)* in Australia's Declaration. They could also give rise to disputes between Australia and that country in adjacent areas, such as areas under Australian jurisdiction covered by a unitization agreement. The point to emphasize is this — these are all arrangements

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[20]CR 2013/12, pp. 32-33 (Pellet).

[21]Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea done at Sydney, 12 Jan. 2006, [2007] *ATS* 12, http://www.austlii.edu.au/au/other/dfat/treaties/2007/12.html.

[22]See generally Triggs and Bialek, "The New Timor Sea Treaty and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap" (2002), Vol. 3 (2) Melbourne Journal of International Law, http://www.law.unimelb.edu.au/files/dmfile/download67411.pdf.

[23]Timor Sea Treaty between the Government of East Timor and the Government of Australia done at Dili, 20 May 2002, [2003] *ATS* 13, http://www.austlii.edu.au/au/other/dfat/treaties/2007/12.html.

[24]Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise and Troubadour fields done at Dili, 6 March 2003, [2007] *ATS* 11, http://www.austlii.edu.au/au/other/dfat/treaties/2007/11.html.

relating to exploitation between *parties* to a pending delimitation. It is precisely these sorts of provisional arrangements pending delimitation that are covered by the second part of reservation *(b)*. They are the types of arrangements that may not be covered if the reservation consisted only of the first part. Even if there are no provisional arrangements there is no reason why similar disputes between States with competing claims could not also be covered by the second part.

11. Japan erroneously seeks to extend the operation of the reservation well beyond these types of clearly contemplated situations. It seeks to apply it to any dispute between Australia and a third State over exploitation of resources that just happens to occur in areas subject to an unresolved delimitation situation, even though the third State is not the opposite or adjacent State. This is so, it seems, even if the status of the waters in question is entirely irrelevant to the resolution of the dispute with the third State. That is the situation in this case, under the 1946 Convention.

12. Mr. President, Members of the Court, there are only a few specific points made by Professor Pellet in his attempt to support this erroneous interpretation to which I need to respond. The fact I may not answer every point that he made does not however mean that Australia agrees with them.

13. Japan quotes from the *Fisheries Jurisdiction* case[25] to say that the Court needs, because of the words "concerning" or "arising out of", to look beyond the subject-matter of the dispute, to see if the dispute would not have come into being "in the absence of" the relevant matters covered by the reservation[26]. This passage from the *Fisheries Jurisdiction* was referring to the "conservation and management measures" to which the Canadian reservation related[27]. In this present case, if one asks whether the dispute relating to so-called Article VIII special permit whaling would not arise in the absence of exploitation of an area subject to maritime claims pending delimitation, the answer is it would still have arisen. The fact that Australia may or may not assert claims to some of the area where JARPA II occurs makes no difference whatsoever to

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[25] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432.

[26] *Ibid.*, p. 458.

[27] *Ibid.*

the dispute before this Court. That dispute exists regardless of Australia's maritime claims, in relation to which Australia has made no reference and on which it places no reliance. The Court need not express any view, explicitly or implicitly, on any maritime claim.

14. In my first presentation, I stressed that the words "pending delimitation" confirmed that the reservation concerned disputes between two States pending delimitation between them. Japan says those words are no more than a description of "a moment"[28]. That diminishes the critical importance of those words when interpreting the reservation. A purely temporal effect to those words fails to give the words any substantive effect. That leads to bizarre results as it excludes disputes relating to exploitation unrelated to any pending delimitation for only so long as that delimitation remains pending. Once that delimitation has been resolved, a dispute with no connection with that delimitation also ceases to be excluded. There is simply no logic in such an interpretation. It seems far removed from any reasonable interpretation and bears no resemblance to the intent of Australia.

15. Next, Professor Pellet took the Court to a document that I had referred to in my earlier speech — the National Interest Analysis that explained to the Australian Parliament the purpose of the reservation[29]. I used that document to highlight that, in addition to the requirement of a pending delimitation, the second part of the reservation required there to be a dispute about exploitation, whether it was a dispute arising out of, concerning or relating to exploitation of a disputed area. Japan now accepts that. The document is describing in shorthand what the reservation does. It does not establish that the intention was to cover exploitation disputes between Australia and a State not in a dispute with Australia over delimitation. Rather, as Mr. Campbell said in evidence to the Treaties Committee, the "effect of the exception, combined with the UNCLOS declaration, is to preclude compulsory dispute settlement of Australia's maritime boundaries"[30]. This is not to say that reservation *(b)* does no more than the UNCLOS reservation. The UNCLOS declaration is necessarily more limited, given the wording of Article 287 of the Law of the Sea Convention.

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[28]CR 2013/12, pp. 31-32 (Pellet).

[29]National Interest Analysis, *Australian Declaration under Paragraph 2 of Article 36 of the Statute of the International Court of Justice 1945*, lodged at New York on 22 March 2002, tabled in the Australian Parliament 18 June 2002, http://www.austlii.edu.au/au/other/dfat/ATNIA/2002/20.html (tab 2 of judges' folders).

