Corrigé
Corrected

CR 2013/20

International Court of Justice

LA HAYE

Cour internationale de Justice

THE HAGUE

YEAR 2013

Public sitting

held on Wednesday 10 July 2013, at 3 p.m., at the Peace Palace,

President Tomka presiding,

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

VERBATIM RECORD

ANNÉE 2013

Audience publique

tenue le mercredi 10 juillet 2013, à 15 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

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

COMPTE RENDU

Present:	President	Tomka
	Vice-President	Sepúlveda-Amor
	Judges	Owada
		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 afternoon. The sitting is open and I give the floor to Professor Crawford to continue with his presentation of Article VIII. After having provided interpretation he is now to speak about the application. You have the floor, Sir.

Mr. CRAWFORD: Thank you, Mr. President.

B. Application of Article VIII

28. Mr. President, Members of the Court, I turn to the question of the application of the Convention, notably Article VIII, to the present case.

29. I first note four points of apparent common ground:

(1) First, the Convention only contemplates three types of whaling[1].

(2) Secondly, the Convention establishes a comprehensive régime[2].

(3) Thirdly, that Article VIII is an integral part of the Convention, although that view was not apparently shared by all counsel[3].

(4) Fourthly, that Article VIII is an exception: "l'article VIII . . . constitue une exception au regard des autres règles applicables à la chasse à la baleine, contenues dans la convention . . ."[4].

30. So, there are two questions: is JARPA II a scientific research program within Article VIII, and is it conducted for the sole purpose of such research?

JARPA II is not a scientific research program: the scientific research requirement

31. As to the first point, JARPA II is not a program of scientific research capable of being justified by Article VIII. The Solicitor-General and Professor Sands have already highlighted this morning the total lack of independent or objective evidence led by Japan to answer fundamental questions concerning the conduct of its supposed "research", questions which require a credible scientific answer. I will not repeat what they have said on those matters.

32. I will only make three further points.

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[1]CR 2013/12, p. 44, para. 14 (Akhavan).

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

[3]CR 2013/13, p. 65, para. 17 (Pellet).

[4]CR 2013/14, p. 60, para. 36 (Pellet).

(1) An endless program involving an uncounted number of whales

33. The first point involves the possible character of the program in terms of whether it is a continuing program or not. The evidence has established that a scientific research program should have a reasonably well-defined goal and a reasonably well-defined endpoint. "Monitoring the Antarctic ecosystem", is something one could do until the day of Judgment — and I do not refer to your judgment. In the context of Article VIII of the Convention, monitoring the Antarctic ecosystem is not a scientific research program: it is something that could go forever. If it were a scientific research program, any State party could kill at any time, any number of whales for monitoring purposes. The Convention disciplines would break down completely. The simple fact is that JARPA II is an endless program involving an uncounted number of whales.

34. In this context Judge Cançado Trindade asked last week whether one could determine the *total* number of whales to be killed to attain such objectives[5]. Professor Boyle asserted, quoting the JARPA II plan, that JARPA II "will last for six years and, at the end of that period, 'a review will be held and revisions [will be] made to the program if required'"[6]. On this basis, Japan would have you believe that JARPA II might end following its 2014 review.

35. But this suggestion is contradicted by the plain terms of the plan, as quoted by Professor Boyle[7]. How can a research program be said have a defined six-year term, when the plan expressly states that the program will be *revised*, if required, following the review held at the end of that time? It is revised in order to be continued.

36. Professor Boyle's suggestion is also entirely inconsistent with Japan's characterization of the JARPA II research period in the Counter-Memorial: "JARPA II is a long-term research programme *and has no specified end date* because its primary objective [that is to say, monitoring the Antarctic ecosystem] requires a continuing programme of research."[8] (Emphasis added.) It is further contradicted by Japanese ministerial statements confirming their determination to perpetuate the program until the moratorium is lifted. For example, in May 2011 the Senior

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[5]CR 2013/14, p. 51.

[6]CR 2013/15, p. 51, para. 24 (Boyle).

[7]Government of Japan, "Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) — Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources", 2005, SC/57/O1, p. 13; MA, Ann. 105.

[8]CMJ, para. 5.42.

Vice-Minister of Fisheries confirmed that "we at MAFF are determined to continue [JARPA II] until commercial whaling is resumed, whenever that may happen"[9]. I quoted this in our first round: Japan in its first round neither explained nor denied it.

37. Accordingly, the answer to your question, Judge Cançado Trindade, is: an unknown and indefinite number of whales will be taken under JARPA II.

(2) The real reasons for JARPA and JARPA II catch limits

38. My second point concerns the real reason for JARPA and JARPA II catch limits.

39. Australia has already established the total lack of clarity in Japan's purportedly scientific method for determining sample sizes[10]. The scientific façade Japan has attempted to construct, in purported reliance on an undergraduate text on mathematical statistics[11], does not stand up to scrutiny, as Professor Sands has shown. But we have historical evidence as well. Let us return briefly to the beginning of this story, and look at Japan's internal discussions in determining the initial catch limits for JARPA.

40. Upon taking the decision to withdraw its objection to the moratorium, as required by the exchange of letters with the United States in 1984[12], Japan began to devise a "research" plan, which would enable it to continue whaling in the Southern Ocean. In describing the process for arriving at the sample size for this program, the Japanese IWC Commissioner, Tatsuo Saito, recalls (tab 39):

[Screen on: graphic of Saito quote]

> "As I saw it, the research had to be something that made proper sense. At the time, the commercial whaling quota was . . . about 1,800, so my gut feeling was that [the research quota] would be somewhere between 400 or 500. So I asked Mr. Ikeda (then General Manager, Deep Sea Fish Wild Resources Department, Institute of Far Seas Fisheries; first Director-General of the ICR) to draw us up a research plan. Mr. Ikeda said that the quota would be 825."[13] [Screen off]

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[9]Government of Japan, Minutes of the Second Meeting of the Committee on the Whale Research Program, 17 May 2011, Statement by Committee Chairman, Nobutaka Tsutsui, Senior Vice-Minister of Agriculture, Forestry and Fisheries, pp. 9-10; CR 2013/10, p. 51, para. 32 (Crawford).

[10]CR 2013/9, pp. 24-28 (Sands); CR 2013/10, pp. 42-43, paras. 6-10 (Crawford); CR 2013/14, pp. 41-47.

[11]CR 2013/15, pp. 62-64 (Boyle).

[12] CR 2013/10, pp. 49-50, paras. 27-29 (Crawford).

