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International Court of Justice

LA HAYE

Cour internationale de Justice

THE HAGUE

YEAR 2013

Public sitting

held on Wednesday 10 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)**

VERBATIM RECORD

ANNÉE 2013

Audience publique

tenue le mercredi 10 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))**

COMPTE RENDU

Present:	President	Tomka
	Vice-President	Sepúlveda-Amor
	Judges	Owada
		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
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 morning. The sitting is open. Judge Abraham, for reasons explained to me, is not able to sit today. The Court will hear the continuation of Australia's second round of oral argument and I shall now give the floor to Mr. Gleeson, Solicitor-General of Australia. You have the floor, Sir.

Mr. GLEESON:

THE TRUE CHARACTER OF JARPA II: THE PROPOSAL ITSELF AS ILLUMINATED BY THE EXPERT EVIDENCE

Introduction

1. Thank you Mr. President, Members of the Court, and good morning to you all. Australia thought it might be most helpful to the Court to structure our presentation today on the treaty interpretation and breach argument in three segments. Firstly I will offer you some summary propositions about the true nature of the JARPA II proposal as illuminated by the expert evidence. I will also seek to pull together the evidence you now have on the availability of non-lethal methods. Professor Sands will then present our main science speech in response to Japan. Professor Crawford will then bring together our legal arguments on treaty interpretation and breach. Later this afternoon, I hope not too much later this afternoon, I will respond on Australia's alternative case on good faith and abuse of right and the Attorney-General and the Agent will conclude our presentation. If that is convenient, Mr. President, that is how we were to proposing to use our time today.

The nature and quality of the expert testimony

2. Could I first be permitted to offer you a few words on the approach you might choose to take to the expert testimony you have heard. For our part, Australia has offered you two experts who have given you detailed and pertinent written evidence, fully supported by references, you will have noted. It will not have escaped you that hardly a line in those reports was challenged by Professor Lowe in his brief cross-examination. We invite you simply to accept the substance of those written reports.

3. You heard the oral testimony of Professor Mangel and Dr. Gales and we trust that you observed them to be honest, reliable and measured, quite measured, in their opinions. They were certainly fully responsive to the questions asked by counsel or by the Court. Professor Mangel, for his part, was undoubtedly independent. We trust you might conclude that Dr. Gales did not, in any way, allow his position as Australia's Chief Antarctic Scientist to intrude upon the opinions he gave you; and Professor Lowe quite rightly did not ask any questions challenging the integrity of Dr. Gales' evidence.

4. We ask you then to accept their oral evidence, as well as their written evidence. I must briefly mention Professor Pellet's later attacks on the integrity of Australia's dealings in the IWC and indeed the integrity of our whaling scientists[1]. I ask you to treat those attacks with reserve. Not only did he not offer you evidence to support his attacks, but he did not ensure that his colleague, Professor Lowe, put to Dr. Gales, our Chief Antarctic Scientist, those attacks for Dr. Gales' response. That failure, we suggest, you might consider to be not conducive to sound fact finding and, indeed, you might consider it to be unfair.

5. Professor Walløe's evidence was in a little different category, which we have all observed. I will not dwell upon his unhelpful monologue-in-chief, his failure to tell you he was defending his own work, or many of his rather lengthy answers. What is more important for you, we suggest, Mr. President, Members of the Court, is in his final 15 minutes of testimony last Wednesday he acknowledged a rather gaping hole at the heart of JARPA II: the lack of a scientific justification for the number and species of whales to be taken. That is a matter we will place some emphasis on during today.

The nature of JARPA II as elucidated by the experts

6. Could I then come to the substantive part of this presentation, which concerns the summary propositions we would offer you about JARPA II. I will ask for them to be shown on a slide, and perhaps invite you for a moment to see where I will be going for the next 20 minutes or so. [Slide]

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[1]CR 2013/16, pp. 40, 41, 42, 43, 57 (Pellet).

7. Our first summary proposition is that it has not been established that JARPA II was necessary at all: when we scrutinize the JARPA II Plan with care, it is very hard to find a justification — as opposed to a bare assertion — that it is scientifically necessary to conduct a new, large, long-term, indefinite, lethal field-work project, as opposed to using, for example, the body of data available in 2005.

8. The most we could find, Mr. President, Members of the Court, is when you go back and read Section 10 on page 20 of the JARPA plan, there is a one line statement that it is necessary to collect more data in order, and these are the words, to "connect" the past with the future, or to "continue" the original JARPA. That is it. The question we respectfully ask is why is that necessary? Has JARPA provided an explanation why the vast databank of information, available in 2005 was not necessary for whatever scientific purposes were in mind. And when we ask that question, we point you to the principles you have now seen in Annex P, Annex Y[2], the evidence of Professor Mangel[3] and you might recall even Professor Walløe said that he accepted that some enquiry of this type was necessary. He said in his cross-examination: "you must have a question" and "you should have some idea why you are studying this, why you are collecting this data"[4].

9. As we listened to and reread Professor Hamamoto's helpful exposition of JARPA we couldn't find that it descended to the justification in JARPA II itself, or elsewhere, for why it was truly necessary to connect the past with the future, or to continue the earlier work. We don't believe Professor Boyle took that question any further.

10. Against this, Japan might remind you that in answer to one of the questions from the Court, Professor Walløe said he had a belief that a "continuing" collection of data had some value, although he could not say for how long he thought it might have to go on[5]. We would also

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[2]See Australia's judges' folders, Vol. I, tab 12. Ann. P, para. (2) *(a)* (iii) requires that any fieldwork methods must include "an assessment of why non-lethal methods, methods associated with any ongoing commercial whaling, or analyses of past data have been considered to be insufficient". Ann. Y, Australia's judges' folders, Vol. I, tab 11, at (C) (2), (3) and (4) provides that, in relation to methodology, the objectives for Art. VIII research must be those that are not practically and scientifically feasible through non-lethal research techniques, that consideration is to be given to whether the information sought could be obtained by non-lethal means, and also that the research concerns a question that could not be answered by the analysis of existing data and/or non-lethal techniques.

[3]CR 2013/9, p. 46 (Mangel): "Lethal take can only make sense if we have a question that needs to be answered that is a meaningful question, and for which lethal take is the best way of answering that question."

[4]CR 2013/14, p. 34 (Walløe).

[5]*Ibid.*, pp. 23-26, 55 (Walløe).

respectfully suggest that Professor Walløe did not ask or answer the "why" question. While he was happy to talk about projects on which he was a joint researcher — such as blubber thickness and stomach contents — he did not really address why it was necessary to connect the past with the future or to continue the data collection[6].

11. On the topic of blubber thickness and stomach contents — which you do not want to hear too much more about from me, or us, or perhaps anyone — I do need to observe, since Japan placed some reliance upon Professor Walløe's papers last week, that in cross-examination he came to accept the reality that: the Scientific Committee with stomach contents in 2007[7] — and we provided a reference — and blubber thickness in 2013[8] — we have given a reference — made it clear that it remains the position after 26 years that lethal investigations into these subjects have proved unreliable and unnecessary for the conservation and management of whales or any other critical research need.

12. To conclude this first proposition, Members of the Court and Mr. President, we respectfully suggest that nothing you have heard in the first round for or on behalf of Japan has really told you why, after 26 years, in 2005 *more* collection of this lethal data was necessary. They certainly have not established for how much longer the killing and collection must go on. In short, there are no guidelines in JARPA II or in Japan's evidence for how one might establish when enough is enough. That we suggest might properly be of critical concern to you in your resolution of this case. [Screen off]

13. Let me turn to the second proposition and Professor Crawford outlined it yesterday. It seems clear beyond doubt that JARPA II does not scientifically establish why the fin whales and the humpback whales are to be killed. Throughout the proposal there are references that it is "essential" to expand the original JARPA beyond minke whales into minke, fin and humpback whales[9] and indeed that provides the basis for the so-called "model" of inter-species competition. Yet, there are two matters that are now fairly clear before you: (i) the first is that there is no

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[6]CR 2013/14, p. 26 (Walløe).

[7]*Ibid.*, pp. 30-31. See also, Dr. Gales' second expert statement, dated 31 May 2013, at para. 4.9.

[8]CR 2013/14, p. 29. See also the extract from the "Report of the Working Group on Ecosystem Modelling", Ann. K-1 to the "Report of the Scientific Committee Annual Meeting 2013", pp. 1-7 reproduced at tab 7 of Australia's cross-examination folder of 3 July 2013.

[9]For example, see JARPA II Plan at pp. 9, 10 and 19.

explanation for why the permits each year authorize the killing of humpbacks whales, when not a single humpback has been taken; and (ii) the second matter, which ought to be clear — and I will ask for you to be shown Professor Walløe's correct concessions [Slide] — is that, as he told us at about 4.15 p.m. last Wednesday, he "never liked the fin whale proposal because I think, and especially with 18 whales caught, it is no information you can get from it"[10]. And you might recall when I, rather uncharitably perhaps, pressed him on why his own calculations were left at home in Norway, his answer was this: "as I said, I never considered humpback and fin because I did not like the proposal to catch, especially the fin whales but also the humpback whales"[11]. [Screen off]

14. Perhaps we should have heard earlier from Professor Walløe in his report these statements. In any event we know his true opinion now. So that is our second point: no scientific justification for the lethal take of humpback and fin whales.

15. Which leads immediately to the third point. Obviously Objective Two, which had aimed to build the grand overarching model of inter-species competition[12], is — and it is hard to put this more politely than this — rather illusory. The plan for a model is rather illusory.

16. If lethal sampling is not conducted on one of the three essential species to build the model, and if it is carried out on the others in a manner incapable of yielding the intended information, the model is rather illusory. If I could just pause on that point alone, if Australia were to say nothing else today, as Japan threatens and intends this November, as with each other November, to issue a permit authorizing the usual take of minke plus 50 humpback plus 50 fin whales, on those grounds alone the Court would be entitled to grant Australia the relief it seeks.

17. I have mentioned that the plan for the model was found in Objective Two. You may also recall that in relation to Objective Two, Professor Walløe correctly accepted that it was the only place in JARPA II where he could find a testable hypothesis; and he agreed that the data needed to test that hypothesis was not identified, and therefore no sample size could be identified for Objective Two[13].

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[10]CR 2013/14, pp. 44-46, esp. 44 (Walloe).

[11]*Ibid.*, pp. 46-47 (Walloe).

[12]JARPA II Plan at pp. 11, 15-16.

[13]CR 2013/14, pp. 40-41 (Walloe).

18. Let me move to the fourth point. You may then have in mind that, well, if we dismiss the humpback whales and the fin whales, what is the Court to do with the minke whale aspect of the proposal? What we would be so bold as to say that at the end of the evidence, you will conclude it has not been shown that there was a justification for doubling the minke take from 300/400 under the original JARPA to the 850 in JARPA II. [Screen on]. On that topic I might seek to just remind you of what it was Professor Walløe told you last Wednesday at about 4.15 p.m. You will recall he opened up — indeed he almost volunteered — these statements: "I do not really know how they have calculated the sample sizes"[14]. And again when I uncharitably pressed him on why his own calculations were left in Norway, his answer was "so I thought it was sufficient to say that I did not really understand it but that is my answer". We would ask you to conclude, on this material, that we now have common ground between Professor Walløe and Professor Mangel and this represents the gaping hole at the heart of JARPA II: sample sizes are arrived at by a "particular number" being "picked [from a range] without any explanation"[15] as Professor Mangel had said in his reports. [Screen off]

19. With those matters being common ground and it being a long day ahead, I fear I might risk your patience if I mention the words "sample size" any further. However, I need to do just this, which is what one might regard as a precautionary approach, given what Japan might wish to say to you next week, if they ask you to conduct an archive expedition into the Appendices of JARPA II. What I would wish to do is just to remind you of those few examples we looked at with Professor Walløe from the Appendices, which led him to make his fairly candid concession that he really did not have the foggiest of how the samples were chosen.

20. So if you would just bear with me in that brief exercise in revision, what you should next see on the screen, [slide: table 3] as you have already seen, was the humpback proposal. And you know that to get a sample size of 50, one needed to assume a rate of change of plus or minus 3 per cent. You will not find in the JARPA proposal a scientific justification for why a 3-per-cent

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[14]CR 2013/14, p. 41 (Walløe).

[15]CR 2013/9, p. 45 (Mangel). See also Professor Mangel's first expert statement of April 2011 at paras. 5.38-5.50.

change is plausible. I would simply reference that at page 64 of the proposal, the last available data showed a change of only 1.3 per cent. [Screen off]

21. Let me turn then to the table that you have already seen in relation to the fin whales. [Slide: table 4] In short, the position is pretty similar. [Screen off]

22. Then let me turn to the table you saw for the minke whales. [Slide: table 2] And we know that if one followed through the approach with the other two species of 12 years and 3 per cent, you would only take 18 whales; if your made it six years, on that assumption you would take 138; if you made it six years and adopted the 1-1.5 per cent range, you would need between 87 and 213. JARPA II does not explain why one would adopt 1-1.5 per cent, but there it is.

23. All of this is simply to confirm the arbitrary nature of the sample size which led Professor Walløe to his correct concessions. If the project needs three, not one, species, why do you only kill one species? If for two of the species it will take 12 years to get useful results, why select a sample size for the other which uses a six-year period, resulting in a lethal take four times higher than it needs to be? That, we suggest, is hardly necessary or proportionate, if one applies the standards New Zealand helpfully laid out on Monday of this week[16]. On the other hand, if the project is really about only killing minke whales, delete the other two species, discard the aim to build a model and get down to examining through science whether a minke whale program of this scale and indefinite nature is needed.

24. [Slide: table 6] I will simply ask for you to be shown the other table in Appendix 6 dealing with a different parameter where, for the fin whales, 12 years is taken, for the minke whales, six years is taken, without explanation.

25. So hopefully my last word on statistics is to draw together that proper statistics require a rational connection between the hypothesis to be tested, the power expected from the text, the margin of error and the resulting sample size.

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[16]CR 2013/17, pp. 36-38 (Ridings).

26. That was Professor Mangel's view in his report[17]. It is now Professor Walløe's view[18]. To the extent that any sample sizes are offered, they only relate to the "monitoring" objective[19], Objective One.

27. That objective has no identified hypothesis, as Professor Walløe confirmed[20]. There can be no analysis in JARPA II of the precision with which any parameter needs to be measured.