[30]Commonwealth, Joint Standing Committee on Treaties, *Parliamentary Debates: Treaties tabled on 18 and 25 June 2002*, 12 July 2002; CMJ, Ann. 167, p. 215.

Reservation *(b)* remains, however, a reservation directed at disputes about maritime boundaries or exploitation issues arising between Australia and another State with overlapping claims pending resolution of the maritime boundary between them. The references in the discussion before the Treaties Committee by Mr. Campbell to cases with a maritime aspect, to which Professor Pellet referred[31], were not explaining the scope of the reservation. They were answering a question about previous cases involving Australia.

16. I shall also say something about Japan's argument that JARPA II concerns the exploitation of a resource. I emphasize that this issue only arises if the Court rejects Australia's primary construction argument that the reservation only applies to exploitation disputes between Australia and another State with an overlapping claim with Australia.

17. For a dispute arising out of, concerning, or relating to the exploitation of any disputed area in a delimitation context, ordinarily requires competing claims by the relevant States to a right to exploit the relevant resources. In the present case, it is self-evident that the dispute does not involve any assertion by Australia of a right to exploit whale resources. In the absence of competing claims to exploitation of whales — only Japan wishes such exploitation — any notion of a "dispute" relating to such exploitation within the meaning of Australia's Declaration disappears.

18. I turn finally to a matter Professor Pellet emphasized, but which seems unrelated to jurisdiction. This was that Australia's claim only related to JARPA II and not JARPN[32]. That is true, but not for the reasons given. In this respect, Professor Pellet seeks to impute a motive to Australia which simply does not exist and for which he has offered no evidence. The scope of the dispute has not been confined in this way in order to protect Australia's proclaimed waters off its Antarctic Territory. Australia has made no mention of these claims and they are irrelevant to the dispute before this Court. JARPA II, in any event, extends well outside any waters claimed by Australia. Japan's own diagram, at page 39 of its Counter-Memorial, shows that JARPA II covers half the Southern Ocean, south of 60 degrees S, including areas thousands of nautical miles

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[31]CR 2013/12, p. 32 (Pellet).

[32]CR 2013/12, p. 35 (Pellet).

eastward from any claimed Australian waters[33]. JARPA II's area of operation is not defined in any way by Australia's Antarctic claim. As the Attorney-General has just mentioned, Australia, as a southern hemisphere State, has a strong interest in the whole of the Antarctic ecosystem. It does scientific research in areas of the Antarctic unrelated to its own claimed area, including in co-operation with other States. It is not surprising, therefore, given Australia's strong interest in the Southern Ocean, that the case has been confined to whaling activity by Japan in that area, rather than extending also to JARPN, conducted in the northern hemisphere. The fact that the dispute does not also extend to JARPN is of no legal relevance to the jurisdiction of this Court to hear this case.

19. Australia does not claim to be an injured State because of the fact that some of the JARPA II take is from waters over which Australia claims sovereign rights and jurisdiction. Professor Boisson de Chazournes will answer Judge Bhandari's question concerning the injury suffered by Australia in more detail. Every party has the same interest in ensuring compliance by every other party with its obligations under the 1946 Convention. Australia is seeking to uphold its collective interest, an interest it shares with all other parties.

20. Mr. President, the interpretation of the reservation contended for by Australia is clear and strongly supported by its intent and wording, reasonably interpreted. Japan's alternative interpretation should be rejected and the Court should find that it has jurisdiction.

21. Thank you, Mr. President and Members of the Court, this concludes my presentation. I invite you to call Professor Boisson de Chazournes.

The PRESIDENT: Thank you, Mr. Burmester et je passe la parole à Madame Laurence Boisson de Chazournes. Vous avez la parole, Madame.

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[33]CMJ, p. 39.

Mme BOISSON DE CHAZOURNES :

LA CONVENTION DE 1946 — INTÉGRITÉ, OBJET ET BUT

Introduction

1. Monsieur le président, Mesdames et Messieurs les juges, tirant peut-être inspiration du célèbre auteur, Haruki Murakami, le Japon a vainement tenté cette fois-ci de nous plonger dans une histoire fantastique, au-delà des frontières du réel. Toutefois, alors que les héros du roman à succès *1Q84* étaient transportés dans un futur inconnu, les conseils du Japon ont décidé eux de se transvaser dans un passé inconnu. Ce passé c'est celui d'une conférence imaginaire dans laquelle aurait été adoptée «a convention about sustaining whaling»[34]! Une telle vision est, bien entendu, éloignée de la réalité juridique, de la réalité politique ainsi que de la réalité institutionnelle qui caractérisent le régime de la convention de 1946 depuis son adoption.