[13]*The Institute of Cetacean Research — The First Ten Years* (ICR, Tokyo, 30 Oct. 1997), pp. 85-86 (Tatsuo Saito, former Japanese Commissioner to the IWC), Whaling Library website: http://luna.pos.to/whale/jpn_zadan1 and http://luna.pos.to/whale/jpn_zadan2 on 8 July 2013.

41. One high level official remembers Mr. Saito's involvement in determining JARPA's sample sizes as follows:

> "I can remember clearly what Mr. Saito said at the time. He pointed out in very strong terms that, since the commercial whaling take was 1,900 whales, if we were to take 1,700 whales for the research, then nobody would believe it was research, and that it would be nothing more than a name change.
>
> . . . . . .
>
> Mr. Saito said that he thought that about 500 would be probably the maximum at the start."[14]

42. In fact, Japan established catch quotas of 825 minke whales and 50 sperm whales in the original proposal[15]. Six months later, it significantly reduced these sample sizes[16]. The reduction, like the original setting, was not dictated by scientific considerations. Again, I would describe the reasons for the reduction in the words of another person involved, Kazuo Shima, another Japanese IWC Commissioner, who said:

> "It was after the 1987 meeting ended that the sample number was decided at 300. There was a Cabinet Meeting prior to Prime Minister Nakasone's departure for a visit to the United States, and in addition to the outcomes of the Scientific Committee, it was decided to reduce the sample number in consideration of relations with the United States. . . . I will never forget that, when we went to brief Mr. Tanaka [a leading Japanese whale scientist], his response was, 'It's all right for you bureaucrats. Scientists need to conduct surveys with numbers that have significance scientifically.'"[17]

43. This dialogue, drawn from a roundtable held in Japan and published in the Institute of Cetacean Research, firmly establishes that Japan did not have scientific considerations in mind

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[14]*The Institute of Cetacean Research — The First Ten Years* (ICR, Tokyo, 30 October 1997), p. 91 (Junichiro Okamoto, Director, Fisheries Conservation Division, Japan Fisheries Agency; Director, Ecosystem Conservation Office), Whaling Library website: http://luna.pos.to/whale/jpn_zadan1 and http://luna.pos.to/whale/jpn_zadan2 on 8 July 2013. See also Kazuo Shima, IWC Commissioner; Chairman, Japan Fisheries Resource Conservation Association, p. 91.

[15]Government of Japan, "The Program for Research on the Southern Hemisphere Minke Whale and for Preliminary Research on the Marine Ecosystem in the Antarctic", 1987, SC/39/04; MA, Ann. 156.

[16]Government of Japan, "The Research Plan for the Feasibility Study on 'The Program for Research on the Southern Hemisphere Minke Whale and for Preliminary Research on the Marine Ecosystem in the Antarctic'", Oct. 1987, SC/D87/1.

[17]*The Institute of Cetacean Research — The First Ten Years* (ICR, Tokyo, 30 October 1997), p. 91 (Shima, IWC Commissioner; Chairman, Japan Fisheries Resource Conservation Association), Whaling Library website: http://luna.pos.to/whale/jpn_zadan1 and http://luna.pos.to/whale/jpn_zadan2, on 8 July 2013.

when devising catch limits for JARPA. The catch limits were set by "bureaucrats"; the number of 300 was devised for political considerations and to avoid criticism[18].

44. The sample sizes for JARPA II are no more scientifically defensible than those of its predecessor. Japan has yet to provide *any* explanation why, when setting its sample sizes for JARPA II, it more than doubled the sample size [for minke whales] up to 850 whales. This only emphasizes the continuity between JARPA — which Professor Walløe did not even attempt to defend[19] — and JARPA II. We look forward to hearing Japan attempt once more a scientific explanation of its sample sizes next week, though, of course, without new evidence.

(3) Why Japan's JARPA II research objectives do not account for JARPA II

45. I turn to my third point. The plain fact is that JARPA II research objectives do not account for JARPA II.

46. If Japan had been really serious about scientific research on the Antarctic ecosystem it would have focussed on:

(a) first, developing a preliminary ecosystem model to guide program design and identification of the items of study;

(b) two, identifying breeding grounds and estimation of whale movements using satellite tracking and biopsy samples;

(c) three, collecting sighting data using standard methods to achieve an agreed abundance estimate for numbers of whales and not only minke whales.

47. But in fact as to each of those things, first:

(a) an agreed estimate based on IDCR/SOWER data was not achieved until 2012[20], many decades later;

(b) the abundance estimate which was achieved in 2012 did not derive from JARPA data[21];

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[18]"Fisheries Agency Director-General Told by Prime Minister: Do Scientific Whaling that Won't be Criticised", *Asahi Shimbun*, 26 April 1987 (morning edition), 2; MA, Ann. 127. See, also, T. Kasuya, "Japanese Whaling and Other Cetacean Fisheries", (2007) 14 (1) *Env. Sci. Pollut. Res.* 39, 45-6; MA, Ann. 77.

[19]CR 2013/14, p. 50.

[20]Report of the Scientific Committee, *J. Cetacean Res. Manage. 14 (Suppl.)*, 2013, 27.

[21]*Ibid*, 26-29.

(c) and this condemns JARPA as a scientific programme in and of itself, after 25 years of JARPA effort, we do not know whether minke numbers are (i) stable; (ii) increasing, or (iii) decreasing; all three scenarios are possible on the basis of the existing knowledge[22];

(d) we know more about humpback numbers than we do about minke numbers, despite the following JARPA/JARPA II death tally — minkes, 10,410; humpbacks, zero.

48. If Japan had been really serious about scientific research on the Antarctic ecosystem, it would also have focused on obtaining a much better understanding of krill distribution and abundance.

49. But in fact:

(a) there has only been one collaboration between JARPA and a krill survey by the Far Seas Fisheries Research Laboratory during the 18 years of JARPA (that was published in 2013)[23];

(b) JARPA II has put no more than a token effort into studying krill.

There are in fact excellent Japanese krill scientists but, this one paper aside, there is little evidence of contact between them and JARPA scientists. I refer in that context to Judge Keith's question last week[24].

Conclusion on the scientific research requirement

(Tab 40) [Screen on — Annual quota and take numbers]

50. To conclude on the scientific research requirements, for all these reasons, in addition to those given by the Solicitor-General and Professor Sands, JARPA II is not a program of scientific research for which a special permit under Article VIII can lawfully be granted. There is no testable hypothesis, no relation between means and ends, no peer review, no calculation of the need for lethal taking, no endpoint in sight.