28. The fifth point takes us back to the real world. By now, I suggest you might be heavily puzzled why the permit is issued in the same form and with the same numbers each year when the actual take is at great variance to that. In chief you heard our explanation which was that the size of the vessel was significant. Mr. President, Members of the Court, you may know that the Court received a letter on the 3 July from Japan — that we have not objected to — giving us some interesting information about the effective refrigeration capacity of the Japanese vessel, such that it can only take, they say, 400 whale carcasses per season[21]. Let us now assume that to be true. What does that tell you? It tells you that, in order to carry out the JARPA II program, Japan would either require two factory ships of that size or, perhaps more realistically, use refuelling vessels with refrigeration capacity to offload the prize back to Japan during the season. Japan has not given you any explanation for why it does not send two vessels, it has not explained to you what it does by way of offloading whale carcasses on the refuelling vessel. It asks you to find, through a chart you may have been bemused by last week, that if more Sea Shepherd vessels are sent, that explains the whole of the difference. We would respectfully suggest that the Sea Shepherd cannot stop a vessel that Japan chooses not to send to the Antarctic. The explanation comes back to commerce. As Professor Crawford put in our opening round: a drop in demand for whale meat and a desire to keep the price high[22].

29. Could I turn then to the last three of our summary points from JARPA. The sixth point is a matter about which the Court has asked many questions, helpful, if I may say so, with respect to

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[17]See, for example, Professor Mangel's supplementary expert statement, dated 15 April 2013, at pp. 9-11.

[18]CR 2013/14, pp. 34, 53-54 (Walløe).

[19]JARPA II Plan, p. 17.

[20]CR 2013/14, p. 38 (Walløe).

[21]See the letter dated 3 July, sent by Japan to the Court concerning the capacity of its whaling vessels. See also CR 2013/15, pp. 45-46 (Boyle).

[22]CR 2013/10, p. 41 (Crawford).

focus the Parties' attention. Before launching JARPA II, Japan did not establish that lethal scientific research was necessary on the scale proposed and could not be done by any other available method[23]. Further, to take up one of the Court's questions — Judge Donoghue's question — Japan has not established on a year-by-year basis before issuing the permit, that matter[24]. [Slide] On the screen you will see shortly what appears to be the entirety of the substantive justification in the lengthy JARPA proposal for the lethal take[25]. You might have thought that a topic of such intense concern to the Commission and to many of its members deserved more attention [slide]. We have summarized then on the next slide you will see, what is wrong with that brief and thin justification.

30. I must mention on this topic, that one point is now also common ground. Professor Boyle's careful and accurate answer to Judge Donoghue's question[26] confirmed that Japan does not year by year, as it issues the permits, consider the options of non-lethal methods. That is a significant matter. [Screen off]

31. The last two points, perhaps unfortunately, descend a little further to the science, and I will deal with them briefly. The seventh point is that any suggestion that JARPA is designed to obtain information to "implement" the RMP lacks justification[27]. [Slide] The key points for that proposition are seen on the slide. And, the point that perhaps requires only this elaboration, the fourth point, would take us to the issue of genetic data and the alternative of biopsy sampling. And our response on that topic is provided on the following slide that you will see. I would emphasize that the proposition that biopsy is impractical on the apparently fast-swimming nifty minke whales in the high seas, you will not see addressed in the proposal from Japan, and there is a solid body of evidence to the contrary which it would seem Japan has not considered. Professor Gale, in fact, referenced a paper from as early as 1991, from scientists from the ICR who proved it feasible to biopsy sample minke whales[28]. He referenced the work of Paul Ensor on the SOWER ~~cruises~~ Cruises

[23]See the question of Judge Bhandari, CR 2013/14, p. 74.

[24]See the question of Judge Donoghue, CR 2013/12, p. 64.

[25]JARPA II Plan, p. 20.

[26]CR 2013/15, pp. 69-70.

[27]See Professor Mangel's first expert statement of April 2011 at paras. 3.21-3.31, and his supplementary statement at paras. 4.1-4.14.

[28]See Dr. Gales's second expert statement, dated 31 May 2013 at para. 2.5.

work on the high seas[29] and he referenced his own work for which he has been praised[30]. The real point seems to be that body of material is not, and has not been, considered by Japan.

32. The final point is the suggestion that JARPA *may* produce results which will *improve* the RMP, that particularly relates to the question of age data. The short point is that, as you now see, Japan has not engaged with the defined procedure to amend the RMP[31]. The aim of the original programme to use earplugs, to establish mortality has failed as the Committee reported in 2007[32]. The Committee in 2009[33] found catch-at-age data was of low reliability. The Committee in 2013 made a slight adjustment to the bounds of the MSYR without using age or lethal data[34]. And indeed it found a range of problems in the current age model[35].

33. Mr. President, Members of the Court, to make sure that I was not losing the wood for the trees, or losing the Southern Ocean Sanctuary for the large whale who knocked a surfer unconscious off Sydney Harbour last weekend, I have tried to prepare for you, a little table — which you should see relatively shortly, and it is at tab 17 [Slide] — which pulls together how it is that for none of the four objectives can you actually see the four most basic things you would want in combination: a specific hypothesis, a proper sample size, a proper justified assertion of lethal methods, and a proper analysis of non-lethal alternatives. That is not to say it could not be done, but it has not been done in this proposal. [Slide off]

Non-lethal techniques

34. The final matter I mentioned at the outset, was the question of non-lethal techniques. You now have clear evidence that they include satellite tagging, short term tags, biopsies, and digital photography[36]. Dr. Gales importantly confirmed for you that biopsies are now a "very

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[29]See Dr. Gales's second expert statement, dated 31 May 2013 at paras.2.8-2.12.

[30]See Dr. Gales's first expert statement, dated 15 April 2013 at paras. 6.1-6.17.

[31]Australia's cross-examination folder, 3 July 2013, tab 24 (Extract from "Report of the Scientific Committee" (1993)).

[32]*Ibid.*, tab 28 (Extract from "Report of the Intersessional Workshop to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic, Tokyo, 4-8 Dec. 2006).

[33]*Ibid.*, tab 20, p. 502 ("Report of the Intersessional Workshop on MSYR for Baleen Whales" 2010).

[34]*Ibid.*, tab 22, p. 4 ("Report of the Sub-Committee on the Revised Management Procedure" 2013).

[35]*Ibid.*, tab 23, table 1, p. 2 (Extract from the "Report of the Sub-Committee on In-depth Assessments" 2013).

[36]CR 2013/10, pp. 22-23 (Gales); CR 2013/9, p. 47 (Mangel).

standard method" [37]. He spoke of the enormous advances in the field, as did Professor Mangel[38], and perhaps most importantly, Dr. Gales confirmed the obvious, that the non-lethal methods are available to scientists of all whaling communities in the world. Professor Mangel agreed to that proposition. And we suggest that Professor Mangel — and I might end on this — with his characteristic understatement, said this quite accurately, the JARPA II program simply assumes "non-lethal methods will not work" and Japan has "not put any serious effort into developing such methods"[39].

35. Mr. President, I would invite you shortly then to call on Professor Sands to deliver our substantive science speech. Thank you for your attention, Members of the Court.

The PRESIDENT: Thank you very much, Mr. Gleeson. And I give the floor to Professor Sands. You have the floor, Sir.

Mr. SANDS:

JAPAN'S "SCIENTIFIC" WHALING IN THE SOUTHERN OCEAN

1. Mr. President, Members of the Court, you have now heard from both Parties on the central question, namely whether JARPA II is a programme "for the purposes of scientific research" under the Convention. When I addressed you two weeks ago, I said that the subject requires a careful assessment of the facts. The arguments show that the Parties agree on that proposition, but on little else. Japan has now offered its version of the facts, and it is to this that I will now turn.

2. This is a court of law, it addresses facts on the basis of evidence that is before it. The Attorney-General for New Zealand said that "giving full consideration to all relevant facts and circumstances" is indispensable to this case[40]. It is striking that much of Japan's argument is mere assertion, unsupported by documentary, expert or other evidence. Japan claims that JARPA II is a programme for "the purposes of scientific research", that claim rests on two asserted propositions:

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[37]CR 2013/10, p. 23 (Gales).

[38]CR 2013/9, p. 47 (Mangel).

[39]*Ibid.*

[40]CR 2013/17, p. 30, paras. 48-49 (Finlayson).

first, what Japan says is science is science, and second, the Scientific Committee of the IWC has endorsed that claim.

3. On Japan's case, the Court's assessment of what is largely a factual issue — is JARPA science — need go no further than that. According to Japan, you, as a Court, do not have to bother yourself with any objective criteria to determine what science is, you do not have to bother even applying such criteria. Forget about all the expert evidence. You just take what Japan has said at face value and you follow that. It could be said that they have nailed their flag rather firmly to a shaky and dangerous mast.

4. There are many difficulties with Japan's approach to this case. One of them is that it rests on a particular version of "the facts", including what Japan says the Scientific Committee has done, unsupported by evidence. There is no evidence in the Counter-Memorial to support their case. The testimony of Professor Mangel and Dr. Gales doesn't support their case. We now know that the testimony of their own expert, Professor Walløe, doesn't support their case. We will all have noted that moment in the hearing, towards the end of Professor Walløe's testimony, around 4.15 p.m. last Wednesday, when Japan's case began to fully unravel: JARPA II offered to this Court as a multispecies programme "for purposes of scientific research", and Japan's only expert tells the Court that it shouldn't be taking fin or humpback whales, and that he doesn't support those elements of JARPA II. That testimony made Japan's claim to be allowed to kill fin or humpback whales totally unarguable. You cannot run a multi-species programme by looking at one species. And you cannot run a programme that claims to be a science programme, as Professor Walløe told you, if you cannot explain to this Court why 850 whales have to be killed.

5. The evidence before this Court, and in particular the testimony of Professor Walløe, makes it difficult to see how this Court can offer Japan the stamp of approval that it seeks. To allow Japan to continue to accord itself the right to kill three species of whales requires this Court to ignore the evidence and testimony that is before it.

6. Mr. President, my presentation will be in four parts, and it may be appropriate to have a break at a convenient moment. I am going to begin by addressing you on the Scientific Committee, which has not offered any positive assessment of JARPA II's role in conserving and managing whales in the Antarctic. I will then move on to the events of 2005, the circumstances in which

Japan proposed JARPA II without bothering to await the review of JARPA. I shall then turn to the criteria that we say are to be applied by the Court, explaining how those criteria should be approached and applied. And I shall then end with a few brief conclusions. I have focused my comments, in the time available, to the key issues. But for the avoidance of any doubt, we would not wish any silence that we have had on any point raise by Japan to be taken as a concession.

7. Before moving onto these four matters, can I make some brief preliminary points of a general nature. We could not help but be struck by Japan's approach to these hearings, characterized by three distinct elements: silence, contradiction and disparagement.

8. Japan's silences have spoken very, very loudly. There are so many matters on which it has simply declined to offer argument, or evidence. It offered no evidence on the assessment it carried out in 2005 — the period between JARPA and JARPA II — or on methods alternative to the killing of whales. It has offered no evidence to explain the increase in the number of minke whales it says have to be killed. It has offered no evidence, or even argument, to explain to the Court how it proposes to meet the objectives of JARPA II in circumstances in which it has killed less than half the targeted number of minke whales, less than 5 per cent of the fin whales, and none of the humpbacks. We look forward to hearing what Japan says about that next week; it has said nothing in its first round. And of course if it raises these matters now in, its second round, Australia is left in the unfortunate position of not being in a position to respond, unless their address of these matters relates to the questions put by Judges Donoghue, or Greenwood or Judge Gaja or Judges Cançado Trindade or Charlesworth, on which we have a right to put in a written response.

9. Japan's contradictions are equally striking. There are, of course, many contradictions between its own counsel. It is as though they hadn't read each other's written submissions before they were delivered. But it's the contradiction between counsel and expert that is so telling, like a fault line that divides its case. Professor Akhavan told you that the Scientific Committee functions well, his words, as an "independent expert body"[41], but Professor Walløe distanced himself from that view, it has "close connections . . . with politics"[42], he said. Professor Boyle told you that

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[41]CR 2013/12, p. 45, para. 21 (Akhavan).

[42]CR 2013/14, p. 37 (Walløe).

sample sizes in JARPA II were set using, his words, "solid statistical reasoning"[43]. It's not what Professor Walløe said, he said he did "not really know how they have calculated the sample sizes"[44].

10. So, in the absence of any evidence to support its case, or a desire not to engage with the merits, what does Japan do? It turns to disparagement. Of all and sundry. Professor Mangel? Just an ivory tower academic[45]. States that have voted with Australia in the Commission? Australian lackeys, it might be said, complicit in "hijacking the Convention"[46]; those words were used. The 63 members of the Scientific Committee who declined to participate in the "review" of the JARPA II proposal? Politically motivated boycotters, scientists who have merely aligned themselves to Australia's policy[47]. Japan's counsel were no more complimentary of the views of other distinguished scientists. You will recall I drew your attention to the 21 distinguished scientists who put their name to a letter expressing serious scientific concerns with Japan's scientific whaling programme a decade ago. I mentioned one of them, Sir Aron Klug, who was described as an "environmental activist"[48]. (Tab 18) [Screen on] Well, you can see Sir Aron Klug now on your screens; he is a distinguished scientist, an extremely distinguished scientist, awarded the Nobel Prize for Chemistry in 1982, knighted in 1988, elected President of the Royal Society in 1995. In 1983 elected an Honorary Fellow of Trinity College, Cambridge — a notable achievement. Counsel for Japan may not like the views expressed by Sir Aron Klug, that Japanese "scientific whaling" does not meet, his words, "accepted scientific standards"[49], but the fact is he expressed them as a scientist, a distinguished scientist. And he was not alone. [Add image to screen] Professor Masakazu Konishi? Also labelled by counsel as an "environmental activist". Why? Because he dared to express the opinion that Japanese scientific whaling was "not designed to answer scientific questions relevant to the management of whales". Yet he is a wholly

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[43]CR 2013/15, p. 63, para. 70 (Boyle).

[44]CR 2013/14, p. 41 (Walloe).

[45]CR 2013/15, p. 47, para. 12 (Boyle).

[46]CR 2013/12, p. 48, para. 32 (Akhavan).