2. Mais là ne s'arrêtent pas, Monsieur le président, les velléités du Japon de réécrire la convention de 1946. Contre toute attente, le Japon nous confie que *in fine* la perception de l'importance des baleines est une question qui relève de différences culturelles et religieuses entre nations[35]. Par le biais de l'un de ses conseils, il nous révèle que l'évolution qu'a connue la conservation internationale des espèces de baleines, avec notamment le *moratorium*, relèverait plutôt de l'«émotion»[36], de l'«éthique»[37] ou encore de la «prise en otage de la CBI»[38], mais non de la *réglementation* qui s'impose en vertu du droit international.

3. Le Japon oublie, à escient, qu'il est partie à une convention multilatérale dénommée convention de 1946, par le biais de laquelle il a contracté des obligations multilatérales en vue de la conservation des baleines. Contrairement à ce qu'affirme le Japon[39], c'est lui et lui seul qui a choisi la voie de l'unilatéralisme, et non l'Australie.

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[34] CR 2013/13, p. 44, par. 16 (Boyle) ; CR 2013/12, p. 42, par. 8, p. 49, par. 38 (Akhavan) ; CR 2013/13, p. 70, par. 29 (Pellet).

[35] CR 2013/12, p. 20-21, par. 28 (Tsuruoka) ; CR 2013/12, p. 44, par. 18, p. 63, par. 84 (Akhavan).

[36] CR 2013/12, p. 47, par. 27 (Akhavan).

[37] *Ibid.*, p. 46, par. 26 (Akhavan).

[38] *Ibid.*, p. 48, par. 32 (Akhavan).

[39] *Ibid.*, p. 21, par. 29 (Tsuruoka).

4. Le Japon, certes, s'efforce autant qu'il le peut, à se faire thuriféraire du principe *pacta sunt servanda*[40] mais il ne le fait qu'à demi-mot et sans en tirer toutes les conséquences aux fins de l'intégrité, de la mise en œuvre et de l'effectivité de la convention de 1946.

5. Le Japon a également essayé de faire croire à la Cour que de rares allégations de coopération de la part du Japon démontreraient tout l'attachement de ce dernier aux règles fondamentales de l'interprétation et de l'application des traités. Or, il n'en est rien. Le Japon menace depuis fort longtemps l'intégrité de la convention de 1946.

I. La Cour doit être garante de l'intégrité et de l'effectivité de la convention de 1946

6. C'est le souci de garantir l'intégrité et l'effectivité de la convention de 1946 qui anime fortement l'Australie tant dans sa requête que dans ses écritures et plaidoiries orales. Contrairement aux insinuations du Japon, c'est là un souci qui ne fait appel ni à la «révolution»[41], ni à la «régression»[42] et ni à la «revision»[43] du droit international des traités. L'approche de l'Australie est des plus constructives. Elle consiste, en effet, à demander à la Cour, organe judiciaire principal de l'Organisation des Nations Unies, de garantir l'intégrité de la convention de 1946, en interprétant et en appliquant le traité de manière conforme à sa lettre et à son esprit. La Cour contribuera ainsi à la mise en œuvre effective de la convention et au bon fonctionnement de ses organes.

7. Le Japon a déployé bien des stratagèmes pour donner à la Cour l'image d'un membre discipliné au sein de la CBI, respectueux de la coopération de bonne foi et travaillant «to gather scientific data for the resumption of sustainable commercial whaling»[44]. Mes collègues reviendront sur ces assertions non fondées.

8. Toutefois, Monsieur le président, il y a une question qui me taraude et qui doit, peut-être, tarauder l'esprit des membres de la Cour. Pourquoi un Etat qui se proclame champion de la

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[40] CR 2013/12, p. 20, par. 27 (Tsuruoka).

[41] *Ibid.*, p. 20, par. 27 (Tsuruoka).

[42] *Ibid.*, p. 21, par. 30 (Tsuruoka).

[43] CR 2013/13, p. 68, par. 25 (Pellet).

[44] CR 2013/12, p. 41, par. 4 (Akhavan).

coopération au sein de la CBI[45] et champion dans le domaine de la recherche scientifique sur les baleines[46] s'évertue-t-il autant à vouloir limiter le rôle de la Cour dans la présente instance ?

9. Si comme le prétend le Japon, «la CBI va mal [et] que le Japon a choisi de rester membre, alors même que ... ses droits [sont] bien souvent bafoués»[47], ne devrait-il pas se féliciter de la saisine de la Cour par l'Australie ? La Cour, en tant qu'«organe judiciaire international»[48] peut, en clarifiant le droit international, pallier l'impasse ou l'effondrement diplomatique qui, selon les dires du Japon, caractériserait la CBI[49], et permettre aux organes de la convention de 1946 d'exercer leurs fonctions comme ils le doivent.