51. But I would add something here, and it is a slightly different way of looking at the same problem. Even if JARPA II as proposed, and that is what is in the special permits, was a scientific

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[22]"Report of the Sub-Committee on In-depth Assessments", Ann. G to the "Report of the Scientific Committee Annual Meeting 2013", p. 4, available at <http://iwc.int/screport> on 8 July 2013.

[23]Murase, J., Kitakado, T., Hakamada, T., Matsuoka, K., Nihiwaki, S., and Naganobu, M., "Spatial Distribution of Antarctic minke whales (*Balaenoptera bonaerensis*) in relation to spatial distribution distributions of krill in the Ross Sea, Antarctica", 2013 *Fisheries Oceanography* 22, 154-173.

[24]CR 2013/14, pp. 57-58.

programme — *quod non* — there is a glaring discrepancy between the special permit and the actual conduct of the program. It is such that it cannot be said that "the killing, taking, and treating of whales in accordance with" the permit is occurring within the meaning of Article VIII. Article VIII requires that the "the killing, taking, and treating of whales" be in accordance with the permit. What is happening bears no relationship to the permit. You can see from the table which shows the annual quota and take numbers (tab 41 in your folders), that "the killing, taking, and treating of whales" bears no relationship to the research program envisaged by the permit. This was a multi-species program aimed — I am putting it charitably — at monitoring competition between different predators. In fact in the last four years the percentage of the whales taken by the three species for which the special permit is granted is: minkes, 30.7 per cent; fin whales, 2 per cent; humpbacks, 0 per cent. The special permit is indefensible in its own terms; but the JARPA II program bears no relationship to the special permit. This is not science; it is random hunting and gathering. But from another perspective it is not so random; it is attuned to the wavering Japanese market for whale meat. [Screen off]

The purpose requirement: JARPA II is conducted for commercial purposes

52. Mr. President, Members of the Court, that brings me to the second requirement for the invocation of Article VIII, which is that the real purposes of the program be scientific and not any other purpose or purposes. In particular, with a moratorium in force prohibiting the taking of whales for commercial purposes, a moratorium which is part of the system of the Convention as it stands, Article VIII cannot be used to authorize conduct which is actually commercial or significantly motivated by commercial considerations. But JARPA II is a commercial operation; it is materially motivated by commercial considerations. There are five points here.

(1) Japanese conduct in commencing JARPA

53. First there has been considerable discussion by both Parties about the process of introduction of JARPA at the same time as the moratorium came into effect for Japan. Both sides agree that this was no coincidence: they disagree as to the inference to be drawn from that fact[25]. I

[25]CR 2013/8, p. 61, para. 15 (Sands); CR 2013/10, p. 50, para. 28 (Crawford); CR 2013/12, p. 50, para. 41 (Akhavan); CR 2013/13, p. 23, para. 41 (Hamamoto); CR 2013/16, p. 25, para. 32 (Iwasawa).

need to say something more about this, but I would first observe that the transition from JARPA to JARPA II is actually much more important, and on this Japan has much less to say.

54. Last week, Japan was asked by Judge Bhandari to comment on a statement translated by Australia, as follows: "[t]he implementation of scientific whaling was viewed as the *only method available to carry on* with the traditions of whaling"[26] (emphasis added). Japan's response was that Australia had been "misleading" — a rejoinder it seemed to apply indiscriminately to *all* Japanese Ministerial and officials' statements which we cited as evidence of Australia's case[27], and it is evidence. The serious allegation — that Australia had misled this Court — had two bases, according to Professor Iwasawa[28]. The first was that Australia had mistranslated this statement, and that it properly read: "scientific whaling was viewed as the only method to *pass on* the tradition of whaling" (emphasis added).

55. I am instructed, not ~~being~~ knowing Japanese myself I regret to say, that Australia's translation is defensible and not inaccurate, but that Japan's is better. Although the nuance of the interpretations may be different, both signify that special permit whaling was the only method available for Japan to continue its whaling traditions. This is hardly grounds for an allegation of misrepresentation.

56. The second basis for Professor Iwasawa's allegation is equally groundless. This is Japan's unsubstantiated assertion that "under paragraph 10 *(e)*, special permit whaling was indeed the *only method available for Japan to achieve the lifting of the moratorium* . . ."[29]. Now that is a mere assertion, which we reject. Japan's own conduct in authorizing and implementing JARPA for 18 years belies the truth of this statement. In 1987, before the commencement of JARPA, the IWC adopted no less than eight Resolutions which noted that JARPA would not materially contribute to the comprehensive assessment nor contribute information required or essential for the rational management of the relevant whale stocks[30]. If Japan had wanted to contribute to the lifting of the

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[26]G. Satake, *Japanese Fisheries and Overseas Fisheries Cooperation in the Era of Globalisation* (Seizankdo-Shoten Publishing Co. Ltd, 1997), 113 [MA, Ann. 75].

[27]CR 2013/16, pp. 21- 22, paras. 22- 23; pp. 24- 25, paras. 29 and 31 (Iwasawa).

[28]CR 2013/16, p. 24, para. 29 (Iwasawa).

[29]*Ibid.*; emphasis added.

[30]Resolution 1987-4 [MA, Ann. 10]; Resolution 1989-3 [MA, Ann.16]; Resolution 1990-2 [MA, Ann. 18]; Resolution 1991-2 [MA, Ann. 19]; Resolution 1992-5; Resolution 1993-7 [MA, Ann. 21]; Resolution 1994-10 [MA, Ann. 25]; Resolution 1997-5 [MA, Ann.29].

moratorium, there were different things it could have done, most of which it did not do. In addition, as Professor Sands noted last week, Resolution 1995-9 recommended that "scientific research intended to assist the comprehensive assessment of whale stocks and the implementation of the Revised Management Procedure *shall be undertaken by non-lethal means*"[31]. Yet Japan persisted with JARPA, killing 6,777 whales in the process, purportedly in pursuit of "research" to lift the moratorium, research which the IWC repeatedly affirmed was not required for management, and therefore not relevant to the lifting of the moratorium. This was borne out in 2007, when the IWC noted the failure of the program to meet any of its objectives or to obtain any results which were required for management under the RMP, and therefore relevant to the moratorium[32]. But by this time, Japan had already transitioned, without pause or proper review, into the conduct of JARPA II.