[47]CR 2013/15, p. 33, para. 18 (Takashiba).

[48]CR 2013/12, p. 59, para. 70 (Akhavan).

[49]"An Open Letter to the Government of Japan on Scientific Whaling", *The New York Times*, 20 May 2002.

independent and globally renowned scientist. He was awarded the International Prize for Biology by Japan's Society for the Promotion of Science, and the citation was for "outstanding contribution to the advancement of research in fundamental biology"[50]. It was not for environmental activism. These distinguished scientists deserve better from counsel from Japan. [Screen off] We invite counsel for Japan to stick to the merits, to the law and to the evidence. And it is to this that I now turn.

(I) The Scientific Committee has not offered positive support to JARPA II

11. Let us begin with the role of the Scientific Committee. Japan argues that whether JARPA II is a programme "for purposes of scientific research" is a matter exclusively for the Scientific Committee. It asserts that the Scientific Committee "scrutinized" the JARPA II proposal in 2005, and it told you repeatedly — I gave up counting — that JARPA II will be reviewed by that body again next year, in 2014[51]. That, counsel for Japan seemed to be saying, is the beginning and the end of the matter. It was as though they were saying "back off, don't touch this, it's being dealt with elsewhere, you have no role"; that's what you are being told.

12. Now, given that this is a central plank in Japan's case, it is understandable, the absence of evidence on the merits, that they would try to come down hard on Australia's assertion that, in respect of JARPA and JARPA II, the Scientific Committee has "never . . . offered any positive assessment of either program's contribution to the conservation and management of whales, or to the IWC's Revised Management Plan"[52]. That submission attracted the attention of Professor Akhavan[53]and Professor Hamamoto[54], both of whom sought to persuade you that Australia was wrong. Well, Australia's characterization is entirely correct.

13. In support of his contention, Professor Akhavan offered you a series of examples, quotations that he attributed on his slides to the "Scientific Committee". You can see that slide on the screen at tab 19 [Screen on], under the heading "Scientific Committee 1997 and 2006 JARPA

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[50]http://www.jsps.go.jp/english/e-biol/01_outline.html.

[51]CR 2013/15, p. 68, para. 89 (Boyle).

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

[53]CR 2013/12, p. 57, para. 61 (Akhavan).

[54]CR 2013/13, p. 29, para. 54 (Hamamoto).

Review Conclusions". He offered *ten examples*. Yet not one of them relates to JARPA II, the only programme with which this case is concerned. Professor Akhavan, the embodiment of creative lawyering, who also has the great merit of making *me* sound reasonable, was unable to find any positive assessment from the Scientific Committee on JARPA II on the conservation and management of whales. He could not do so because it has not done so.

14. Even on JARPA he struggled, for understandable reasons. Professor Walløe has spent quarter of a century at the Scientific Committee, but even he distanced himself from the JARPA programme. "JARPA itself is a much more difficult program and I must admit I had some reservations on some parts of JARPA"[55]. More difficult even than JARPA II, on which he does not support the killing of fin and humpback whales? Counsel for Japan might have asked Professor Walløe during examination or re-examination about the positive assessment of JARPA — or for that matter JARPA II — by the Scientific Committee. But Professor Lowe chose not to ask him any questions in relation to that matter.

15. Professor Akhavan's ten examples are flawed. I do not have time to go through each one, but let me give you a sense of the technique that he has employed. (Tab 20) [Next slide] If you look at the last three statements, 8, 9 and 10 let us call them, they are offered as three separate views of JARPA's record of publications — you can see ~~on~~ that at the bottom. But, if we now turn to the next slide [next slide] and we see those three separate views, we see that they emerge from a single paragraph, of the same document. It is not one point, it is not three points, sorry, it is a single point. More than that, it is a hopeless single point because all the paragraph says is a purported statement of fact. There is no positive assessment there of anything. [Screen off]

16. Let us turn to another one, the third statement which he attributes to the Scientific Committee. Actually, his third statement is a view expressed by a 1997 Intersessional Workshop. The Workshop is not the same as the Scientific Committee. It is instructive to look at the list of attendees of that Workshop, which you can now see on your screen. (Tab 21) [Screen on] There were 38 participants at the Workshop, if you exclude the Scientific Committee Chair, the IWC secretariat and what are termed "local scientists". The Japanese team, plus Professor Walløe

[55]CR 2013/14, p. 50 (Walloe).

and Professor Butterworth — who is on the Japanese delegation here — offer a straight majority at that Workshop. Comments expressed by the Workshop are dominated by the views of Japanese and aligned scientists of their own work on the very project on which they are working, the point made by the Solicitor-General. [Screen off]

17. Let us move to 2006, and Professor Akhavan's fourth quote (tab 22), which you can see on the screen [screen on], that "[T]he JARPA dataset provides a valuable resource". [Next slide] Well, the technique here is a slight modification, because what you see if you look at the next sentence is that "With appropriate analyses, this has the *potential* to make an important contribution to the Scientific Committee's work." (Emphasis added) (Tab 23). "Potential", it is exactly what I said last week, there is a world of difference between "potential" and "actual".

18. Now look at his *seventh* quote (tab 24) [next slide] – "[T]he JARPA dataset provides a valuable resource to allow investigation of some aspects of the role of whales within the marine ecosystem." Read it carefully. Does it look familiar? (Tab 25) [Next slide]. Yes, it does look familiar: that it because it is exactly the same as the fourth quote, from the same line of the same document, on the same page[56]. It is double counting, but poor double counting, of potentiality and nothing more. This is a serious court of law, Mr. President, you are entitled to more than this. [Screen off]

19. I could take you through the rest of the document, and demonstrate that there is no positive assessment of JARPA, just as there is no positive assessment of JARPA II. The same points may be made in relation to Professor Hamamoto's very acrobatic exercise in reading documents.

20. The point can be made very simply. The evidence shows that the Scientific Committee has not been able to function as a proper scientific committee on these matters. That is what Professor Walløe told you. It has not offered a positive assessment, it has not characterized JARPA as a programme "for purposes of scientific research" within the meaning of Article VIII.

21. I have taken you, Mr. President, Members of the Court, through this exercise for three reasons. First, it demonstrates that Japan clutches at straws, there is no substance to its claim that

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[56]"Report of the Intersessional Workshop to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic", Tokyo, 4–8 Dec. 2006, *J. Cetacean Res. Manage. 10 (Suppl.), 2008*, pp. 411–445, (available at: http://iwc.int/workshop-reports#!year=2007), p. 431 (Sect. 5.5).

the Scientific Committee has positively assessed the JARPA II programme. Second, Professor Akhavan has not been candid with you. The document he referred you to is a motley collection of incomplete and selective quotations, wholly irrelevant to JARPA II and this case.

22. And third — my most significant point — close analysis shows that we are here a world away from the report of the Porter Commission in *Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda)* (2005)[57], of the factual findings of the ICTY (International Criminal Tribunal for the former Yugoslavia) in *Bosnia and Herzegovina* v. *Serbia and Montenegro* (2007)[58], or the reports of the IFC (International Finance Corporation) in the *Pulp Mills* case more recently in 2010[59]. In each of those cases you had rather clearer statements by independent third bodies that admitted of little doubt or ambiguity — it was right that you should look at them. In this case, Japan has no independent body to turn to for support.

23. It has been unable to function — the Scientific Committee — it is at an impasse. Professor Boyle told you that it is "not for Australia or its experts to come to this Court to criticize what the Scientific Committee has found acceptable"[60]. Yet it is clear that as with so many matters, you are getting mixed messages from Japan's counsel, and its expert, who expresses rather different views. Ms Takashiba contradicted Professor Boyle, she said that *"Les débats au sein du comité scientifique sont polarisés"*[61]. Like her, Professor Walløe takes a dim view of the Scientific Committee. He told you, on JARPA and JARPA II, that body is highly politicized, "not like a scientific committee in my other scientific fields"[62]. On this point at least — and again — he and Dr. Gales are in agreement. And of course they are very well-placed to know, they have attended the Scientific Committee for many years. You can choose Professor Walløe's view of the Committee, or you can choose Professor Boyle's. How many meetings of the Scientific Committee

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

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

[59] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*; see in particular paras. 167, 210 and 252.

[60] CR 2013/15, p. 64, para. 77 (Boyle).

[61] *Ibid.*, p. 39, para. 32 (Takashiba).

[62] CR 2013/14, p. 29 (Walløe).

has Professor Boyle attended, one might ask — probably no more than me. The accurate view is as stated by Dr. Gales: the Scientific Committee, as he puts it, is "characterised by its polarity and its lack of assessment of the scientific weight of the issues raised by members of the Scientific Committee"[63]. Japan could have challenged that claim of opinion by Dr. Gales in cross-examination, but again Professor Lowe chose not to do so. On this point the expert evidence offered by both Parties concurs.

24. Against this background, three points may be made by way of conclusion. First, the Scientific Committee has offered no positive assessment of the JARPA II programme. It has not characterized it as a programme "for purposes of scientific research". Second, the Scientific Committee's activities and output offer no basis upon which the Court can conclude that JARPA II is a scientific programme. Third, and consequently, it falls for this Court to decide for itself whether JARPA II is a programme "for purposes of scientific research". To do that, the Court has to identify the standards and the criteria to be applied in determining whether it is a programme "for purposes of scientific research". Having carried out that initial exercise, the Court must then apply those standards and criteria to the JARPA II programme. I am going to turn to these matters shortly, but before doing so I would like to address what occurred at the Scientific Committee in 2005, when the JARPA II proposal came to that body.

(II) The 2005 Scientific Committee meeting

25. Japan accepts that it put forward the JARPA II proposal in 2005, before the Scientific Committee had reviewed the output of the JARPA programme. That is not in dispute. Japan also accepts that the arrival of the JARPA II programme was highly controversial when it reached the Scientific Committee. Sixty-three members of the Scientific Committee declined to participate in the review of the JARPA II proposal. Japan had very little to say about the reason this notable and large group of scientists declined to participate. They told you that the group was basically a bunch of boycotters[64], perhaps "troublemakers" was the word they did not quite feel able to use.

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[63]N. Gales, "Statement of Dr Nick Gales", 15 April 2013 (Gales, Expert Statement), para. 4.3.

[64]CR 2013/15, p. 33, para. 18 (Takashiba).

26. But let us look at what the 63 said and who they are. You will find their written statement at tab 26 of today's judges' folder. [Screen on] And I do invite you to open it and have a look at what that document actually says. You can see on that page the list of the 63 highlighted individuals[65]. They come from 16 countries, and they include 16 invited participants, individuals not associated with a national delegation. They include scientists from Australia, France, Italy, Japan, Mexico, New Zealand, the United Kingdom and the United States, coming from a range of academic and other institutions[66]. [Next screen] They state their conclusion at the top of page 261. What they say is that they were "unable to engage in a scientifically defensible process of review of the JARPA II proposal". They go on to say that to proceed to a review "would substantially undermine the scientific credibility" of the IWC. In their view — and these words are important — the proposal could be addressed by the Scientific Committee "only when the JARPA review is complete".

27. Now, this whole document is worth reading carefully — and I am not going to take you through the whole thing. But there are other elements of it I would like you to have a look at now. [Next screen] If you go back to the beginning of the document, you can see that JARPA II is treated as a concluded programme, and that the review of that programme is only to take place in 2006 or 2007. The 63 scientists note the paucity of peer-review literature on JARPA. They note then that JARPA II "will more than double the annual catch of minke whales and also take 50 fin and 50 humpback whales", and will "abandon the accepted IWC method of managing whale stocks" — that is a reference to the RMP — in favour of what they call "a speculative 'multi-species' approach". They note the significant increase in annual take, to levels that are "approaching the annual commercial quotas for Antarctic minke whales that were in place prior to

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[65]S. Childerhouse *et al.* (62 other authors) 2006, "Comments on the Government of Japan's proposal for a second phase of special permit whaling in Antarctica (JARPA II)", App. 2 of Ann. O1 to "Report of the Scientific Committee" (2005). *J. Cetacean Res. Manage. 8, 2006*, 260-261; MA, Ann. 52; see also Gales, Expert Statement, para. 3.38.

[66]By way of example, they include Professor Scott Baker, Oregon State University Marine Mammal Institute (US); Dr. Per Berggren Associate Professor, Marine Ecology, Stockholm University (Sweden); Dr. Bob Brownell, Director of the Marine Mammal Division at the Southwest Fisheries Science Centre in La Jolla, California (who served three terms as a Scientific Advisor to the US Marine Mammal Commission); Dr. Jean-Benoit Charrassin, Muséum National d'Histoire Naturelle Paris (France); Dr. Frank Cipriano, Director, Conservation Genetics Laboratory, San Francisco State University; Dr. Bruno Cozzi, Faculty of Veterinary Medicine, University of Padua (Italy); Dr. Simon Northridge, Senior Lecturer, School of Biology, University of St. Andrews (UK); Dr. Lorenzo Rojas Bracho, Marine Mammal Program Coordinator, Instituto Nacional de Ecología (Mexico); Dr Michael Stachowitsch, Department of Marine Biology, University of Vienna (Austria); Professor Peter Reijnders, Wagingen University and Research Centre (Netherlands); Dr. Karl-Herman Kock, Institute of Sea Fisheries (Germany); Dr. William Perrin, South West Fisheries Center (USA); Professor Toshio Kasuya, Teikyo University of Science and Technology (Japan).

the moratorium". (Now, can I just say here, by way of parenthesis, that immediately prior to the moratorium entering into force for Japan in 1986/1987, the number of Antarctic minke whales taken by Japan was *1941* (emphasis added). It is not very far away from what they are taking now.[67]) The 63 scientists express the view that the increase in annual take, from 300 or 400 to 800 plus, is a result that goes "far beyond the intention envisaged when Article VIII of the Convention was developed". [Screen off] Mr. President, can I just pause there to remind you of the evidence that was given by Professor Walløe, when he confirmed in cross-examination that when he reviewed the papers of the Norwegian drafter of the 1937 Convention, Birger Bergersen, the latter envisaged a take of no more than *ten whales* (emphasis added). (Tab 27) [Screen on] You can see that interview that Professor Walløe gave in 2007, (tab 28) with the relevant article where he is quoted, in which Professor Walløe says — this is Professor Walløe speaking: "It's clear that in his mind he was thinking that the number of whales a country could take for science was *less than 10*; he didn't intend for hundreds to be killed for this purpose."[68] (Emphasis added.)