10. L'Australie est convaincue que la Cour peut contribuer au plein et au bon fonctionnement du régime juridique et institutionnel découlant de la convention. Pour ce faire, votre Cour doit garantir l'intégrité de la convention de 1946. Garantir l'intégrité de la convention de 1946 reviendrait précisément pour la Cour à clarifier l'objet et le but de la convention de 1946, à apprécier la licéité de JARPA II à l'aune des obligations découlant de la convention de 1946 et de son règlement, et à déterminer si le Japon a agi de bonne foi dans l'exercice de ses droits en vertu de cette convention.

11. Il ne fait pas de doute que la Cour a compétence en vertu de l'article 36, paragraphe 2, du Statut, à rendre un arrêt aux fins d'assurer l'intégrité de la convention de 1946, ainsi que mon collègue Henry Burmester l'a démontré. Il est utile à ce stade de rappeler que l'article 36, paragraphe 2, du Statut de la Cour prévoit que les Etats parties au Statut de la Cour peuvent reconnaître la compétence obligatoire de la Cour pour tout différend «d'ordre juridique», c'est-à-dire un différend ayant pour objet, *inter alia* : «*a)* l'interprétation d'un traité ; *b)* tout point de droit international ; *c)* la réalité de tout fait qui, s'il était établi, constituerait la violation d'un engagement international».

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[45] CR 2013/16, p. 54, par. 44 (Pellet).

[46] CR 2013/13, p. 15, par. 11, p.16, par. 13 (Hamamoto).

[47] CR 2013/16, p. 54, par. 44 (Pellet).

[48] *Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande), fond, arrêt, C.I.J. Recueil 1974*, p. 181, par. 18.

[49] CR 2013/16, p. 54, par. 44 (Pellet).

12. En soumettant à la Cour des questions relatives à l'interprétation et à l'application de la convention de 1946, l'Australie a bien saisi la Cour d'un différend d'ordre juridique à l'égard duquel votre juridiction a pleine compétence en vertu de l'article 36, paragraphe 2, de son Statut.

13. La Cour doit tout simplement rejeter l'affirmation de mon ami et contradicteur — Alain Pellet. Mais c'est curieux... pourquoi ai-je si peu de mal avec la masculinisation des mots ... je ne sais ... Mon contradicteur a affirmé de manière erronée que «chaque Etat est gardien de l'intégrité de la convention qui ne prévoit pas de mode particulier de règlement des différends»[50]. Cette diversion doit être écartée. La «compétence [de la Cour] repose sur le consentement des Etats parties, dans la seule mesure reconnue par ceux-ci»[51].

Dans la mesure où le consentement à la compétence de la Cour a été *in casu* bien établi, la Cour peut se prononcer de telle manière à garantir l'intégrité du régime exhaustif de la convention de 1946. En d'autres termes, la Cour, saisie d'un différend relatif à la convention de 1946, peut le trancher.

II. Le respect de l'intégrité de la convention de 1946 est une question d'intérêt commun

14. Monsieur le président, la convention de 1946 repose sur l'intérêt commun des Etats membres à conserver et reconstituer les peuplements baleiniers.

15. Les conseils du Japon ont cherché à passer outre à l'importance de cet intérêt commun tel que protégé par la convention de 1946. D'entrée, l'agent du Japon a affirmé sans retenue que la requête de l'Australie dans la présente instance viserait à «établir la supériorité de telle culture sur telle autre»[52] et cacherait «une tentative unilatérale de [l'Australie] pour imposer l'interdiction de toute chasse baleinière en se fondant sur ses propres valeurs plutôt que sur une argumentation juridique»[53].

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[50] CR 2013/16, p. 58, par. 54 (Pellet).

[51] *Activités armées sur le territoire du Congo (nouvelle requête : 2002) (République démocratique du Congo c. Rwanda), compétence et recevabilité, arrêt, C.I.J. Recueil 2006,* p. 39, par. 88; *Certaines questions concernant l'entraide judiciaire en matière pénale (Djibouti c. France), arrêt, C.I.J. Recueil 2008,* p. 200, par. 48.

[52] CR 2013/12, p. 21, par. 29 (Tsuruoka).

[53] CR 2013/12, p. 21, par. 29 (Tsuruoka).

16. Ainsi que l'*Attorney-General* d'Australie l'a dit, l'Australie rejette fermement l'invocation de prétendues spécificités liées aux «religions et cultures»[54], invocation faite dans le dessein de faire fi de la règle de droit international à laquelle les deux Parties au présent différend ont souscrit.

17. Le préambule de la convention de 1946 parle de l'intérêt des «nations du monde»[55] à «sauvegarder, au profit des générations futures, les grandes ressources naturelles représentées par l'espère baleinière»[56]. Les «nations du monde»... Comme l'a reconnu votre juridiction, «l'analyse littérale»[57] des mots a toute son importance dans le processus d'interprétation des traités. Le Japon autant que l'Australie fait partie de ces «nations du monde» qui ont reconnu en devenant parties à la convention de 1946 que la conservation et la reconstitution des peuplements baleiniers étaient une question d'intérêt commun. Le Japon autant que l'Australie fait partie de ces «nations du monde» qui ont reconnu, en devenant parties à la convention, que les baleines sont une espèce particulière qui méritait une protection particulière en droit international[58]. C'est la convention de 1946, et non l'Australie, qui qualifie les baleines de «*grandes* ressources naturelles».