57. Professor Iwasawa also asserts that numerous statements cited by Australia, quoting Japanese Ministers and officials and stating their determination to continue whaling "in some form or another"[33], are "taken out of context and misrepresented"[34]. He says that: "[d]uring the period between 1982 and 1987, different views were expressed as to the future of Japan's whaling. The views supporting the continuation of whaling need to be read in this context."[35]

58. I invite you to turn to the Chronology of the years 1982 to 1987 at tab 42.

— On 17 March 1982, Japan's Prime Minister affirmed: "The Government intends to place even greater efforts than it has to date into the protection and growth of the whaling industry into the future."[36]

— In July 1982, the IWC adopted the moratorium.

— In early 1984, a select group of individuals were asked by the Government to make a plan for the conduct of scientific whaling, on two conditions:

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[31]CR 2013/ 10, p. 36 (Sands); emphasis added.

[32]Resolution 2007-1 [MA, Ann. 41].

[33]CR 2013/10, pp. 50-51, para. 31 (Crawford); MA, paras. 3.18-3.19.

[34]CR 2013/16, p. 24-25, para. 31 (Iwasawa).

[35]CR 2013/16, p. 25, para. 31 (Iwasawa).

[36]Government of Japan, *National Diet Debates,* House of Councillors — Budget Committee — No. 10, 17 March 1982, Speaker: 23/360 (Zenkō Suzuki, Prime Minister) [MA, Ann. 88].

(1) the project had to be "self sustainable", funding its continued operations through the sale of whale meat; and

(2) the project had to require a "long period perhaps ~~under~~ until the reopening of commercial whaling"[37].

— July 1984 — About six months later, the Study Group recommended that Japan "should seek the understanding of relevant countries for Japan to undertake scientific whaling"[38] in that precise context.

— August 1984 — The Director-General of the Japan Fisheries Agency stated in the Diet, "the path to ensure the continuation of whaling would be, for Southern Ocean whaling, to *position it* as a research whaling activity"[39] (emphasis added).

— 1 May 1987 — the moratorium came into effect for Japan[40].

— January 1988 — JARPA came into force.

There is no element here of scientific planning; there is every element of continuing whaling into the future for other reasons. This is the "context" for the statements of Japanese determination to continue whaling "in some form or another". I will leave the Court to draw your own conclusions.

(2) Alleged contrast with commercial whaling

59. (Tab 43) [Screen on - Iwasawa Graphic — Japanese Catches] Japan argued, again through my good friend and colleague, Professor Iwasawa, that JARPA II is not a commercial operation because the catch limits fall well below those of the period of commercial whaling[41]. You will remember the graphic he showed which seemed so striking. It is certainly true that the

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[37] T. Kasuya, "Japanese Whaling and Other Cetacean Fisheries", (2007) 14(1) *Env Sci Pollut Res* 39, 45-46; MA, Ann. 77.

[38] MA, Ann. 98; Whaling Issues Study Group, *Report on Preferred Future Directions for Japan's Whaling* (July 1984) in *New Policy Monthly* (August 1984) 108.

[39] MA, Ann. 92; Government of Japan, *National Diet Debates*, House of Representatives - Agriculture, Forestry and Fisheries Committee — No. 27, 2 Aug. 1984, Speaker: 211/342 (Hiroya Sano, Director-General, Fisheries Agency).

[40] MA, Ann. 54; IWC Circular Communication RG/VJH/16129, "Withdrawal of Objection to Schedule Paragraph 10 *(e)* by Japan", 1 July 1986 enclosing Note from the Ambassador of Japan to the United Kingdom to the Secretary of the International Whaling Commission, 1 July 1986.

[41] CR 2013/16, p. 28, para. 40 (Iwasawa).

catch limits for JARPA II bear no relationship to the vast quantities that were taken when commercial whaling was at its height. This is not surprising because during that period of whaling the various species of whales were almost exterminated. However, if one looks at the ten years before the moratorium, the position is rather different; Professor Iwasawa's graphic did not deal with that.

60. First of all, the graphic he showed you showed all pre-moratorium commercial whaling for the whole world, whereas the areas we are interested in are the areas subject to JARPA and JARPA II operations. The relevant areas for comparison alternate annually between Areas A and B and Areas B and C — JARPA II alternates annually between those two Areas. Secondly, he showed you actual catches under JARPA and JARPA II, whereas, as you know, these actual catches — especially under JARPA II — bear no relationship to the catch targets. The presentation of graphics which are as misleading as this one does not assist the Court in reaching the correct decision. [Screen off]

61. Let me show you something more credible. (Tab 44) [Screen on — Graphic Showing Catches 1977-1986] The graphic on screen now shows you the southern hemisphere catches in the areas for the ten years prior to the moratorium coming into effect for Japan. The line on the graphic, horizontal line, represents the JARPA II upper catch limit of 935 minke whales — only minke whales were taken during this period. It will be seen that in Areas A and B the commercial catches of minke whales by Japan in this period were of the same order of magnitude as the JARPA II upper catch limit. In the three years prior to the moratorium, the position is even clearer. Looking at Areas B and C it will be seen that the upper catch limit for minkes is *higher* than the actual commercial catch for four years, and not much lower for four other years. The conclusion is that the proposed catch for scientific whaling was not much different than Japan's immediately prior commercial take, and certainly not such as to justify a different characterization of the operation.

(3) Alleged contrast with commercial whaling: JARPA tracklines

[Iwasawa Trackline Graphic]

62. Third point: Japan alleged in the first round that "in JARPA II, research vessels faithfully follow a scientifically predetermined trackline set across every ten degrees in longitude in zigzags, with a view to obtaining meaningful research data"[42] — again with Professor Iwasawa — and he showed you this graphic on the screen (tab 45). He said "research vessels spend most of the time in low-density areas and *only about 20 per cent* of the time in high density areas"[43]. There is no authority provided for those propositions in the speech. Again we have assertions without any evidence.

[Show Cruise Report Graphic]

63. I invite you now to study the second graphic on screen, and compare it with Professor Iwasawa's graphic. The second figure shows the design of the survey trackline of the Japanese "sighting and sampling vessels" submitted by Japan in its official reports — the JARPA II Cruise Reports[44]. This figure entirely contradicts Professor Iwasawa's graphic, and the unsubstantiated assertions by Japan on the subject of trackline[45].

64. On the basis of the trackline identified in Japan's Cruise Reports, the movement of these JARPA II vessels includes 22 short legs in the high density southern stratum, and only six legs in the lower density northern stratum — 79 per cent of the legs are in the high density area. In terms of distance covered, approximately 50 per cent of the trackline is in the high density area. Given that the fleet will cover a greater distance in less time when the density is lower, the JARPA II fleet is likely to have spent considerably more than 50 per cent of its time in the productive whaling grounds of the high density area. This scenario is based on Japan's own reports to the IWC; it is the antithesis of that presented by Professor Iwasawa last week.