28. Let us go back to the views of the 63 scientists. [Next screen] They state that it is *"scientifically invalid"* to review the JARPA II proposal before the IWC has conducted a full review of JARPA (emphasis added). "By bringing this proposal forward at this time", they write, "the Government of Japan has substantially compromised" the Scientific Committee, and has put "at stake" the Committee's capacity "to provide objective and representative scientific advice". [Screen off]

29. Mr. President, the 63 scientists who addressed their initial substantive concerns as to the proposal are not just anyone. I have listed in the footnotes some of their institutional affiliations. These are serious people who followed the Commission's guidelines, a reference to the guidelines set out in Annex Y. Their concerns are instructive for a number of reasons, not least because they dovetail very closely with the themes of so many of the questions that have come to both Parties and to the experts from the Bench. The 63 are concerned that "the proposal is open-ended and has no time limit by which it can be assessed". This mirrors exactly the point raised by

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[67]"International Whaling Commission Report 1986-87", *Rep. Int. Whal. Commn. 38:1* (available from http://iwc.int/annual-reports).

[68]V. Morell, "Killing Whales For Science?", *Science*, Vol. 316, April 2007, pp. 532-534 (available at: http://www.seaaroundus.org/magazines/2007/Science_MarineBiologyKillingWhalesForScience.pdf), p. 533.

Judge Cançado Trindade, who posed a question asking whether it was possible to determine "the total of the whales to be killed" to attain the objectives of JARPA II[69]. Judge Cançado Trindade, the answer to that question is "no", there is no evidence that admits of a different answer. The 63 scientists make the point that to be able to evaluate "ecosystem interactions", the expertise of CCAMLR is "necessary". Well that provides a response, Judge Keith, to your question to Professor Walløe, whether it would make "good scientific sense", I think you asked, for JARPA II to be linked to CCAMLR and other projects which deal with the Antarctic ecosystem[70]. The answer to that is plainly "yes", and Professor Walløe agreed with that[71] but it is not happening.

30. Mr. President, I pause here to note that Japan has offered no evidence at all to show that work under JARPA II has been associated with CCAMLR, or SORP, or even with projects conducted by Japan's own venerable National Institute of Polar Research, to which mention has been made. It is interesting, for example, in 2009, Japan's National Institute of Polar Research hosted the Xth Symposium on Antarctic Biology under the auspices of the Scientific Committee on Antarctic Research (SCAR). It was held in Sapporo, in Japan, in connection with SCAR's biological research programme, which is entitled "Evolution and Biodiversity in the Antarctic". So you might have thought this is of some interest to those proponents of the JARPA II programme and there would be some participation in that symposium. Participation, for example, from the Institute of Cetacean Research who are supposedly doing scientific research on exactly the topic of a symposium being held in Sapporo, Japan, in 2009. The Symposium was attended by 255 established scientists and post-graduate students from 22 countries. The programme indicates that not one oral presentation was given on any of the JARPA or JARPA II research findings, out of 113 oral presentations. Of the 122 "posters papers" presented at the symposium, not one related to JARPA or JARPA II. There is no evidence before the Court that any scientists from the Institute of Cetacean Research attended the symposium[72]. And yet they claim this is scientific research to do with the very subject-matter of this symposium.

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[69]CR 2013/14, p. 51 (Walløe).

[70]*Ibid.*, p. 58 (Walløe).

[71]*Ibid.*

[72]Report on Agenda Item # 19 at the SSG-LS, XXXIth SCAR, Buenos Aires, 2010, available at: http://www.scar.org/researchgroups/lifescience/meetings/2010meeting/LSSSG-10_Doc20_10thBioSymp.pdf.

31. Going back to the views of the 63 scientists, they note that the JARPA II proposal —and I quote, because this is very significant— "does not have well-defined hypotheses and performance criteria". Two points to makc here. First the view accords entirely with the view expressed by Professor Mangel, offered by way of expert evidence, and a view now we know largely shared by Professor Walløe, as he confirmed in answering your question, Judge Yusuf[73]. But more to the point, it makes it clear that for these 63 scientists, "well-defined hypotheses" were required in 2005, in the review of JARPA II, under the Guidelines applicable at the time.

32. Those quotes simply deal with the objectives of JARPA II. But they were equally trenchant when it came to the methodology of JARPA II. The 63 scientists state "the new proposal provides an undefended rationale to more than double the take of minke whales". That concern, the concern of an undefended rationale goes directly to the heart of the two questions put to Japan by Judge Greenwood, concerning the basis on which Japan proceeded with higher sample sizes before JARPA had been reviewed[74]. The rationale was undefended 8 years ago, in 2005, and it was undefended last week in this courtroom in July 2013. One would have thought that in the intervening 8 years they might have been able to come up with something; they have come up with nothing.

33. Following the events in the Scientific Committee, the matter went to the 57th Annual Meeting of the Commission. You can find extracts from the report at tab 29 of your judge's folder. [Screen on] At page 37 of that report, please note the short summary of what had transpired in the Scientific Committee: "there was severe disagreement within the Committee regarding advice that should be provided on a number of issues, including: the relevance of the proposed research to management, appropriate sample sizes and applicability of alternate (non-lethal) research". [Screen off] Where is the positive assessment, Professor Akhavan; where is the positive assessment? On the next page you have the details of the resolution that was passed, strongly urging Japan to withdraw or revise its JARPA II proposal. This is the very same resolution that the Attorney-General made reference to yesterday. And, you will also see there the list of 26 States that co-sponsored, that was read out to you yesterday. Three of those States — and I am sure

[73]CR 2013/14, p. 53 (Walløe).

[74]CR 2013/16, p. 62.

FN: Italics

"Chair's Report of the 57th Annual Meeting" (2005), Annual Report of the International Whaling Commission 2005, 5 (available at http://iwc.int/chairs-reports), at pp. 37-39.

Mr. President, you have noted which three States are there set out — had only joined the Convention earlier that year. Are these also hijackers, Professor Akhavan, to be characterized as having succumbed to the Australian-led "takeover of the IWC"[75]?

34. What has happened in the 8 years? Nothing. All Professor Boyle could do was refer you to Appendices 3 to 8 of the JARPA proposal. He showed you a formula, but was unable to offer any explanation as to how sample size was fixed, or why the increase from JARPA was necessary. You saw him for yourselves, flailing before the Court, proclaiming that "none of us understands"[76]. He must have been hoping for support from Professor Walløe, but by the time Professor Boyle came to the Bar the lawyers had been cast adrift by their expert. Professor Walløe had attached himself to the views of the 63 scientists, distancing himself at a rapid pace from Japan's case. "I do not really know how they have calculated the sample sizes", Professor Walløe told the Bench[77]. So you have your choice, on one side of the room a consensus view: 63 members of the Scientific Committee, Professor Mangel[78], Dr. Gales[79], Professor Walløe, all in agreement on the absence of any explanation as to the basis for sample sizes set in the JARPA II proposal. On the other side, cutting a solitary figure, Professor Boyle, waving a textbook, telling you with a straight face and admirable aplomb: "I haven't the foggiest idea" what it all means[80]. Mr. President, that was as memorable a concession as I have ever seen in a courtroom.

35. It appears there is common ground between the Parties as regards some aspects of the standards and criteria that were to be applied by the Scientific Committee in 2005 in respect of the JARPA II proposal. Japan appears now to agree with us that the applicable Guidelines, 2005, are set out in Annex Y; a compilation of a series of IWC Resolutions on special permits[81], including IWC Resolution 1995-9 and 1999-2 to which I took you two weeks ago[82]. Professor Crawford will have more to say about the legal effect of these Guidelines as reflected in Annex Y, and the

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[75]CR 2013/12, p. 48, para. 33 (Akhavan).

[76]CR 2013/15, p. 64, para. 74 (Boyle).

[77]CR 2013/14, p. 41 (Walløe).

[78]CR 2013/9, p. 45 (Mangel).

[79]Gales, Expert Statement, paras. 3.25, 3.42.

[80]CR 2013/15, p. 63, para. 69 (Boyle).

[81]CR 2013/12, p. 53, para. 33 (Boyle).

[82]CR 2013/10, pp.35-37 (Sands).

consequences of them. The currently-applicable Guidelines are set out in Annex P, which were adopted by consensus. Professor Boyle told you that with the adoption of the Annex P Guidelines, the earlier Resolutions "ceased to be relevant"[83]. That is wrong, as the Attorney-General of New Zealand made clear[84]. The continued applicability of earlier Resolutions is confirmed by the 2009 JARPN II Review, which was the first to be conducted under Annex P. That addressed the review by reference to the Resolutions referred to included in Annex H to that Report — I will give you the citation in the footnotes; and that included IWC Resolution 1995-9[85].

36. Professor Boyle had as little to say about the standards applicable under Annex Y as he did about his equation, or formula. You will recall that I had identified the five questions that arise under Annex Y standards[86].

— First, does the proposal constitute a programme "for purposes of scientific research"?

— Second, is the proposal being made in "exceptional circumstances"?

— Third, do the questions addressed in the scientific research programme address critically important issues?

— Fourth, can the questions be answered by analysis of existing data?

— Fifth, and finally, can the questions be answered by non-lethal techniques?

37. Mr. President, Members of the Court, Professor Boyle did not take issue with those questions. It is difficult to see how he could. What he did was to devote all of half a paragraph to the supposed "review" of JARPA II that took place, without the involvement of the 63 scientists[87]. In various places, the report of that review makes it clear the responses from the Committee had to be "limited", because of the non-involvement of the 63 and the Committee offered no conclusion or recommendations. Even Professor Boyle recognized that the "review", such as it was, was cursory. "It was discussed", he told you, "as far as we can tell they were satisfied that Annex Y had been

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[83]CR 2013/15, p. 55, para. 36 (Boyle).

[84]CR 2013/17, p. 31, para. 54 (Finlayson).

[85]"Report of the Expert Workshop to Review the Ongoing JARPN II Programme", *J. Cetacean Res. Manage. 11 (Suppl. 2) 2010*, pp. 405-449 (SC/61/Rep.1), (available at: http://iwc.int/workshop-reports#!year=2009), pp. 423, 448.

[86]CR 2013/10, p. 36 (Sands).

[87]"Report of the Scientific Committee" (2005), *J. Cetacean Res. Manage. 8 (Suppl.) 2006* (available at: http://iwc.int/scientifc-committee-reports), pp. 48-52.

complied with"[88]. But of course he does not know, because he was not there and because no conclusion is offered, one way or another. The reality is that none of the questions raised by Annex Y were properly addressed.

38. So let us turn to those five questions, in the light of Japan's arguments and Professor Walløe's testimony.

39. First question, is the proposal for a programme "for purposes of scientific research"? We say, that question requires this Court to form a view on the essential characteristics of a programme for scientific research. We set out our views in the Memorial, assisted by the expert evidence of Professor Mangel. In its Counter-Memorial, Japan offered no expert, so the criteria identified by Professor Mangel were inapposite: but they did not bother offering you any alternative. Professor Mangel was rather robust when he was questioned by counsel for Japan, who made no inroads whatsoever into the criteria identified by him, and even abandoned the cross-examination early. Professor Mangel explained how he identified the criteria, taking into account practice under the Convention, at the Scientific Committee, and general scientific practice. He offered a clear and credible account.

40. What did Japan have to say about Australia's approach? Well, Professor Boyle conceded that the 1946 Convention offers no definition[89], but offered you, this Court, absolutely no help whatsoever in how to go forward. His only word of advice was that this "is not a matter to be answered by reference to expert scientific evidence from eminent scientists"[90]. And I can understand why he would say that, having been abandoned by Professor Walløe. He spent all of five minutes on this subject, even though he accepted — and Japan concedes — that this is a question that "the Court has to decide"[91]. The five minutes were devoted to the testimony of Professor Mangel and it avoided all substance. In a rather unfortunate tone, the Court was told that Professor Mangel had approached the matter as a mere university professor, stuck in his ivory tower. "[A]n interesting diversion", were the words of Professor Boyle[92].

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[88]CR 2013/15, p. 54, para. 35 (Boyle).

[89]*Ibid.*, p. 47, para. 12 (Boyle).

[90]*Ibid.*, p. 44, para. 2 (Boyle).

[91]*Ibid.*, p. 47, para. 11 (Boyle).

[92]*Ibid.*, p. 46, para. 13 (Boyle).

41. Well, the Court can form its own view. As Professor Mangel's CV shows, he has many, many years of providing practical, real world advice to governments and international organizations on their real scientific research activities. He served for eight years on the United Kingdom Special Committee on Seals, which provides scientific advice to the British Government on matters related to the management of seal populations. Stuck in his ivory tower, the United Kingdom Government made him chairman of the Committee[93]. Two months ago he was appointed as a founding member of the Scientific Review Board for the International Pacific Halibut Commission, an intergovernmental body that researches and manages stocks of Pacific halibut for the United States and for Canada, under a 1923 Convention[94]. He is very well placed to offer totally independent, practical advice on what does and does not constitute scientific research.

42. He has drawn from his experience in assisting Australia, and, we say, the Court, with what the criteria are and he has explained the basis for his criteria, including within the practice of the IWC.

43. Professor Boyle might have been more plausible if he had offered alternative criteria, but he offered none. Science is just what Professor Boyle says it is, just what Japan says it is, nothing more, nothing less. If Japan tells the Commission and the Scientific Committee, and this Court, that the collection of data is science, then it is science. If Japan tells this Court that a room full of body parts of hundreds or thousands of dead whales is science, then you are supposed to simply keel over and accept that it is science. Professor Boyle devoted a single paragraph to this submission[95]. And in another paragraph in which he expressed the hope that nothing more would be said about the need for a hypothesis[96]. It seems that he is not a fan of M. Poincaré, and would be perfectly content for the Court to rule that a heap of body parts is science. Nor, it might add, does Professor Boyle seem to be a fan of the rather impressive book *Angels and Ages*, referred to by Judge Keith, on the subject of scientific advances. "It is in the leap of the data, not the heap of the

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[93] http://www.smru.st-andrews.ac.uk/pageset.aspx?psr=411.

[94] http://blog.pugetsoundinstitute.org/2013/06/marc-mangel-appointed-to-international-pacific-halibut-commission/.