18. L'Australie, comme tous les autres Etats parties à la convention de 1946, a un intérêt commun à ce que l'intégrité du régime découlant de la convention soit maintenue.

19. Je saisis cette occasion pour répondre à la question du juge Bhandari posée le 3 juillet dernier[59]. En «raison des valeurs qu'ils partagent»[60] et telles qu'exprimées dans la convention de 1946, tous les Etats parties à cette convention ont un intérêt commun à ce que chaque Etat respecte ses obligations en vertu de la convention et du régime en découlant. Pour reprendre les mots de la Cour de céans, «cet intérêt commun implique que les obligations en question s'imposent

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[54] CR 2013/12, p. 20-21, par. 28 (Tsuruoka).

[55] Préambule de la convention de 1946, premier paragraphe.

[56] Préambule de la convention de 1946, premier paragraphe.

[57] *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua), arrêt, C.I.J. Recueil 2009*, p. 239, par. 52.

[58] CR 2013/17, p. 18, par. 13 (Finlayson).

[59] CR 2013/13, p. 73.

[60] *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal)*, arrêt du 20 juillet 2012, par. 68.

à tout Etat partie à la [convention de 1946] à l'égard de tous les autres Etats parties. L'ensemble des Etats parties ont un «intérêt juridique» à ce que les droits en cause soient respectés»[61].

20. L'Australie fait ainsi valoir son intérêt juridique à ce que les droits découlant de la convention de 1946 soient respectés par le Japon. Pour reprendre encore les termes de la jurisprudence de la Cour, les Etats parties «n'ont pas d'intérêts propres ; ils ont seulement tous et chacun, un intérêt commun ... »[62] dans le cadre du régime établi dans la convention de 1946.

21. Il est bon, à ce stade, de rappeler que la convention de 1946 a permis la mise en place d'un organe plénier, la CBI[63], organe doté, on l'a dit, de pouvoirs larges. Aux côtés de ses pouvoirs normatifs déjà évoqués, la CBI a des pouvoirs au titre de l'article IV de la convention. Ces pouvoirs ont trait à la recherche scientifique dans le champ d'application de la convention. Les études, évaluations et programmes de cet organe, tel le programme SOWER[64], contribuent à promouvoir l'objet et le but de la convention. Meilleur usage pourrait être fait de ces compétences telles que prévues par la convention de 1946.

22. En dépit des oppositions farouches du Japon, l'Australie invite respectueusement la Cour à faire le choix de l'intégrité de la convention de 1946. Ce choix de l'intégrité conduira également la Cour à rappeler au Japon le véritable objet et but de la convention de 1946.

III. L'intégrité de la convention de 1946 est tributaire du respect de son objet et de son but, à savoir la conservation et la reconstitution des peuplements baleiniers

23. Ainsi que l'Australie l'a clairement indiqué lors de son premier tour de plaidoiries, l'objet et le but de la convention de 1946 ont trait à la conservation et à la reconstitution des peuplements baleiniers. Ils constituent des fins en soi dans le régime mis en place par la convention de 1946. Cela ne fait pas de doute. L'Australie souhaite à nouveau dans ce contexte évoquer le sixième paragraphe du préambule de la convention de 1946, lequel englobe le désir «d'instituer un régime de réglementation internationale de la chasse à la baleine qui soit de nature à

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[61] *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal)*, arrêt du 20 juillet 2012, par. 68.

[62] *Réserves à la convention pour la prévention et la répression du crime de génocide, avis consultatif, C.I.J. Recueil 1951*, p. 23.

[63] Originellement dénommée la commission internationale de la chasse à la baleine.

[64] Voir *Statement by Dr. Nick Gales*, p. 22, par. 5.5-5.7 ; voir aussi SOWER à l'adresse : http://iwc.int/sower.

assurer d'une manière appropriée et efficace la conservation et l'accroissement des peuplements baleiniers»[65].

24. Le Japon n'a pas jusqu'à présent démontré de manière objective en quoi le soit-disant «scientific-based sustainable whaling»[66] constituerait la fin en soi de la convention de 1946 (ou selon encore les termes du Japon, «the very purpose of the Convention !»[67]). Le Japon n'a pas non plus démontré en quoi la conservation ne serait qu'un moyen devant permettre le développement méthodique de l'industrie baleinière. Il n'a pas réfuté les arguments de l'Australie en la matière ; je serai donc brève sur la question de l'objet et du but afin d'éviter de répéter la position de l'Australie.