[Screen off]

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[42]CR 2013/16, p. 26, para. 34 (Iwasawa).

[43]*Ibid.*

[44]See MA, Ann. 57; Nishiwaki, Shigetoshi *et al*, *Cruise Report of the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) in 2005/2006 — Feasibility Study*, SC/58/O7, p. 19, Fig. 3.

[45]CR 2013/16, p. 26, para. 34 (Iwasawa); CMJ, para. 5.132.

(4) Article VIII (2) and sales of "by-product"

65. Fourth point: Japan attempts to invoke Article VIII (2) as a shield to justify the disproportionate focus of its purportedly "scientific" program on the production, sale and distribution of whale meat, and on increasing sales in the face of falling demand[46]. It proclaims that these activities are justified, and possibly *required*, by Article VIII (2)[47].

66. It further submits that the use of proceeds obtained from the sale of research "by-products" is a widely accepted practice, including by Australia[48]. However, Australian domestic legislation which permits the sale of fisheries research catch is irrelevant to the question of Japan's compliance with the express terms of Article VIII which is a question of characterization.

67. We have never claimed that the sale of "by-products" per se violates the moratorium[49]. But Article VIII (2) was written to avoid waste, not with the idea that the funds from whale meat sales on the commercial market would constitute a major contribution to the continuation of large-scale, long-term, self-sustainable programs of whaling, as Japan has attempted to arrange. It was not intended that the incidental processing of whales envisaged by Article VIII (2) become the raison d'être of Article VIII whaling.

68. The predominant influence of commercial considerations on the design and implementation of JARPA II is clear from the material I cited the other week[50]. On that basis, JARPA II falls outside the permitted scope of Article VIII (1). This approach is consistent with the views of the Commission, which stated in Resolution 2003-2: "Article VIII of the Convention is not intended to be exploited in order to provide whale meat for commercial purposes and shall not be so used[51]." That view of the Commission is entitled to considerable respect.

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[46]CR 2013/11, pp. 18-19, paras. 59-61 (Crawford).

[47]CR 2013/16, p. 16, para. 8 (Iwasawa).

[48]CR 2013/16, pp. 17-18 (Iwasawa). See also CR 2013/12, p. 60, para. 73 (Akhavan).

[49]CR 2013/16, p. 16, para. 8 (Iwasawa).

[50]CR 2013/11, p. 24, para. 82 (Crawford).

[51]MA, Ann. 38, Resolution 2003-2.

(5) Dual purpose takings

69. This brings me to Judge Gaja's question, which followed Judge Donoghue's earlier question[52]. Judge Gaja asked Australia and New Zealand the following question: "If a whaling programme is both for purposes of scientific research and for commercial purposes, what are the applicable rules according to the ICRW?"[53]

70. Australia agrees with the answer given to this question by New Zealand on Monday[54]. I will add only a few clarifications.

71. First, having regard to Article VIII (2) any program of scientific research will have a commercial element. The incidental sale of "by-product" is not enough to invalidate a genuine program of scientific research, but it must be incidental. The facts show that it is much more than incidental in the case of JARPA II. It is Australia's position that the commercial considerations are determinative. But even if you do not go as far as that, the position is that Article VIII requires the program to be for the purposes of scientific research. Operating against the background of the moratorium on commercial whaling by which Japan is bound, Article VIII should be strictly interpreted so as to require that any commercial catch be purely incidental.

72. The answer to Judge Gaja's question is that a program which is characterized as both commercial and scientific is not capable of justification under Article VIII.

Conclusions

73. Mr. President, Members of the Court, I come to my conclusion. I will first make the point that this is the last opportunity for Australia to make oral submissions to the Court. We therefore trust that the Respondent will not raise completely new legal arguments to which we have had no opportunity to respond. Japan seeks to reassure the Court by assurances. But its core legal theory is inconsistent with these assurances.

74. First, Japan says that the Court should trust the Scientific Committee, which has endorsed the JARPA programs[55]. Professor Sands has shown that this is not true — there has been

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[52]CR 2013/9, pp. 67-68.

[53]CR 2013/16, p. 63.

[54]CR 2013/17, pp. 27-28, paras. 42-43 (Finlayson).

[55]CR 2013/12, p. 45, para. 21 (Akhavan); CR 2013/15, p. 68, para. 89 (Boyle).

no such endorsement. In any event, this contradicts Professor Pellet, who told you that the Scientific Committee has no normative role or value in relation to the special permits under Article VIII[56] — this is the Pellet void. The most it can do is to discuss them, but with no obligation of any kind upon Japan to listen, still less to learn from the views expressed.

75. Secondly, Japan accepts a qualified duty not to harm the stock[57]. But that duty *does not arise*, as a matter of substance, under Article VIII, and the Scientific Committee has no mandate to do anything but receive the proposal. This does not make sense of the Convention.

76. The real point lies in what Professors Pellet and Lowe have argued — which I have already summarized:

(a) the Convention is, vis-à-vis Article VIII, entirely procedural in its character; procedure is ranked above substance, and it is said Japan has fully complied with the procedures[58] — although we say that is not true;

(b) secondly, as to the necessity, scope and conduct of a *soi-disant* scientific program, Japan is effectively in a position of self-judgment: it issues the permit on its own sovereign authority, the authority it had before the Convention, an authority not deriving from the Convention, and for the exercise of which Japan is not accountable to the other member States[59];

(c) thirdly, limits on Japan's authority revolve round an indeterminate notion of good faith — which is presumed in the absence of clear contrary evidence[60].

I shall say a word about the question that the relationship of good faith, or bad faith, is our primary argument based on the Convention. I said earlier on that, allegations of bad faith can create problems for courts and tribunals. And the treaties based on the conservation of marine living resources in the public domain should not have as their sole criterion for violation, allegations of bad faith. But of course, if bad faith is shown, then it is highly relevant. And for the reasons we explained in our pleadings, and in our first round, we do allege bad faith in relation to Japan as a

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[56]CR 2013/13, pp. 61-62, paras. 5 and 7 (Pellet).

[57]CR 2013/15, p. 24, para. 51 (Lowe); WOJ, para. 9.

[58]CR 2013/15, p. 15, para. 9; p. 21, paras. 34-35 (Lowe); CR 2013/16, p. 50, para. 33 (Pellet).