[95] CR 2013/15, p. 48, para. 16 (Boyle).

[96] *Ibid.*, para. 17 (Boyle).

data, as Muhammad Ali might have put it, that the advance lies." That is Adam Gopnik's, the author of that book, view on exactly the issue that is before us[97].

44. The gulf between Professor Boyle and Professor Walløe was very great indeed. He was abandoned by his expert. When Professor Walløe was asked by Judge Yusuf about the four criteria identified by Professor Mangel, he responded "I agree with much of it"[98]. On the subject of the need for a hypothesis, he said "I agree that there should be some questions, something the scientists would like to explore"[99]. The difference between Professors Walloe and Mangel is of emphasis, not of principle. Yet the JARPA II Objectives have no questions or hypotheses, as Professor Walløe accepted, with the exception of the krill surplus hypothesis and Japan says, at paragraph 5.31 of its Counter-Memorial, that it is not exploring that question[100].

45. This may be a good moment also to return to the question posed by Judge Donoghue, in relation to the human genome project. JARPA II is plainly not comparable to the Human Genome Project. That Project had an overarching conceptual framework, namely that many — and possibly most — human diseases had a major genetic component. This is often referred to as the "common variant" hypothesis[101]. The Human Genome Project met all the criteria identified by Professor Mangel:

— it had a clear overarching scientific need;

— it had a specific question with measurable milestones and a defined outcome;

— it employed (and developed) appropriate methods; and

— it had rapid publication and peer review[102].

And I have offered you citations for all of that, Judge Donoghue, in the footnotes to these submissions.

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[97]A. Gopnik, *Angels and Ages*: A Short Book about Darwin, Lincoln and Modern Life (2009), p. 71.

[98]CR 2013/14, p. 53 (Walløe).

[99]*Ibid.*

[100]See CMJ, para. 5.31.

[101]E. Lander, "The New Genomics: Global Views of Biology" (1996) *Science* 274:536-539; G. Gibson, "Rare and common variants" (2012) *Nature Reviews Genetis* 13:135-145.

[102]F. Collins, M. Morgan, and A. Patrinos, "The Human Genome Project: Lessons from Large-Scale Biology" (2003) *Science* 300:286-290; H. Williams, "Intellectual property rights and innovation: Lessons from the human genome" (2013) *Journal of Political Economy,* 121:1-27.

46. Early in the Project, some scientists expressed concern, in relation to the point you raised, about whether the rapid throughput of data would undermine the notion that science requires testable hypotheses. There was a series of pieces in the journal *Genome Research*[103]. Ultimately, the authors agreed that testable hypotheses — not hypothesis testing, in the statistical sense — is the foundation of science, and I have offered you the citations for that in the footnotes.

47. Professor Walløe too agreed that "the correct set of empirical tools" — the methodology — depends on the questions that are to be explored; it is the hypothesis is what he's referring to[104]. He offered no objection either to Professor Mangel's third criteria, on peer review. He conceded the need for proper review and confirmed to the Court that the Scientific Committee is no substitute for peer review. Indeed he offered to the Court, on more than one occasion, that he himself seeks to get his writings on subjects that are before the Scientific Committee to be the subject of peer review[105]. Why would he do that, if the Scientific Committee was peer review? And finally Professor Walløe told Judge Yusuf that he agreed too with Professor Mangel's fourth criteria, the need to avoid endangering the stock[106].

48. In short, on the basis of the evidence from the two experts, there really is no material disagreement between them on the criteria that are to be applied in determining whether an activity is properly to be characterized as scientific research. That having been made crystal clear, I can quite understand why Professor Lowe recognized the danger of re-examining Professor Walløe. It was no surprise, indeed, Professor Boyle was left with no alternative but to adopt the course that he did, seeking to convince you that what constitutes "scientific research" is not to be answered by "expert scientific evidence from eminent scientists"[107], because he now knows that if you disagree with him and you go to look at the expert evidence you have to hang your hat on the hook offered by the two experts. The problem for Professor Boyle and his colleagues as counsel on the Japanese team is that they put forward an expert, and the expert basically agreed with Australia. It also

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[103]J. Engert, "Unlimited Hypothesis Research" (2000) *Genome Research* 10:271-272; L. Goodman, "Hypothesis-Limited Research" (1999) *Genome Research* 9:673-674; K. Lastowski and W. Makalowski, "Methodological Function of Hypotheses in Science: Old Ideas in New Cloth" (2000) *Genome Research* 10: 273-274.

[104]CR 2013/14, p. 53 (Walløe).

[105]*Ibid.*, pp. 20, 21, 31, 52 (Walløe).

[106]*Ibid.*, p. 53 (Walløe).

[107]CR 2013/15, p. 44, para. 2 (Boyle).

reflects a recognition on their part that expertise is both useful and necessary. Having taken that path, they cannot now row back; they are stranded. Professor Walløe is Japan's expert, for now at least — how long that will last we do not know — but Japan is stuck with what he told this Court.

49. Where does this leave the Court? The standard to be applied in determining whether JARPA II is a programme "for purposes of scientific research" is readily identifiable and not in issue. The criteria described by Professor Mangel — largely agreed with by Professor Walløe — should assist the Court in answering the first question that is offered by Annex Y; the other questions emerge from Annex Y itself. I will turn to the application of the other criteria, but this may be an appropriate moment, Mr. President.

The PRESIDENT: It is certainly an appropriate moment for you to relax, and for Members of the Court as well. A coffee break for 15 minutes.

The Court adjourned from 11.35 a.m. to 11.50 a.m.

The PRESIDENT: Please be seated. Professor Sands, if you are ready to resume, we are ready to listen. You have the floor.

Mr. SANDS: Thank you very much, Mr. President, I will try to keep you attentive. I know these scientific matters are not of the most accessible nature. I was talking about the criteria and I have spent some time identifying what other criteria we say that the Court should have heard. Let me now turn to the matter of the application of the criteria in this case.

(IV) The application of the criteria: what is scientific research?

50. The first question that arises under Annex Y takes us directly to the four criteria identified by Professor Mangel. There is no real disagreement, as I have mentioned, between Professors Mangel and Walløe on the first criteria, namely that for it to be scientific research JARPA II has to have defined and achievable objectives that contribute knowledge important to the conservation and management of whale stocks. Meeting the standard involves the selection of particular hypotheses, or questions, as Professor Walløe accepted. You will recall that the

63 scientists in the Scientific Committee said that they would not participate in the review of JARPA II because it "does not have well-defined hypotheses"[108].

51. The Solicitor-General took Professor Walløe through the objectives of JARPA II and as you heard, he was unable to identify the hypotheses or questions that underpinned any of the Objectives[109], with the exception of the krill hypothesis.

52. This absence of hypotheses, or questions, is absolutely fatal to Japan's case. A hypothesis is important because it determines the statistics that are required and the data that is to be collected. Without a set of clear questions you cannot determine the sample size. Professor Walløe accepted in cross-examination, and I use his words — and I am going to quote them carefully — "there is a connection between the formulation of the hypothesis and . . . the selection of methods"[110]. We say that is a crucial point and a concession, which is why his testimony is so problematic for Japan. Methodology includes the choice between killing and not killing, and it determines the sample size. "I do not really know how they have calculated the sample sizes", Professor Walløe said, "I have to make guesses"[111]. As you saw, asked whether he could find any justification in JARPA II ~~to~~ for determining that certain changes in pregnancy rate over a 12-year period was "a plausible hypothesis worth testing", he provided a clear answer: he said "No"[112]. Asked about the assumptions made by Japan for taking 50 fin and 50 humpback whales over a 12-year period, rather than the six years for the minke whales, he simply said "I never liked the fin whale proposal" — you will have picked up the *tremblement* on the other side of the room as those words emerged from his mouth. To compound the anguish, he then said "there are difficulties with the humpback proposal". He then said that without knowing about the assumptions on which Japan relied, the statistical basis for Japan's approach was "worthless"[113]. That is his word, "worthless". Could it get any worse, one might ask. Well, it could. Asked whether he could find a scientific explanation for the choice of 12-year periods for fin and

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[108]See para. 31, above.

[109]CR 2013/14, p. 40 (Walløe).

[110]*Ibid.*, p. 35 (Walløe).

[111]*Ibid.*, p. 41 (Walløe).

[112]*Ibid.*, p. 44 (Walløe).

[113]*Ibid.*

humpback whales, as compared with six years for minke whales, he provided another clear — and equally devastating — answer: he said "No"[114].

53. Professor Walløe confirmed the need for hypotheses and the obvious connection between the questions a scientific research project seeks to explore and the methods adopted. In short, you cannot determine how many whales are to be killed without knowing to some degree of precision the questions that you seek to explore. Professor Walløe was very candid in confirming that.

54. It fell to Professor Boyle to pick up the pieces, an impossible task. He could do no more than tell you that the figure of 850 minke whales, 50 fin whales and 50 humpback whales was "a compromise"[115]. He offered no scientific explanation. The problems with sample size haunt Professor Boyle's case, as it haunted the Scientific Committee in 2005[116] and as it haunted the 63 members of the Scientific Committee who cited that as one of the reasons they would not get involved in this process[117].

55. I move to the second characteristic of a programme "for purposes of scientific research", namely the need to apply appropriate methods to achieve the stated objectives. Japan has offered no scientifically justified rationale for why it needs to kill so many whales. But its difficulties go further than that: it has offered no scientific justification for killing any whales. On Professor Mangel's view, confirmed by Professor Walløe and reflected in the requirements of the Guidelines set out in Annex Y, lethal methods may be resorted to *only* where they are necessary and the research objectives cannot be achieved by non-lethal means.

56. To meet this requirement, Japan has to demonstrate that it has gone through certain steps: it has to demonstrate that it has identified the questions its programme seeks to explore, and on that basis determined the data that it needs, and then ascertained the different options for obtaining the necessary data. Judge Donoghue asked Japan what analysis of the feasibility of non-lethal methods it had conducted prior to setting the sample size each year for JARPA II[118]. The questions were

[114]CR 2013/14, pp. 45-46 (Walløe).

[115]CR 2013/15, p. 64, para. 73 (Boyle).

[116]"Report of the Scientific Committee" (2005), *J. Cetacean Res. Manage. 8 (Suppl.), 2006* (available at: http://iwc.int/scientific-committee-reports), p. 51.

[117]See para. 32, above.

[118]CR 2013/12, p. 64 (Donoghue).

formulated in a very precise and comprehensible way, and they were concerned with JARPA II, not JARPA. Yet Professor Boyle in his answer simply referred Judge Donoghue back to a document prepared in 1997 in relation to JARPA, eight years *before* the JARPA II proposal. It was very plain to us from his response, and what he did not say, that the answer to your question, Judge Donoghue, is that Japan conducts no analysis of the feasibility of non-lethal methods, either on a year-by-year basis, or at all.

57. Your second question concerned the bearing of such analysis on the sample size. You asked: "How did any such analysis bear on those sample sizes?" In response to the question, Professor Boyle said "our scientists were not quite sure what this question meant"[119]. I have to say, speaking for myself, the question seemed remarkably clear. The answer to the question has to be "it did not" bear on sample sizes, because it did not exist; there was no analysis.

58. Professor Boyle also sought to answer your question, Judge Bhandari. You asked whether, before launching JARPA II, Japan had established that it was carrying out lethal research on such a large scale because it was critical and because there was no other available method[120]. Interestingly, Professor Boyle challenged your characterization — I am sure you remember that — that the killing of 850 minke whales and 50 fin whales and 50 humpback whales every year for ever and ever and ever, in his words, "can properly be described as large scale" — well, if that is not large scale then I do not know what is — the point is, he did not offer any substantive answer: he simply asserted, without any evidence, that no other method was available[121]. Again, his answers were contradicted by the evidence, and in particular that of Professor Walløe: Professor Walløe told the Court last week that the JARPA sample of 300 or 400 minke whales — that is JARPA — was "a large number"[122], and that was less than half of the annual take of minke whales under JARPA II, and did not include any fin or humpback whales. As for JARPA II itself, I have already noted that the 850 whales a year — or 935 — is not far off the last commercial quotas for Japan — of 1,941 — in the 1986/1987 season[123].

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[119]CR 2013/15, p. 70, para. 97 (Boyle).

[120]CR 2013/14, p. 74 (Bhandari).

[121]CR 2013/15, p. 70 (Boyle).

[122]CR 2013/14, p. 50 (Walloe).

[123]See para. 27, above.

59. What is striking, Judge Bhandari, is that he did not direct you to any evidence to show that the research addressed a "critical" need, as Annex Y required. Of course, he is unable to do so: the answer to your question is that there is no evidence before the Court to show that Japan established any critical need to carry out this research, or the absence of alternative non-lethal methodes ~~alternatives~~. No evidence. Indeed, the evidence that is there is to the contrary: since JARPA II was launched before JARPA had been reviewed, it would be impossible to identify a critical research need. Which is why the 63 members of the Scientific Committee declined to be associated with an exercise of review. They wanted to see the results of JARPA. Japan chose not to wait.

60. Professor Hamamoto and Professor Boyle referred to a 2009 report of the JARPN II —JARP*N*— review panel, as evidence that non-lethal alternative methods of data collection — satellite tagging, biopsy sampling, etc. — are impracticable or unavailable[124]. [Screen on] Well, they seem to have overlooked page 426 of the relevant report — which is at tab 31 of the judges' folder — this is what the panel "strongly" recommended, in bold. Japan should "quantitatively compare lethal and non-lethal research techniques *if* it decides to continue a lethal sampling programme", and collaborate "in the design of a well specified study to fully evaluate lethal and non-lethal techniques"[125]. That is a complete answer to the questions of Judge Donoghue and Judge Bhandari. It is doable. Has it been done in relation to JARPN? It has not. Japan has not acted on the 2009 recommendation, which you can see for yourselves on the screen. It has simply closed its mind to non-lethal alternatives. [Screen off]

61. I turn now very briefly to three or four issues that are before you. But, it maybe that you do not even need to get to them in deciding this case. Issues of age data, blubber thickness, stomach contents and the dreaded RMP. *Age data* — I suppose I have got to say something about earplug issues, since Japan has sought to make much about Australia's experts stating that age data *can* be useful, and that it can only be obtained by non-lethal means. Let me be very clear about Australia's position on this: the age of an animal can be an important parameter for some

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[124]CR 2013/13, p.19, para. 24 (Hamamoto); CR 2013/15, p.59, para. 59 (Boyle).