25. Le Japon, par la voix de son conseil, s'est mélangé les pinceaux. Il admet désormais que la convention de 1946 «of course, was, and remains, a convention designed to promote conservation and recovery of whale stocks»[68]. Toutefois, il apporte immédiatement un bémol en expliquant que la convention de 1946 «is also a convention designed to promote sustainable exploitation of whale stocks»[69]. Ces assertions ne s'appuient point sur la pratique de la CBI et encore moins sur l'évolution du droit international général, qui mettent tous deux l'accent sur la conservation comme une fin en soi en matière de protection des ressources naturelles.

26. Le Japon reconnaît pourtant que la convention de 1946 donne le pouvoir à la CBI[70] de faire les modifications nécessaires au règlement pour «atteindre les objectifs et buts de la convention et assurer la conservation, le développement et l'utilisation optimum des ressources baleinières». Cependant, il en tire une conclusion hâtive selon laquelle «the Convention is all about [optimum utilization], it is *not* about conservation as an end in itself»[71].

27. Les articles V et VI de la convention de 1946 reconnaissent à la CBI un pouvoir spécifique en matière de réalisation de l'objet et du but de la convention de 1946. La pratique de

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[65] Préambule de la convention de 1946.

[66] CR 2013/12, p. 49, par. 38 (Akhavan).

[67] *Ibid.*

[68] CR 2013/13, p. 45, par. 19 (Boyle).

[69] *Ibid.*

[70] CR 2013/13, p. 42, par. 11 (Boyle).

[71] *Ibid.*

cet organe plénier, conforme à la lettre du préambule et s'inscrivant dans la même dynamique que le droit international général, se doit d'être prise en compte dans le cadre du présent différend. Le conseil du Japon ne s'y est toutefois pas référé, préférant adopter des interprétations hasardeuses ou se référer de manière tronquée à certains instruments de droit international de l'environnement.

28. Si le Japon s'appuyait, comme il aurait dû le faire, sur la pratique de la CBI, il constaterait que la pratique de cette dernière a évolué pour mettre l'accent principalement sur la conservation[72]. Cette évolution reflète l'approche collective quant à l'objet et au but de la convention de 1946 et nul ne saurait s'en écarter au risque de menacer le cadre collectif de coopération.

29. La Cour, elle-même, a reconnu dans son avis sur la *Licéité de l'utilisation des armes nucléaires par un Etat dans un conflit armé*, l'importance de la «pratique propre»[73] d'organes tels la CBI pour interpréter des traités qui, comme la convention de 1946, instituent des organes. Hormis les diverses initiatives juridiques déjà évoquées au cours de ces plaidoiries[74], cette «pratique propre» est composée des diverses résolutions adoptées par la CBI aux fins de la conservation des peuplements baleiniers[75], et de l'établissement du comité de conservation auquel, je le rappelle, le Japon refuse de siéger[76]. Cela confirme l'importance de la conservation au sein du régime de la convention de 1946 ainsi que le fait que la conservation est une fin en soi. Pour souligner la pertinence de cette pratique, qu'il me soit permis de me référer à titre illustratif au rapport, déjà mentionné devant vous, de l'organe d'appel de l'OMC dans l'affaire *Crevettes*. Dans son rapport, l'organe d'appel a reconnu que l'établissement d'organes comme le comité de conservation devait être pris en compte pour analyser la portée des droits et obligations des membres de l'OMC en matière de protection de l'environnement. Aux côtés du préambule de

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[72] Voir P. Birnie, *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching*, vol. II, Oceana Publications, Inc., New-York/London/Rome, 1985, p. 575-634 ; voir aussi P. Birnie, A. Boyle, *International Law and the Environment*, Second edition, Oxford University Press, Oxford, 2002, p. 667.

[73] *Licéité de l'utilisation des armes nucléaires par un Etat dans un conflit armé, avis consultatif, C.I.J. Recueil 1996 (I)*, p. 75, par. 19.

[74] MA, p. 17-19, par. 2.47-254, p. 19-23, par. 2.55-2.70, p. 27-32, par. 2.79-2.93.

[75] Voir *Annual Report of the International Whaling Convention 2003*, 55th Annual Meeting, 2003, *Resolution 2003-1, The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission*. Une liste de 100 résolutions portant sur la conservation est attachée audit rapport.

[76] CR 2013/16, p. 48, par. 28 (Pellet).

l'accord instituant l'OMC dont il a souligné l'importance en matière d'interprétation, l'organe d'appel a considéré que «l'élément le plus important ... est la décision prise par les ministres à Marrakech d'établir un comité du commerce et de l'environnement permanent»[77].

Mesdames et Messieurs les juges, une pratique semblable a trouvé place dans le cadre de la convention de 1946 avec la création du comité de la conservation.