[59]CR 2013/13, p. 61, para. 5 (Pellet); CR 2 013/13, p. 64, para. 10 (Pellet); CR 2013/15 p. 15, para. 7 (Lowe); CR 2013/15, p. 21, para. 34 (Lowe); CR 2013/16, pp. 51-52, para. 37 (Pellet).

[60]CR 2013/15, p. 5, para. 15; p. 21, para. 38; p. 24, para. 54 (Lowe); CR 2013/16, p. 53, para. 41 (Pellet).

subsidiary matter, and we adhere to those allegations. We believe we have evidence that supports them and it will be a matter for the Court to assess that. Mr. Gleeson will deal with that in a moment. The position under Japan's three propositions that I have outlined, is that Japan has a prior right to whale — for so-called science — a sovereign right to reduce whales to ownership *ad libitum*. This is inconsistent with the collective regulation of the whale stocks, inconsistent with the object and purpose of the Convention, inconsistent with the original understanding of Article VIII. In short ,Japan seeks to escape the *lex specialis* of the Convention in order to roam the effectively unregulated high seas of "scientific research". This involves the assertion of science in lieu of the evidence of science.

77. But, Mr. President, Members of the Court, even genuine scientific research needs to take serious account of the views of the Scientific Committee and the IWC. To illustrate the point, in the need for the integration of Article VIII into the Convention as an effective part of the Convention, we have put in tab 46 of your folders, a proposed experiment involving the validation of the well-known Allee effect on blue whales. The Allee effect, as you will recall, I am sure, from your biology classes at school, is the hypothesis that below a certain population density, a species breeds more slowly[61]. The mechanisms of recovery from near extinction ~~is~~ are poorly understood; there is plenty of need for more research. Blue whales were nearly extinct in 1982, certainly less than 1,000, probably less than 500. Now there may be 6,000 in Antarctic waters. As you will see from tab 46, this proposed experiment is comparatively simple. There are two phases: phase one, involves the lethal take of 1,050 blue whales over four years to determine the pregnancy rates — that is the first thing you have to do; phase two, involves a lethal take of 500 blue whales each year for ten years, that is to drive the population down by 50 per cent, to test the Allee effect.

78. The experiment will stop when either the pregnancy rate is statistically significantly below the baseline, proving the Allee effect, or when 5,000 animals have been taken, disproving it. Testing the hypothesis requires an experimental reduction of population size, non-lethal methods will not do.

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[61]See Courchamp F., Berec J., Gascoigne J. (2008). *Allee effects in ecology and conservation*. Oxford, New York, USA: Oxford University Press.

79. Now Japan will no doubt say that it has no intention of taking blue whales: at least I hope Japan will say so. But that is not the point of our thought experiment. The point is its legal theory of Article VIII. The experiment I have outlined, is without doubt scientific. First, there is an important gap in our understanding of the extinction and recovery of marine species. Secondly, there is an identified hypothesis — the Allee effect — based on existing knowledge. Thirdly, there is a developed experiment designed to, and capable of, testing that hypothesis. Fourthly, there is a defined endpoint, so we will know whether the experiment has succeeded. None of these four features is true of JARPA II. Our blue whale experiment would be a scientific experiment conducted for scientific purposes. It follows from Japan's interpretation of Article VIII, the void or vacuity, that a special permit to catch 6,050 blue whales over 14 years will be lawful under the Convention, even though it involves killing more blue whales than presently exist. In Professor Pellet's words, "les permis spéciaux délivrés à de fins scientifiques échappent au mécanisme de la convention . . ."[62]. In Professor Lowe's words, "the limits imposed by Article VIII do no more than require that Japan comply with the procedural obligations set out in the Convention"[63]; So much for the régime of the 1946 Convention! So much for effectiveness! If Japan's interpretation entails that the killing over 14 years of more blue whales that presently exist in the southern hemisphere is a practice unreviewable by the Court, then Japan's interpretation should be rejected.

80. I should add that we have drafted, proleptically, a set of likely comments from the increasingly dysfunctional Scientific Committee on this modest proposal — to quote Jonathan Swift. These suggested draft comments reflect the Committee's current division and disarray: "some members . . . other members . . .". There is currently no effective process for the Court to defer to when it comes to Article VIII. It is time for the Court to act.

81. Mr. President, Members of the Court, the facts and expert evidence being now — I suggest — rather clear, what is the Court to do? This calls for a procedural remark and a substantive one.

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[62]CR 2013/13, p. 61, para. 5 (Pellet).

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

82. First the procedural remark. In its Counter-Memorial, Japan did not bother to produce its own scientific evidence to refute that presented by Australia. Japan was evidently dismayed when Australia, taking the view that the issues had been sufficiently joined, elected not to file a Reply. We thought that the repeated protests of Japan at the absence of a second round must have implied an intention to include large quantities of expert evidence and documentary evidence in its Rejoinder. It seems now that there was no such intention, and no such evidence. The Court gave the Parties nonetheless a further opportunity to present expert evidence, and Japan presented a report by Professor Walløe, a close affiliate of the JARPA programs — a report that contained not a single footnote. You've heard Professor Walløe — you can judge his evidence for yourself. It is sufficient to say that globally, he did not support Japan's case.

83. Then at the last moment, Japan produced observations which could have been filed in its Counter-Memorial, but which were presented in such a way as to give us no further opportunity to respond. The Court rightly treated this late unscheduled filing as "observations of Japan". And you, Mr. President, if I may say so with great respect, rightly prevented Japan from raising them in cross-examination as if they were an expert report duly filed[64].

84. Mr. President, Members of the Court, I understand the reservations some Members of the Court may have at what may seem the interposition of common law methods into the Court's fact-finding and evidence assessing process. The Court will no doubt find its own balance in these matters. But meanwhile, Japan has had access to senior members of the Bar, on both sides of the common law/civil law divide. Further, under your guidance, Mr. President, Japan has had a full opportunity to present its case and to be heard, and the questions asked by the Court — on both sides of the common law/civil law divide — show, I hope I may say so, an acute understanding of the issues and a grasp of the dossier. You are now in a position to act.

85. That brings me to the substantive remark. You are a court of law. It is respectfully submitted that you should focus on the precise issues presented. Do the JARPA II special permits so far issued exempt Japan from its undisputed obligation not to engage in whaling commercial in scale while the moratorium remains in force? To that question, there is, I suggest on the evidence,

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[64]CR 2013/9, p. 61 (President).

only one answer and that is, "no". The answer should be given now, with respect, irrespective of the Japanese intimations of mutability in relation to the 2014 "review". There are also two questions concerning fin whales under the Sanctuary and factory ship regulation. I dealt with these in the first round[65] and we have heard from Japan *no trace* of a defence.