[125]Report of the Expert Workshop to Review the Ongoing JARPN II Programme, *J. Cetacean Res. Manage. 11 (Suppl. 2) 2010*, 405-449 (SC/61/Rep.1), available at: http://iwc.int/workshop-reports#!year=2009, pp.426, 432.

particular questions, provided that you know what the question is, and provided that it can be measured with precision[126]. But the results of 26 years of JARPA and JARPA II have repeatedly and unambiguously shown that age estimates using the lethal method adopted by Japan have not produced reliable data and useful results. The 2006 Review of JARPA found that estimates of natural mortality based on JARPA age data were so unreliable that they were "effectively unknown"[127].

62. We mentioned this in the first round and Japan's response was to turn to catch-at-age analyses, using JARPA and JARPA II age data, and arguing this would allow trends in whale populations to be identified and provide a basis for estimating sustainable yield[128]. Ms Takashiba *asserted* that, thanks to this information, "le comité scientifique dispose d'estimations fiables sur le taux de mortalité naturelle et le ratio de rendement maximum de renouvellement"[129]. Well, that may be counsel's view, but it is not the view of the Scientific Committee as expressed at its meeting just last month. The outcomes of the "Statistical Catch-at-Age" analyses — "SCAA" — undertaken using JARPA and JARPA II age data, were presented just last month at the 2013 Scientific Committee meeting. The outcomes were summarized in a table in the report of the relevant sub-committee — you will find it in an extract at tab 33 of your judges' folder, and you can now see it on the screen[130]. [Screen on] What has JARPA data usefully and reliably led to? MSYR? Not robust. Natural mortality? Requires further investigation. Growth curves? Not reliable. Errors in age-determination? Present and important to take into account. This is the last word from the Scientific Committee, just last month. It is a complete answer to Ms Takashiba; it confirms that the JARPA II material is unreliable[131]. [Screen off]

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[126]CR 2013/10, p. 31 (Gales); CR 2013/9, p.65 (Mangel).

[127]Report of the Intersessional Workshop to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic", Tokyo, 4–8 Dec. 2006, *J. Cetacean Res. Manage. 10 (suppl.), 2008*, p. 434; see also Gales, Expert Statement, fourth dot point of para. 5.9; N. Gales, "Statement by Dr. Nick Gales in Response to the Expert Statement by Professor Lars Walloe", 31 May 2013 (Gales, Response to Prof. Walloe), para. 3.13.

[128]CR 2013/15, p. 68, para. 91 (Boyle).

[129]*Ibid.*, p. 41, para. 35, (Takashiba).

[130]See: Table 1, "Report of the Sub-Committee on In-depth Assessments", Ann. G to the "Report of the Scientific Committee Annual Meeting 2013", available at: http://iwc.int/screport, p. 2.

[131]See, also, Gales, Response to Prof. Walloe, paras. 3.9-3.14.

63. Japan's counsel have repeatedly asserted that the Scientific Committee has confirmed that all of the technical problems regarding age data have been resolved[132]. Yet the Scientific Committee concluded this year that "errors in age determination" exist and are important to take into account, and that the SCAA analysis produced nothing reliable or useful[133].

Blubber thickness and stomach contents

64. Blubber thickness and stomach contents: another subject in which Japan's counsel have sought to take refuge. Again, the Scientific Committee, or workshops involving some of its members, disagree on both counts that this has been useful or reliable. Serious concerns have been raised about blubber thickness as an appropriate measure for ecosystem change[134], and analyses arising out of JARPA and JARPA II have been routinely criticized as unreliable[135]. At last month's 2013 meeting, the Scientific Committee concluded that the problems raised had still not been resolved, despite the presentation by proponents of purported solutions[136]. We have inserted an extract of the relevant Sub-Committee report at tab 34 of your judges' folder. And, similarly, the Scientific Committee has questioned the ability of stomach contents to provide useful information about the feeding behaviour of whales[137], and has noted the unreliability of such data[138].

65. I turn to the RMP. Much has been said about whether lethal data is required for the IWC's agreed management model, the RMP. Let me make Australia's position very clear: killing whales and obtaining lethal data is *not* required for the RMP. The Solicitor-General has dealt with

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[132]CR 2013/13, pp. 37-38, para. 69 (Hamamoto); CR 2013/15, p. 41, para. 35, (Takashiba); CR 2013/15, p. 60, para. 61 (Boyle).

[133]Table 1, "Report of the Sub-Committee on In-depth Assessments", Ann. G to the "Report of the Scientific Committee Annual Meeting 2013", available at: http://iwc.int/screport, p. 2.

[134]"Report of the Intersessional Workshop to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic", Tokyo, 4–8 Dec. 2006, *J. Cetacean Res. Manage. 10 (suppl.), 2008*, pp. 411–445, available at: http://iwc.int/workshop-reports#!year=2007, pp. 428-429, 434; see, also, Gales, Response to Prof. Walloe, para. 4.13.

[135]"Report of the Scientific Committee", 1987, *Rep. Int. Whal. Commn 38, 1988*, available at: http://iwc.int/scientifc-committee-reports, p. 56; "Report of the Scientific Committee", 2011, *J. Cetacean Res. Manage. 13 (Suppl.), 2012*, available at: http://iwc.int/scientifc-committee-reports, pp. 50-51.

[136]"Report of the Working Group on Ecosystem Modelling", Ann. K1 to the "Report of the Scientific Committee Annual Meeting 2013", available at: http://iwc.int/screport, p. 5.

[137]"Report of the Scientific Committee", 2007, *J. Cetacean Res. Manage. 10 (Suppl.), 2008*, available at: http://iwc.int/scientifc-committee-reports, p. 45; "Report of the Scientific Committee", 2011, *J. Cetacean Res. Manage. 13 (Suppl.), 2012*, available at: http://iwc.int/scientifc-committee-reports, p. 51; see, also, Gales, Response to Prof. Walloe, paras. 4.5-4.10.

[138]"Report of the Scientific Committee", 2012, *J. Cetacean Res. Manage. 14 (Suppl.), 2013*, available at: http://iwc.int/scientifc-committee-reports, p. 51

this point. The data needed for the RMP are the levels of past catches and an up-to-date abundance estimate of the population — and both are obtainable, and obtained, through non-lethal means[139].

66. I turn to the third characteristic of a programme "for purposes of scientific research", and that is the need for periodic, independent review of research proposals and results, and adjustments in response to such review. This is of course "peer review". And, Japan has conceded the absence of peer review, at least in its established sense. It has made no real response to the points I made in the first round, an output from JARPA II described by Professor Mangel in examination-in-chief as "woefully low"[140]. Again, he was not challenged on this in cross-examination.

67. What does Japan have to say in response? It says that peer review is not relevant, because the work is carried out by the Scientific Committee[141]. Yet again, that view is contradicted, by Professor Walløe.

68. There is a further point to be made on peer review. And it goes to a point that Japan harks back to it time and again. They say that the Scientific Committee will review JARPA II next year, and so this Court should back off[142]. This is a very constant theme and no doubt you will hear a lot about it next week. Professor Boyle addressed Annex P in some detail. As with so much of the Japanese submissions, it is what they do not say that is often more interesting than what they do say. Professor Boyle was very silent about the Annex P review of JARPN II's programme, which took place in 2009 — I have already mentioned that it was the first review under the new Annex P procedure. Professor Hamamoto complained, in a very genial way, that we hadn't referred to this review in our first round, so let us look at it now, and I am grateful to him for referring us to it[143].

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[139]"The Revised Management Procedure (RMP) for Baleen Whales", Ann. H to the "Report of the Scientific Committee", 1993, *Rep. Int. Whal. Commn 44, 1994*, 145-152, pp. 146 (Sec. 3.2 — "Data Requirements"); L. Walloe, "Scientific review of issues raised by the Memorial of Australia including its two Appendices", 9 April 2013 (Walloe, Expert Statement), p. 11; Gales, Expert Statement, Annexure 2, para. 13; M. Mangel, "Supplement to An Assessment of Japanese Whale Research Programs Under Special Permit in the Antarctic (JARPA, JARPA II) as Programs for Purposes of Scientific Research in the Context of Conservation and Management of Whales", 15 April 2013 (Mangel, Supplementary Expert Opinion), para. 4.9.

[140]CR 2013/9, p. 49 (Mangel).

[141]CR 2013/15, p. 46, para. 9 (Boyle).

[142]CR 2013/12, p. 58, para. 68 (Akhavan); CR 2013/13, p. 22, para. 39 (Hamamoto); CR 2013/13, p. 29, para. 53 (Hamaoto); CR 2013/13, p. 37, para. 68 (Hamamoto); CR 2013/13, p. 38, para. 70 (Hamamoto); CR 2013/15, p. 36, para. 27 (Takashiba); CR 2013/15, p. 51, para. 24 (Boyle); CR 2013/15, p. 55, para. 39 (Boyle); CR 2013/15, p. 57, para. 49 (Boyle); CR 2013/15, p. 70, para. 96 (Boyle); CR 2013/16, p. 31, para. 9 (Boyle).

[143]CR 2013/13, p. 19, para. 24 (Hamamoto).

The JARPN II review panel was highly critical of the absence of quantified short term objectives in that program. You see it at tab 35, you see it on the screen. [Screen on] The review stated:

> "Lack of such objectives [quantified short-term objectives] hinders any thorough review and is a weakness of the programme. This is also relevant to sample size considerations as indicated below."[144]

This is of course exactly what the 63 scientists said in 2005 about the JARPA II proposal. This 2009 review then goes on to state in relation to sample size [tab 36] [next screen]:

> "An evaluation of sample sizes depends on each of the objectives being better specified, with an identification of those quantities that need to be estimated to achieve the objectives . . . The precision of the estimate and its relation to sample size and sampling design should be determined. Such an analysis is a pre-requisite for an evaluation of the appropriateness of the sample size and sampling design."[145] [Screen off]

69. A "prerequisite" — that is a review panel of the Scientific Committee. What they concluded was that a "much more thorough approach is warranted and should be carried out as soon as possible" — that is 2009. And they then said, until that more thorough approach was carried out and completed, the panel is "not able to provide appropriate scientific advice on the appropriateness of the sample sizes"[146]. In other words, they said we cannot complete the review, because you have not given us the detailed information that we need. Later that year the matter went to the Scientific Committee, and the Scientific Committee "expressed concern that the Panel was not provided with the information and guidance necessary to review progress, to draw conclusions on sample size and to assess the effects on two of the stocks"[147].

70. Mr. President, Members of the Court, that was four years ago; that was in 2009. Has Japan provided the quantified short-term objectives that the review panel asked for in 2009, four years ago? It has not. The review is still outstanding, because of Japan's failure to better specify its objectives, or provide the information necessary to assess sample sizes. Now, I want to be clear about this, this is the very same point that has emerged as central in this case, and the subject of so many of your questions. That should provide, if nothing else, some reassurance that the Court has

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[144] "Report of the Expert Workshop to Review the Ongoing JARPN II Programme", *J. Cetacean Res. Manage. 11 (Suppl. 2)2010*, 405-449 (SC/61/Rep.1), available at: http://iwc.int/workshop-reports#!year=2009, p. 430.

[145] *Ibid.*, p. 432.

[146] *Ibid.*, pp. 427, 432.

[147] "Report of the Scientific Committee" (2009), *J. Cetacean Res. Manage. 11 (Suppl. 2)* 2010 (available at: http://iwc.int/scientifc-committee-reports), p. 77.

correctly identified — individual Members of the Court are thinking about — some of the central failings of the JARPA II programme. Japan says in response to this that you should await the 2014 Annex P review. What it has not told the Court is that when the same review went on, nothing happened and the review could not be completed. It knows very well, on the Japanese delegation and the Japanese counsel, that when the review is carried out next year, it will not be capable of being completed because of the programme's ill-defined and vague objectives and the problems of the setting of sample sizes. That is, in effect, what Professor Walløe and Professor Mangel have told you.

71. For all these reasons, we say that it is plain that the JARPA II programme, as conceived and implemented, is not a programme "for purposes of scientific research". In the absence of any questions being explored, the methodologies cannot be assessed for their appropriateness, and they cannot be peer reviewed. That is not science.

(V) The application of the criteria: the remaining questions

72. I turn now to the remaining questions that arise under Annex Y and Resolution 1995-9. Even assuming that JARPA II could be treated as a scientific programme — and we say it cannot — it just plainly does not meet the criteria of Annex Y that were applied in 2005, or the criteria of Annex P, including Resolution 1995-9, that would be applied now.

73. I can deal with these points quite briefly, as I have covered the evidential material. Japan has to demonstrate that the JARPA II proposal is being made in "exceptional circumstances". There is simply no evidence before the Court to show that this programme is "exceptional". Indeed, it is the very opposite of exceptional, a regular programme that is intended to operate year in, year out, with scientific permits being spewed out by a photocopier, without any changes, no accommodation of any outcome, is not an exceptional programme.

74. Next, Japan has to demonstrate the JARPA II programme addresses critically important issues, as noted by Judge Bhandari's question. It has manifestly failed to do so. Professor Walløe was offered an opportunity to identify the critical needs, he could not identify any. He confirmed that the Scientific Committee had not identified a long-term project to monitor the Antarctic

ecosystem as a critical research need[148]. Again, he told the Court he opposed the plan to kill fin or humpback whales. Of the 18 fin whales, he said there is "no information you can get from it"[149]. Remove the fins and the humpbacks from JARPA II, you no longer have a multi-species programme. Professor Walløe plainly does not support the JARPA II programme as a multi-species programme, as it is conceived. On his view, it cannot be said, therefore, to address critical needs.

75. Next, Japan has to show that the questions cannot be answered by analysis of existing data. Here Japan faces another obstacle: since the programme has not identified the question that it seeks to answer, there is no way of knowing whether those questions can be answered by existing data. Japan has, in effect, disabled itself from showing that the existing data will not be sufficient.

76. Finally, Japan has to show that the questions it seeks to address cannot be answered by non-lethal techniques. This, of course, overlaps with one of the criteria identified by Professor Mangel, which I have already addressed. But, once again, in the absence of questions or hypotheses, it is difficult to see how Japan can stand before this Court with a straight face and claim that it can only achieve its objectives by killing whales. Alternatives exist, as Professor Walløe confirmed.