30. Plutôt que de se perdre dans un dédale d'instruments internationaux sans rapport direct avec la convention de 1946, le Japon aurait dû prendre en considération la «pratique ultérieure»[78] de la CBI, tant normative qu'institutionnelle. A la lumière de cette pratique ultérieure, il ne fait pas de doute que l'objet et le but de la convention de 1946 sont bien et ont toujours été la conservation et la reconstitution des peuplements baleiniers, n'en déplaise au Japon.

31. L'Australie souhaite à ce stade répondre à la question posée par le juge Cançado Trindade sur l'interprétation des termes «conservation et développement» dans le cadre de la convention[79]. Le terme «développement», qui dans le contexte de la convention de 1946 doit s'entendre de manière évolutive, est lié à la conservation et à la reconstitution des peuplements baleiniers. La meilleure manière de contribuer à la conservation et au développement, ou si vous préférez, à la reconstitution des peuplements baleiniers doit être déterminée par la CBI[80]. Des décisions relatives aux quotas appropriés pour la chasse aborigène de subsistance, ou à des mesures à des fins autres que la consommation, comme l'observation (aussi dénommée en anglais «Whale watching») relèvent des mesures de conservation et de développement au sens de la convention. Permettez-moi de souligner que 87 pays se livrent déjà au *Whale watching*[81]. Cela traduit l'importance et le fort attrait de cette activité économique relative aux peuplements baleiniers, notamment pour les populations côtières sur les différents continents du monde.

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[77] *Etats-Unis — Mesures concernant l'importation de crevettes et de produits contenant des crevettes*, Rapport de l'organe d'appel de l'OMC, WT/DS58/AB/R, 12 octobre 1998, par. 154.

[78] CR 2013/14, p. 63, par. 45 (Pellet).

[79] CR 2013/17, p. 49.

[80] Voir IWC/63/CC5 — «Report of the Small Advisory Group on Conservation Management Plans — Submitted by the Government of Australia on behalf of the Small Advisory Group on Conservation Management Plans» ; IWC/64/CC6 — «Report of the Standing Working Group on Whale Watching Submitted by the United States» ; SC/65a/SCPO1 — (2013 Scientific Committee) — IWC Conservation Management Plans and Scientific Committee advice ; guidance for sub-groups ; IWC/64/CC1 — Agenda of the Conservation Committee.

[81] Voir MA, p. 34, par. 2.97 *[traduction du Greffe]*.

32. Monsieur le président, Mesdames et Messieurs les juges, je vous remercie de votre bienveillante attention.

33. Monsieur le président, puis-je vous demander de bien vouloir donner la parole au professeur James Crawford.

Le PRESIDENT : Merci, Madame. And I call now on Professor James Crawford. You have the floor, Sir.

Mr. CRAWFORD:

AUSTRALIA'S CASE AND JAPAN'S MISAPPREHENSION OF IT

1. Mr. President, Members of the Court. Last week Japan spent a great deal of time arguing vigorously against propositions which it attributed to Australia but which Australia does not actually put forward and which, in any event, are not necessary or even relevant to our legal claim. For example:

(1) The present case, as you will see from reading the Application is exclusively about Japanese "scientific whaling", in reality commercial, and the scope of Article VIII. It is not about the policy issues which divide the IWC as to the continuation of the moratorium. Whatever you might decide on Article VIII, the debate on the moratorium will continue. From listening to Professors Pellet and Akhavan last week, you might have supposed they were arguing a counter-claim concerning the legality of Australian support for the moratorium. But of course Japan never brought such a counter-claim. That was convenient for counsel, who were able to satisfy themselves by making allegations without the slightest need to prove them. Indeed they made extravagant allegations about Australia's role as puppet master in ensuring the continuation of the moratorium: as an Australian, I wish my country had even half the diplomatic clout they attributed to us! Especially now. But all this has absolutely nothing to do with the present case.

(2) The issues which underpin this case will not be resolved by Japan's so-called "review" of the JARPA II program proposed for 2014. This case concerns JARPA II as it has been authorized and implemented by Japan since 2005 and as it continues to this day. There is quite enough

material before the Court without it needing to speculate on what might happen in 2014. Indeed, if anything, the outcome of the 2009 JARPN II review provides further evidence to support Australia's criticisms of Japan's approach to special permit whaling as well as of the inability of the mechanisms established under the Convention to resolve the current impasse. The Solicitor-General and Professor Sands will say something more about that tomorrow.

(3) Nor is this case about the "reform" of the 1946 Convention. It is true that both Australia and New Zealand have made proposals for reform, and these proposals have not been accepted. But that is irrelevant for present purposes: what we seek is the interpretation and application of the Convention in accordance with international law — the Convention as it stands and international law as it stands. That issue arises between the Parties; it is a live legal issue and will remain so whatever the policy issues.