86. Mr. President, Members of the Court. What do we want? Accountability under this major multilateral Convention. When do we want it? Now.

Mr. President, Members of the Court, thank you, in particular for your acute questions and your attention to the answers. Mr. President, I would ask you to call on Professor Sands to answer Judge Greenwood's question and then to call on the Solicitor-General. Thank you, Mr. President, Members of the Court.

The PRESIDENT: Thank you, Professor Crawford, and I give the floor to Professor Sands to provide his answer. Professor Sands, you have the floor.

Mr. SANDS: I can be very brief. Mr. President, Members of the Court, I express our gratitude that you gave us the lunch break and did not put us on the spot and cause us to answer the question immediately. But maybe that is coming in future cases. We went over the reports and we counted the numbers: it is a question of looking at names and adding them up; if one or two errors have crept in, numbers are out by one or two, we apologize in advance. We did our best to do it. The situation is as follows: the total number of participants at the 2005 Scientific Committee was that there were delegations of 31 Contracting Governments, comprising 139 delegates, excluding interpreters. There were, in addition, 44 invited participants, not associated with a delegation of a Contracting Government and two observers from international organizations, excluding those observers already included in country delegations. That comes to a total of 185 members. If you remove the 63 members who declined to participate in the discussions, it leaves 122 members. Of the 122 members, on our counting, 27 were listed as members of the Japanese delegation and subtracting that number, that leaves 95 members who were not in the 63 or on the Japanese delegation, who did not remove themselves from the discussion.

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[65] CR 2013/11, pp. 22-23, paras. 74-76 and 79-80 (Crawford).

"Report of the Scientific Committee" (2005), J. Cetacean Res. Manage. 8 (Suppl.) 2006 (available at http://iwc.int/scientific-committee-reports), pp. 48-52 [tab. 30].

It is worth adding that the review of JARPA II before it went to the Scientific Committee was discussed in a body called the Standing Working Group on Scientific Permits. That Standing Working Group, as documented in its report at Annex 01 of the Scientific Committee Report (FN) and we have footnoted it and will make the documents available, through the Registrar, to all Members of the Court and, of course, to our colleagues on the other side: that Standing Working Group was composed of 87 members, excluding three interpreters. Of the 63 scientists who had declined to participate, 28 of the 63 were also members of this Standing Working Group when discussions were first held, leaving 59 members who had not removed themselves from the Standing Working Group discussions. Of these 59, 26 were listed as being members of the Japanese delegation, excluding interpreters, which left 33 non-Japanese members of the Standing Working Group and also not members of the group of 63, so to speak, who had not removed themselves from discussions within the Standing Working Group. We are not able to indicate to you the views of those remaining members, because that is not recorded, either in the Standing Working Group or in the Scientific Committee. All we can do is point you to tab 29, which is in your judges' folder, which indicates the report of the Chairman of the 57th Commission Report (FN) and tab 30 (FN) from both of which you will see, if there was a discussion, a view was not expressed one way or the other.

I hope that is helpful to you, Mr. President and to the Members of the Court. That is what we have been able to do and we can come back with any more if that would be helpful. I think if you could now invite the Solicitor-General to take the Bar, that would be appropriate.

The PRESIDENT: Thank you, Professor Sands, and I give the floor to the Solicitor-General of Australia, Mr. Gleeson. You have the floor, Sir.

Mr. GLEESON: "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 [tab. 29]. ← italics.

JAPAN'S LACK OF GOOD FAITH AND ABUSE OF RIGHT

Introduction

1. Mr. President, Members of the Court, Australia has now completed the substance of our presentation on the questions of treaty interpretation and breach. It remains for me to reply to

(FN) "Report of the Standing Working Group on Special Permits", Annex to the "Report of the Scientific Committee" (2005), J. Cetacean Res. Manage. 8 (Suppl.) 2006, 259-264, at p. 259 (copies provided to Registry on 10 July). ↓ italics.

Japan's presentation on the topic of lack of good faith and abuse of right, in particular to Professor Lowe, Ms Takashiba and Professor Pellet. I might observe that it is now almost midnight in Sydney and 11 p.m. in Tokyo. After a long day of our careful and detailed — and we hope persuasive — presentations, I trust it does not feel like 2 a.m. in The Hague. You may also be asking whether our second round presentation distinguishes itself from JARPA II in the sense that it does at some point come to an end. The answer is, "yes", I assure you.

2. What it leaves me to do, though, in this important, although alternative, part of our presentation, is to respond to some matters raised by Japan which are of importance, in the three speeches I mentioned. Before I do that, could I deal with two preliminary matters. Firstly, our answer to Judge Charlesworth's question.

3. Our answer is this: the Court does not need to make a finding on lack of good faith or abusive right in order to find success for Australia. The present arguments represent a legally distinct part of the case. Australia could — of course, should not — but could, lose on treaty interpretation and succeed on this part of the case. In that sense, the argument might be regarded as a true alternative. The argument, I observe, draws upon principles of international law, as applied to this treaty and to these facts. International law is relied upon to apply the standards of bona fides and reasonableness to the manner of exercise of the right to determine whether, as we put it in the first round, relying upon the WTO Appellate Body in the *Shrimp* case, whether the abuse or misuse is "sufficiently grave or extensive" such that Japan has, in effect, reduced its treaty obligations to "mere facultative" ones, dissolved their juridical character and in so doing negated the rights of all other treaty members[66].

4. The second preliminary matter is that, as I made clear in the first round and Professor Crawford made clear then and again today, Australia accepts we have a high burden on this alternative part of the case. It is common ground that lack of good faith is only to be alleged on solid evidence. The case must be proved, not presumed and the Court will not ~~likely~~ lightly make the findings sought.

[66]See Australia's speech in relation to good faith and abuse of right in the first round, as recorded in CR 2013/11.

5. It might then help before I come to the three particular responsive aspects of this speech if I just stood back for one moment from the detailed evidence you have heard and identify the three broad categories of evidence that Australia relies upon for this part of the case.

6. The first category of evidence is that there is simply before you now too much material over a 30-year period pointing to commerce as a substantial driver for JARPA and then JARPA II for science to be the true purpose for which the Article VIII right has been invoked. You may recall in the dim and distant past of two weeks ago I commenced with seven indicia of commerce. Professor Crawford has expanded upon the commerce argument in the first round and this afternoon. The lack of good faith lies in the intrusion into the exercise of the Article VIII power of considerations so extraneous to that Article and so pervasive as to justify the conclusion of lack of good faith.