77. Australia has shown that the accepted approaches of taking biopsy samples and attaching satellite tags are feasible[150] and at its meeting last month, the Scientific Committee commended all of this work[151]. I do not think we need to say anything more about that.

78. Professor Boyle by contrast, tells you that certain data can only be attained by killing whales, and that that data is needed, as he puts it, "to facilitate an understanding of minke whale population dynamics"[152]. Notice he said nothing about fin and humpback whales. I have already addressed how the use of JARPA and JARPA II has proved to be unreliable as a means for attempting to undertake population dynamics, or catch-at-age, modelling[153]. But you will have

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[148]CR 2013/14, p. 37 (Walloe).

[149]*Ibid.*, p. 44 (Walloe).

[150]Gales, Expert Statement, paras. 6.14-6.17; Gales, Response to Prof. Walloe, paras. 2.1-2.18.

[151]"Report of the Sub-Committee on In-depth Assessments", Ann. G to "Report of the Scientific Committee Annual Meeting 2013" (available at: http://iwc.int/screport), p. 5.

[152]CR 2013/15, p. 59, para. 57 (Boyle).

[153]See paras. 61-62, above.

noted that Professor Boyle said nothing about the population dynamics of fin and humpback whales. Indeed, Japan's counsel seem to have said nothing about these two species, and this part of JARPA II's programme appears, on the basis of the first round, to all intents and purposes, to have been abandoned. Not one counsel for Japan stood at the Bar and argued for any right to kill fin or humpback whales in terms. In the light of Professor Walløe's testimony, that part of the JARPA II programme is plainly indefensible and, in the first round, undefended. We look forward to hearing the efforts of counsel for Japan to contradict the clear evidence of Professor Walløe.

79. Before I turn to my conclusion, I would like to answer the question put yesterday by Judge Cançado Trindade. You asked, Judge, whether a programme that utilizes lethal methods can be considered "scientific whaling". Professor Akhavan had, last week, told the Court that "Australia is categorically opposed to lethal sampling"[154]. Those are his words. That is not right and that is not fair. Australia does not consider that the use of lethal methods would, as such, mean that a programme could not be characterized as "scientific whaling", as Australia is not absolutely opposed to the killing of whales in all circumstances. And Professor Akhavan knows that. In relation to aboriginal subsistence whaling, for example, Australia consistently votes in support of quotas when they are supported by science and in accordance with IWC rules and procedures. He can smile to you now but, in 2012, Australia voted for the reissuing of quotas for aboriginal subsistence whaling quotas for the United States, for Saint Vincent and the Grenadines and for the Russian Federation. In relation to Article VIII, as he knows, Australia put forward a proposal in 2009 that allows for lethal means if absolutely needed and all strict conditions are met[155] — you can find that proposal at tab 37 of your folders. So when he tells you that Australia is categorically opposed to lethal sampling, he knows that is not true. In short, Australia would not exclude support for scientific whaling that used lethal methods, provided that all the conditions under the IWC rules and procedures had been met, including that the programme could genuinely be characterized as being "for purposes of scientific research". That is plainly not the case in this matter. I need say no more.

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[154]CR 2013/12, p. 47, para. 28 (Akhavan).

[155]Government of Australia, "Addressing Special Permit Whaling and the Future of the IWC", doc. IWC/61/9, presented to the 61st meeting of the International Whaling Commission, 2009 (available at: http://iwc.int/index.php?cID=1744&cType=document).

(VI) Conclusions

80. Mr. President, the meaning of "scientific research" is at the heart of this case, and science is a subject on which Japan has a remarkably distinguished community. I checked and saw that 16 Japanese scientists have been awarded the Nobel Prize in the sciences, seven in the last five years alone[156]. Japan's National Institute of Polar Research does significant work in the field; only a small proportion of its budget — less than 1 per cent — is drawn from research revenue and self-generated income[157].

81. If JARPA II really was science, you would have evidence before you on the interactions between the ICR and the NIPR. We would have heard from this distinguished community of scientists, who would be totally independent of JARPA and JARPA II, who would have come to appear before you, as Professor Mangel did. No one came, no one stood before you to support Japan's claim.

82. I invite this Court and its Members to suspend disbelief for a further moment. If JARPA II was truly a programme for scientific research, Japan's pleadings would have included the following nine elements:

(1) Evidence that JARPA II as a proposal was peer reviewed before it was sent to the Scientific Committee in 2005;

(2) Objectives for JARPA II that set out clearly the questions (or hypotheses) that the programme of research sought to explore, accompanied by evidence to explain why those questions were selected, why other questions were discarded, and how those questions informed the methodologies that were proposed;

(3) Evidence to identify and explain any changes that were made to the objectives of JARPA II in light of the results of JARPA;

(4) Evidence to explain why the annual take was increased from 300 or 400 minke whales to 850 minke whales;

(5) Evidence to support the claim that non-lethal take was necessary because critical data could not be obtained by other means;

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[156]See: http://en.wikipedia.org/wiki/List_of_Japanese_Nobel_laureates; and www.nobelprize.org.

[157]NIPR, "National Institute of Polar Research: 2012-13", available at: http://www.nipr.ac.jp/publication/PDF/outline2012-2013e.pdf, p. 37.

(6) Evidence to show why the research addressed one or more critical needs;

(7) Evidence to show how the figure of an annual sample size of 850 minke whales was arrived at;

(8) Evidence to show how the JARPA II multi-species programme could still function without taking any fin or humpback whales, and evidence to show how its objectives could be met when less than half the target of a single species that remains — the minke whale — is being achieved; and

(9) Evidence to show how the programmes have been adjusted, and can still be reached, in light of the failure to meet annual targets.

83. Mr. President, Members of the Court, none of this evidence is before you, you have none of this. It cannot be said that Japan was not on notice. *All of it* was needed to respond to Australia's Memorial. Japan simply cannot say it hasn't had time to gather it. There really is only one possible conclusion: the reason the evidence is not before the Court is because the evidence does not exist. And the fact that that evidence does not exist is fatal to Japan's case. There is only one possible conclusion: Japan has simply not made out its case, on evidentiary grounds, that JARPA II is "for purposes of scientific research". It is something else. This is the case of the missing evidence.

84. Mr. President, in these proceedings the Court has adopted a different approach to expert evidence, following the important and welcome decision it took in the *Pulp Mills* case. The new approach may not be immediately to everyone's liking, but undeniably it has had a significant impact on the identification and testing of the real issues before the Court. No one who was in the Court whilst Professor Walløe and Professor Mangel were examined and cross-examined could escape that view. The testing process has allowed a clear and unambiguous picture to emerge. Professor Walløe's testimony has removed many of the differences between the Parties' experts, between whom there is much common ground. That is the common ground on which the Court is able to construct a judgment in this case. Of course it is possible that the Court will decide simply to disregard the clear evidence that is now before it. We would say that that would have the most serious adverse consequences for the Convention, for the role of science in international law, and for this Court in terms of the procedures it follows. The Court has adopted a new approach, and that has produced clear evidence. On the basis of the evidence that is before you, it is impossible to

see how the Court can conclude that the JARPA II programme, as it is before the Court, can properly be characterized as being "for purposes of scientific research", within the meaning of Article VIII of the Convention. The facts do not admit of any other conclusion.

85. Mr. President, Members of the Court, that brings my submissions to a conclusion. Could I thank my junior, Kate Cook, for assisting in the considerable effort in putting this together and also the excellent lawyers in the Attorney-General's department, and in particular Michael Johnson, for the tremendous assistance I have received over the last few days. Thank you very much for your attention, and I ask you to call Professor Crawford to the Bar.

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

Mr. CRAWFORD:

JAPAN'S BREACHES NOTWITHSTANDING ARTICLE VIII

Introduction

1. Mr. President, Members of the Court, this presentation is in two parts. The first part addresses Article VIII, the basis of obligation and the standard of review, responding to Professors Pellet and Lowe and to a question put to Australia by Judge Greenwood. The second part deals with the application of Article VIII, applies what we say is the proper standard of review to the facts of the case, and addresses, amongst others, the question asked by Judge Gaja last week.

A. Interpretation of Article VIII

Japan's theory of Article VIII

2. At the heart of Japan's theory of this case are two black holes. These I will name, in accordance with scientific practice, after their first discoverers, that is, the Pellet void and the Lowe vacuity. Or perhaps they are the same black hole seen from different points of view — whether that is so might be a matter for further research, hopefully not lethal.

3. The Pellet void results from the proposition that the rest of the Convention has no application to Article VIII; that once a program reaches a low threshold of scientific plausibility, it vanishes from the screen of the Convention and is sustained only by the self-evaluation of the

permitting State[158]. The target species, all three of them, disappear normatively from the Convention.

4. The Lowe vacuity results from the proposition that scientific whaling, below the same minimal threshold, is governed by a permissive régime of customary international law under which the Court's power of review is limited to scrutiny for good faith, with a strong presumption in favour of the permitting state[159]. The vast space between, on the one hand, a full-scale *de novo* review, in which the Court is the primary decision-maker standing in the shoes of the permitting State, on the one hand and, on the other hand, a preliminary, broad-brush check for good faith — that vast space — is left desert and uninhabited by law. Do not enter the Lowe vacuity, Japan warns the Court, or you may never emerge.

5. These propositions are incredible when applied to a major multilateral convention for the conservation and management of highly migratory mammals whose conservation and management in 1946 cried out, and still today cries out, for collective action. We are not dealing with sedentary or local species which can be effectively managed by a single coastal State.

6. (Tab 38) [Screen on — Whale Abundance Graphic] Mr. President, Members of the Court, we all know where high seas freedoms got the great whales. We all know where high seas freedoms and general international law got the great whales. It got them into great difficulties. Before 1939 the numbers of whales taken were falling sharply: this was because the number of remaining whales was falling sharply. The war years, during which very little whaling took place, saw little signs of recovery. In 1946, when the Convention was concluded, blue whales were at 15-20 per cent of their former abundance[160]. Subsequently things got a whole lot worse. Blue whales were on the verge of extinction — less than 1 per cent of the pre-exploitation stocks[161]. Fin whales were not much better — 1-2 per cent[162]. Humpbacks were 2-3 per cent[163]. There was a

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[158]For example, CR 2013/13, pp. 61-62, para. 5 (Pellet).

[159]For example, CR 2013/15, p. 15, paras. 5 and 8; p. 16, para. 12; pp. 21- 24, paras. 38-54 (Lowe).

[160]Mori and Butterworth, "A first step towards modelling the krill-predator dynamics of the Antarctic ecosystem", *2006 CCAMLR Science 13*, pp. 217-277.

[161]MA, Appendix 1, pp. 282-332.

[162]*Ibid.*, pp. 282-332. Estimated from CPIII (the third circumpolar survey conducted between 1991/92 and 2003/04). This estimate does not include whales north of 60°S.

[163]MA, Appendix 1, pp. 282-332.

great deal of unsubstantiated invective from Professors Akhavan and Pellet as to the iniquities of the "anti-whaling countries" who were, and remain apparently, puppets of Australia[164]. But it is a matter of profoundly important public policy when and on what terms the moratorium is to be modified — that it could be lifted entirely is out of the question, given the still perilously low numbers of blue and fin whales. The proposal in JARPA II to take an unrepresentative sample of 50 fin whales a year was indefensible — certainly Professor Walløe did not defend it[165]! Yet the JARPA II special permits which Japan annually copies and pastes are inseverable. They purport to deal with inter-species interaction, for which purpose they provide for the taking of fin whales. Yet Japan has absolutely no intention of taking fin whales in any numbers! They purport to deal with inter-species interaction, for which purpose they provide for the taking of humpback whales. Yet Japan has no intention of taking humpback whales at all! How can something at the same time be necessary and not merely avoidable but actually avoided? [Screen off]

7. This brings me back — you might think not before time — to Article VIII, to the Pellet void and the Lowe vacuity. As I said a moment ago, their interpretations are incredible. The Court would be wise not to adopt them. And this is because they create black holes in a convention which was intended as one for the collective management of a common resource and was intended to be effective. But it is indeed what they argue, in default of facts argue the law as I will now demonstrate.

The Pellet void

8. Turning first to Professor Pellet, I will just take a few extracts:

> "Leur délivrance relève d'un régime spécial, qui échappe au système de régulation par les organes établis par la CBI. Il s'agit d'un régime *spécial* réservé par la convention aux permis *spéciaux* . . ."[166]

9. There is a régime within the régime; the régime of Article VIII. That "régime" escapes from the system of regulations established by the Convention. And again:

> " . . . l'article VIII a toujours été entendu comme soustrayant la chasse à des fins scientifiques au pouvoir normatif de la commission."[167]

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[164]For example, CR 2013/12, pp. 48-49, paras. 32-39; pp. 53-54, para. 52; pp. 55-56, paras. 57-58 (Akhavan); CR 2013/16, p. 40, paras. 8-9 (Pellet).

[165]CR 2013/14, pp. 44-47.

[166]CR 2013/13, pp. 61-62, para. 5 (Pellet).

"*Soustrayant*". In other words the régime of special permits escapes the régime of the Convention in effect by a side door, a side door which is very easily opened. Article VIII is understood — Professor Pellet does not say by whom — as *soustrayant*, subtracting, scientific whaling from the normative power of the Commission. It is as if the Convention contains an ejector seat, with the button in the sole custody of the proponent State, a button marked "science". But the ejector seat works so quickly that the Scientific Committee will not be in a position to assess the science — the proposal will have already disappeared into the ether.

10. In relation to the reporting obligation contained in Article VIII (1), Professor Pellet remarks: "*Cette obligation d'informer est le seul élément de «régulation collective» introduit dans la convention s'agissant de la chasse à des fins scientifiques.*"[168] This is consistent with his remark about the absence of normative authority on the part of the IWC and its subsidiary organs. They have a right to know, but only at the point of departure of the ejector seat — when it will be too late to do anything about it.

The Lowe vacuity

11. Professor Lowe expressed what is perhaps the same idea in a slightly different way, when he interpreted Article VIII as an affirmation of a pre-existing customary law right, rather than as something integral to the Convention itself. He said, for example:

> "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?'"[169]

As a corollary, the IWC and its organs lack any substantive authority in relation to scientific permits:

> "The limits imposed by Article VIII do no more than require that Japan comply with the procedural obligations set out in the Convention."[170]

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[167]CR 2013/13, p. 62, para. 6 (Pellet).