(4) Nor is this case about suggestions that the precautionary approach leads to a reversal of the onus of proof in environmental cases. Professor Boyle addressed a lengthy speech to you on that subject, but Australia has made no such suggestion. Australia accepts that each party asserting a proposition whether of fact or law should establish that proposition: *actori incumbit probatio*. So that is not an issue either.

(5) Nor does Australia argue that special permits under Article VIII have to be consented to or authorized by the Commission or the Scientific Committee, or that any other Government or authority than the issuing State can revoke or cancel those permits. The question, as with most questions of treaty interpretation coming before you, is simple. It is whether Japan's actions are or are not consistent with the relevant treaty and with the decisions taken under that Treaty. It is true that that can sometimes give rise to difficult remedial questions, as it did in *Lockerbie*, but there are no such questions at stake here. Australia seeks appropriate declarations and orders consequential on your findings, as in any other case of State responsibility. It will be for you to judge the opportunity of the particular declarations and orders sought.

(6) Australia does not seek to convert the 1946 Convention into a convention for the elimination of whaling, nor could it do so in judicial proceedings. Any interpretation you give will leave Article VIII part of the Convention and available to be relied on by any Contracting Government to the Convention which satisfies the criteria of research for scientific purposes.

2. None of this is to diminish the importance of the issues before you, but it is to put them into their legal perspective. This is the first time the Court has been faced with a multilateral convention for the conservation and protection of endangered species. You do not need reminding of the successive conservation crises that have been caused by over-fishing and similar activities around the world. But, though necessary background, that is just background to the specific issues you face under the 1946 Convention. This case concerns a particular program, long-running, justified by the proponent State under a treaty. That is all and that is enough.

3. What Australia *has* argued — I have told you what it has not argued — is relatively straightforward, both as to the law and the facts.

4. As to the law, our position is as follows — and I have four propositions:

(1) The moratorium on commercial whaling is binding on Japan as to all three species designated in JARPA II special permits. The sanctuary and the factory ship moratorium are both binding on Japan as to fin and humpback whales.

(2) It follows that since Japan is engaging in whaling contrary to the terms of those provisions, it is in breach of international law unless it is protected by Article VIII of the Convention.

(3) JARPA II is not a program for the purposes of scientific research within the meaning of Article VIII, for at least two reasons: the first reason, *(a)* it is not a scientific program capable of being protected by Article VIII; the second reason, *(b)* it is in any event a program conducted for commercial purposes, which is itself sufficient to disqualify it from protection under Article VIII.

(4) Although Japan has made assertions, before you and elsewhere, that various resolutions of the IWC are *ultra vires*, nothing turns here on whether that is so. Japan has not challenged the key provisions in the present case, the moratorium, the Sanctuary and paragraph 30 of the Schedule. In any event, these are presumed to be valid as they fall within the range of Article V of the Convention and were passed by consensus or by relevant majorities and Japan has accepted them, except for a reservation as to the application of the Sanctuary to minke whales.

5. Mr. President, Members of the Court, it will be obvious that many of the issues before you turn on questions of fact and appreciation. The facts will be dealt with at some length by counsel tomorrow and I will not seek to anticipate these treatments. I would simply make the following four points:

(1) As to fin whales, Japan has taken around 4.5 per cent of the targeted number — not one in twenty. As it turns out, not even Japan's sole expert defends Japan's scientific position on fin whales, although he did not say so in his report.

(2) As to humpback whales, Japan has taken none. A program ostensibly designed to study inter-species competition declines to take one of the species in accordance with its ostensible program design. One suspects the humpbacks were included as a bargaining tool. But diplomatic positioning or bargaining is not science.

(3) As to minke whales, there is no trace of a scientific justification for the target catch, which seems to have been worked out on the back of a proverbial envelope. Nor is Japan in recent years taking anything like the projected number of minke whales — only about a third of the projected number. We say the reasons for that are commercial; but one thing is clear. If I am your research supervisor and I tell you to inspect the stomach contents of 850 rats plus or minus 10 per cent, and after four years you are averaging 32 per cent of that number of rats, then you are a very bad student . . . and I am a very bad supervisor.

(4) Indeed it is not too much to say that Japan's scientific case has come apart at the seams. Thus Japan has no choice but to fall back on a polemic against Australia's conduct within the IWC, on the one hand, and on the other hand, on purely legal arguments, seraphically free from taint of facts, as to the effectively self-judging character of Article VIII. The former, the polemic, I have already dealt with and we will not say anything more about it; the latter, for purely legal arguments, I will return to, with your permission, tomorrow, Mr. President, after the facts have been more thoroughly exposed and summarized by the Solicitor-General and Professor Sands.

6. Mr. President, that concludes Australia's presentation this afternoon. Mr. President, Members of the Court, thank you for your attention.

The PRESIDENT: Thank you, Professor Crawford. The Court will meet again tomorrow morning at 10 a.m. to hear the continuation of Australia's second round of oral arguments. Thank you. The Court is adjourned.

The Court rose at 5.45 p.m.