[168]*Ibid.*, p. 65, para. 17 (Pellet).

[169]CR 2003/15, p. 15, para. 8 (Lowe).

[170]*Ibid.*, para. 9 (Lowe).

I will return to these black holes in a moment. It should be noted as a preliminary point that Article VIII is not expressed as a reaffirmation of customary international law. In 1946 customary international law was the problem, not the solution. It is expressed as a power of the proponent States, qualified by the ordinary words of the Convention. Already we are in the realm of interpretation, which it was the point of the Lowe vacuity to deny.

The meaning of the Convention

12. I turn to the Convention itself, and to Professor Greenwood's question[171].

The PRESIDENT: Rather, *Judge* Greenwood, not Professor Greenwood.

Mr. CRAWFORD: I am sorry, I think of him in all his possible capacities, and I sometimes get the capacities confused.

The PRESIDENT: Please, proceed.

Mr. CRAWFORD:

I return to the Convention itself, and to *Judge* Greenwood's question. The Convention is explicitly a convention for the *regulation* of whaling. It is quite clear in offering choices to governments which do not like or are unwilling to accept regulations adopted by the Commission. Such governments can opt out of the regulation — under Article V (3). They can denounce the Convention itself — under Article XI. Otherwise they are bound. To the extent of these express provisions, the Convention — an early example of an institution-based conservation convention, probably the first — operates in classical consensual mode. But in other respects it is an advance, in that the Commission can bind member States which do not opt out by regulations adopted by a 75 per cent majority which, as amendments to the Schedule, form an integral part of the Convention — see Article I (2). The Convention is precise in specifying the rights of dissenting Contracting Governments: not merely can they opt out, but by opting out of a regulation they can postpone its binding effect for *all* the States parties for a further 90 days — in effect, six months from the adoption of the contested regulation — see Article V (3) *(b)*. During that additional

[171]CR 2013/12, pp. 63-64.

90-day period other governments, faced with any objection, may themselves object and they have a minimum of 30 days to do so. Given these provisions, to complain about the tyranny of the majority, as Professor Pellet did[172], is absurd. Governments which sufficiently dislike a measure are told quite precisely what they have to do. What they cannot do, beyond the extra 90 or at most 120 days allowed by Article V, is to prevent the majority from co-operating with each other and with the Commission and its organs in pursuit of the purposes of the Convention. Nor can dissenters impose on the majority their — by definition, unpersuasive — interpretations of those objects and purposes. Their ultimate weapon is reservation or withdrawal. Consensualism works both ways, otherwise we would have the tyranny of the minority!

13. As to those purposes of the Convention, Japan has emphasized the recovery of various whale species since the depths of 1982, and in that regard has emphasized that the provisions of the Convention and its Preamble envisage the continuing exploitation of whales. But it is a matter of judgment for the organs of the Convention how to strike the balance. And it should be stressed that the Preamble expressly recognizes the value of conservation as such and for the long run. The very first paragraph of the Preamble:

> "Recogniz[es] the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks."

Magic language.

14. The Preamble also tells a sadly familiar story of over-fishing in the second paragraph — not dated at all:

> "Considering that the history of whaling [we might say the history of fishing] has seen over-fishing of one area after another and of one species of whale after another to such a degree that it is essential to protect all species of whales from further over-fishing;"

The southern hemisphere has seen this pattern repeatedly — new stocks, whether of southern bluefin tuna, Patagonian tooth fish, orange roughy or whatever, discovered and over-exploited to the point of stock collapse. No doubt minke whales were on some way along that morbid trajectory — just how far along is not clear. It is worth noting that overfishing can occur quickly and recovery is slow, especially with species that inhabit the higher latitudes.

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[172]CR 2013/16, p. 61, para. 58 (Pellet).

Article VIII in its context

15. Japan concedes that the ICRW régime is comprehensive: it agrees

> "with the proposition that the object and purpose of the Whaling Convention . . . was 'to establish a comprehensive regime to provide for the proper and effective conservation and recovery of all whale stocks', subject of course to the special position occupied by Article VIII"[173].

But if what Japan says about Article VIII is correct that proposition cannot hold. A "comprehensive regime" subject to a comprehensive escape clause of an effectively self-judging character is hardly a régime at all. The ejector seat cancels out the capsule; as one régime excludes the other.

The legal bases of Australia's claim

16. In the first round, Judge Greenwood asked Australia to clarify precisely the source of obligation in the present case[174]. I apologize if I was not sufficiently clear on this. In truth, the position is relatively straightforward. There are four propositions:

(1) The Convention, including the Schedule, is binding on both Australia and Japan in its entirety.

(2) Regulations made under Article V, passed by the relevant majority, are binding upon the parties unless they are validly objected to in accordance with the clear provisions of Article V — which I have recited.

(3) Other action of the IWC or its organs is recommendatory only, and not binding. But this does not mean that it is without legal significance. You pointed that out in the Advisory Opinion on *Threat or Use of Nuclear Weapons*[175]. As stated in the leading French textbook "même leur valeur juridique n'est pas négligeable"[176]. Although to hear Professor Pellet last week, one would have thought that that statement was incorrect. The precise weight to be afforded to such recommendations is a matter for the Court, and generalizations are of limited use. But in this respect, Australia agrees with the helpful observations made by the Attorney-General of New Zealand on Monday[177].

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[173]CR 2013/13, p. 40, para. 7 (Boyle).

[174]CR 2013/12, pp. 63 –64.

[175]*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 254.

[176]P. Daillier, M. Forteau, Q. D. Nguyen, A. Pellet, *Droit international public* (8e), (Paris, *LGDJ*, 2009), p. 415.

[177]CR 2013/17, pp. 30-31, paras. 51-54 (Finlayson).

(4) There is no better statement of this juridical value of recommendations than the separate opinion of Judge Sir Hersch Lauterpacht in the *Voting Procedure* case which I cited in the first round, and which Japan also cited with approval[178].

The standard of review

17. This brings me to the issue of the standard of review.

18. Reasonable as Professor Lowe made it sound, the effect of his argument was that the Court's role is limited to a preliminary check for apparent good faith[179].

19. Mr. President, Members of the Court, allegations of bad faith should be made only with very great caution, especially when the question is an objective one. It does not contribute to continued good relations between States for protestations of good faith or allegations of bad faith to be thrown around, nor does it contribute to the judicial process for courts to be required to find on the one hand, a dubious compliance, or on the other, an inference of bad faith.

20. In that regard, let me tell you a cautionary tale. The Southern Bluefin Tuna Arbitral Tribunal implausibly suggested that its jurisdictional decision of 4 August 2000 would have been different if Australia had been able to prove bad faith on the part of Japan[180]. Not having actual evidence of bad faith, no such allegation was made by counsel before the Tribunal. Like-minded States do not ordinarily accuse each other of bad faith. Counsel appearing for them in international courts and tribunals are bound not to do so unless they have actual evidence.

21. Yet it turns out that during this period, the period in question in the *Southern Bluefin Tuna* cases, Japan was deliberately and substantially overfishing its quota of tuna. That information was subsequently discovered by Australia after the end of the proceedings and Japan, in due course — I give it full credit — repaid its over-catch by under-catching in subsequent

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[178] *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, sep. op. Judge Lauterpacht, p. 106; CR 2013/8, p. 37, para. 37 (Crawford); and CR 2013/16, pp. 53-54, para. 42 (Pellet).

[179] CR 2013/15, p. 15, para. 5; p. 21, para. 38; p. 24, para. 54 (Lowe).

[180] Southern Bluefin Tuna case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility, Decision of 4 August 2000, *Reports of International Arbitral Awards*, Vol. XXIII, p. 46, para. 64, available at: < http://untreaty.un.org/cod/riaa/cases/vol_xxiii/1-57.pdf> on 8 July 2013.

years[181]. Order was restored — except for the jurisdictional disorder created by the unnecessary and unhappy finding of that Tribunal.

22. The lesson of this cautionary tale is that judicial review, notably in relation to resources in the public domain which do not belong even prima facie to any individual State, and which are a matter of collective interest, should not be regulated by the Court wholly or primarily on the basis of such fluctuating and subjective notions as bad faith. The normal criterion for breach of treaty is whether the terms of the treaty, or any obligations reasonably to be inferred from them, are to be applied fairly and objectively. In respect of resources in the international public domain, to recognize a wide margin of appreciation is, in effect, to allocate those resources to the exploiting State. Likewise, to operate on a strong presumption of good faith is, in effect, to allocate those resources to a State good at concealment. This all suggests that the classic objective mode of State responsibility is underpinned not merely by the actual language of a treaty such as the 1946 Convention, but by good sense and experience.

23. In this regard, it was surprising, and significant, that Professor Boyle analogized the position of Japan with respect to the whale stocks of the southern hemisphere under the Convention, with the position of Uruguay in relation to the River Uruguay under the bilateral treaty with Argentina which was concerned in the *Pulp Mills* case[182]. The 1946 Convention is a collective enterprise. It is not a bilateral treaty between Japan and the rest of the world. Japan does not "own" the whales it catches in the way that Uruguay has sovereignty over its part of the course of the River Uruguay and its banks. The whales of the Southern Ocean are subject to collective regulation on the terms of the Convention. If Japan does not like that it has choices at its disposal. What I suggest it cannot do is to invent new forms of opting out of the Convention by legal sophistry after the event.

24. Professor Lowe made two more specific arguments for deference, to Japan, which I should briefly note. First, he said that the Court is not given any specific role under the

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[181]Commission for the Conservation of Southern Bluefin Tuna, Report of the Thirteenth Annual Meeting of the Commission, pp. 10-13, Oct. 2006, Miyazaki Japan, available at: <http://www.ccsbt.org/userfiles/file/docs_english/meetings/meeting_reports/ccsbt_13/report_of_CCSBT13.pdf > on 8 July 2013. See, esp., para. 46; Att. 4-1, opening statement by Australia; Att. 4-3 opening statement by the Fishing Entity of Taiwan; Att. 4-5, opening statement by Japan.

[182]CR 2013/16, p. 36, paras. 24-25 (Boyle).

Convention[183]. In other words, there is no jurisdictional clause. But that is irrelevant. International law, including treaties, binds States independently of jurisdictional clauses, and your jurisdiction under the Optional Clause extends to determination of any legal dispute between Australia and Japan. The independence of the application of law from jurisdictional clauses has been emphasized by this Court in a series of cases. It operates in both directions. It operates to ensure that international law applies irrespective of the absence of jurisdiction as well as operating in the Germany and Italy context in the reverse way. In other words, the validity of the conduct of States, or for that matter of international organizations, is independent of the source of jurisdiction — especially so far as this Court is concerned. Secondly, Professor Lowe noted that Article VIII did not require a special permit to contain any statement of reasons[184]. Again, that is irrelevant; a special permit will only be exempt under Article VIII if it satisfies the requirements of research for scientific purposes, and it is for the State relying on Article VIII to establish that, whether by reference to the terms of the special permit or, if they are silent, by other means.

Conclusions on interpretation

25. Mr. President, Members of the Court, as I said yesterday, the questions you face are all questions of State responsibility involving the interpretation and application of a treaty. It is extravagant to read Article VIII as a sort of national security exception, couched in subjective terms, and intended to reserve core rights of sovereignty against international incursion. Of course Japan is a sovereign State, but so are the other parties to the Convention, which seeks to regulate their interaction in the matter of whaling, an issue of public interest occurring outside the jurisdiction of any single State, and not the prerogative of any single State. It is wholly inappropriate to interpret Article VIII as if the words "for purposes of scientific research" meant "for purposes the proponent State regards as scientific". It is inappropriate to interpret the words of a convention for the conservation and recovery of a group of seriously depleted species as if it gave special rights to harvest, notwithstanding the views of other parties and the best scientific advice. Japan accuses Australia of seeking to convert the Convention into a convention for the elimination

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[183]CR 2013/15, p. 24, para. 50 (Lowe).

[184]*Ibid.*, p. 21, para. 34 (Lowe).

of whaling, but Japan's interpretation carries with it a real risk of converting the Convention into a convention for the elimination of whales.

26. It is submitted that the governing principle is that of effectiveness, and that an interpretation of Article VIII which allows unrestricted, unilateral taking of whales on an indefinite basis with a view to "monitoring the Antarctic ecosystem" cannot be accepted. The solution is to maintain Article VIII as part of the Convention — which indeed it is — and to require a proper showing from proponent States that their proposals are genuinely motivated by scientific considerations and adapted appropriately to achieve scientific goals. Similarly, it is submitted that in accordance with the principle of effectiveness, the views of the IWC and its subsidiary organs must be considered seriously by proponent States, that notification is not just for the purposes of information — of saying goodbye to the escape capsule as it hurtles on its way — and that a failure to take these views seriously into account is capable of leading you to the conclusion that the project is not being carried out for the purposes of scientific research, but for some other purpose inconsistent with the Convention as it stands at the time.

27. Mr. President, Members of the Court, I should add that in characterizing this case as a normal instance of treaty interpretation and application, and in suggesting that the Court can decide it without getting into invidious and subjective questions of bad faith, I do not suggest that these would be irrelevant if duly established. You do not need to decide them, but you could decide them. The Attorney-General will return to this issue this afternoon.

Mr. President, that completes part A of my presentation; this would be a convenient moment to break.

The PRESIDENT: Thank you, Professor Crawford. The Court will return at 3 o'clock, so you can continue.

Before adjourning, I understand that Judge Greenwood has a short factual question relating to this morning's presentation by Australia. So, I give him the floor. Judge Greenwood, please.

Judge GREENWOOD: Thank you very much, Mr. President. I apologize if the answer to my question is already in the papers and I have missed it. But would Australia this afternoon please explain to the Court:

"After 63 scientists decline to participate in a review of JARPA II, how many members of the Scientific Committee were left?"

Thank you, Mr. President.

The PRESIDENT: Thank you. It would be appreciated if the answer is provided this afternoon, and certainly, Japan will have the opportunity to comment if it so wishes. The text will be sent to both Parties as soon as possible. Thank you. The sitting is adjourned.

The Court rose at 12.55 p.m.