7. The second broad area of evidence concerns Japan's response — or perhaps lack of consideration in response — to the body of IWC Resolutions over 30 years. Stepping back, it is pretty hard to think of a like example in the history of a multilateral convention where one State has so disregarded the statements of the common organ of the convention.

8. The third body of evidence concerns Japan's compliance with paragraph 30 to which I will return later. So they are the three bodies of evidence that Australia relies upon for these two allegations and when the Court considers the body of evidence, we would respectfully invite you to consider them through the framework of the following aggravating factors. Let me list the aggravating factors:

— this is not one-off behaviour;

— it is not a mere technical breach;

— it is not at the edges of the compact.

It is hard to think of a more calculated, sustained course of conduct which threatens the integrity of this very valuable Convention.

Response to Professor Lowe

9. Might I then turn to what Professor Lowe put to you last week. There are three matters that I wish to respond to. *Firstly*, you will recall that he made a correct concession that the good faith of Japan must be considered in the context of the issue of each special permit year by year[67].

10. This point has evidentiary significance at at least two levels. As is now clear from the material, the relevant decision-maker simply cannot have given attention each year to the matters which Professor Lowe correctly agrees must be attended to, and I quote him "the number of whales that, according to good scientific practice, should be caught, and the length of time over which they should be caught". You know now so clearly that, from the very first year of this plan onwards, the plan to take three species in defined numbers lay in tatters. Why did the decision-maker in second and subsequent years continue to authorize 50 humpback whales to be taken when, in departure from the plan, none had been taken? Why did that person continue to authorize the take of 50 fin whales when, in departure from the plan, a very small number of non-representative whales had been taken? Why did the decision-maker continue to authorize a take of 850 minke whales when, for reasons which cannot be wholly attributed to the Sea Shepherd, lower and varying numbers were taken in previous years? Perhaps most significantly, arising out of last Wednesday, why did the decision-maker continue to issue a permit in identical form each year in the face of Professor Walløe's advice that there were fundamental difficulties, at least in the fin and humpback aspects of the proposal[68]?

11. That is the first evidentiary consequence of Professor Lowe's correct concession that good faith has to be assessed year by year. The second evidentiary implication lies in Professor Boyle's correct answer that there was no assessment year on year on the availability of non-lethal alternatives. The failure to address those questions year on year, we would submit, of itself establishes this part of the case.

12. The next matter from Professor Lowe's formulation is — and it was a careful formulation, of course — when one re-reads it, what is missing from it is any recognition that good faith requires any attention to the resolutions expressed by the IWC itself. As Professor Crawford

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[67]CR 2013/15, p. 24 (Lowe).

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

has just outlined this afternoon, he accepts and contends that the only duties are procedural but, more than that, the only procedural duty he expressly accepts is a duty to attend to the comments from the Scientific Committee received under paragraph 30. Here we differ from him on the law. The good faith obligation we submit undoubtedly requires each member to have regard to resolutions expressed by the Commission under Article VI. You know the character of those resolutions over 30 years only too well, New Zealand accurately and usefully summarized their effect on Monday[69]. We respectfully argue that it was an error of Professor Lowe to exclude from a Contracting State's good faith duty in the issue of permits a requirement to have regard to the views of the IWC. Certainly he offered you no legal reason to justify that permission.

13. The final matter from Professor Lowe's presentation, as you may recall, that he twice uttered a polite but firm protest that Australia had not offered evidence in support of the submission we put in chief[70]. The submission, if I may repeat it, was that Japan never opened its mind to a consideration of making the slightest change to the core aspects of its lethal methodology, scale, continuity and indefinite period have never been the subject of reconsideration by Japan. And so it was that last Thursday Professor Lowe politely but firmly invited Australia to re-phrase, as in withdraw, that claim. May I tell you that after reconsideration, Australia does not do so. The claim was made with the closest attention to the evidence and drew an important distinction between the core aspects of Japan's lethal methodology, scale, continuity, indefinite period, and what might be regarded as the details by which the core methodology is carried out. No doubt at the edges Japan may have made one or two changes. Maybe it would do so again at the edges, if heavily pressed. But the core proposition is 850 dead minke whales, 50 dead humpback whales, 50 dead fin whales, permits to be issued in those terms, each year every year, no end in sight. They are the matters, Professor Lowe, upon which Australia does not withdraw its claim that Japan has not opened its mind to a genuine reconsideration.

14. As to Professor Lowe's claim that we then offered no evidence in support, frankly, I am puzzled. In the rather colourful presentation by Professor Pellet last Thursday, you will recall he,

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[69]CR 2013/17, p. 19 (Finlayson). See also tab 47 reproducing the slide from New Zealand's judges' folders at tab 5.

[70]CR 2013/14, pp. 18 and 25 (Lowe).

with some emphasis, referred to the four cardinal sins — or the four capital crimes — which he claimed Australia had advanced against Japan. And he gave you his response[71]. Clearly enough, there was evidence, the question is: does it establish the standard?

15. Before leaving Professor Lowe, could I conclude on a methodological point and underscore some matters which Professor Crawford has just addressed in a slightly different context? The evidence which Australia marshalled in support of this submission, employed the conventional legal tools of fact finding under domestic law and international law. We pointed to *documents*. We pointed to *conduct*, including *omissions* in circumstances where action would be expected. We pointed to *statements* by Japanese officials, providing direct evidence as to state of mind and intention of Japanese decision-makers. We invite the Court to draw the rational and logical inferences which arise from this combined and compelling body of material.

16. No doubt there was some evidence we, for obvious reasons, could not place before this honourable Court. It was not in our power to compel the relevant decision-makers from Japan to give evidence, nor to produce their internal documentary record. That does not mean our case fails.

17. In accordance with the ordinary tools of fact finding, as highlighted by this Court in *Corfu Channel*[72], the Court would look at the body of material assembled by Australia and if the natural and obvious inference is the one for which we contend, then in the absence of Japan bringing forward evidence suggesting a contrary conclusion — which it has not done — the Court may comfortably draw the conclusion.

18. So, Mr. President, Members of the Court, Australia's submission, we trust, was carefully articulated on this topic. It was based on a sound evidentiary finding and it is one we respectfully

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[71]CR 2013/16, p. 43 (Pellet).

[72]*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 18:

> "On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion."

continue to ask the Court to give the closest consideration to. It is *proof* of lack of good faith, not mere *presumption* of it.

Response to Ms Takashiba

19. Could I turn to the second speech, that of Ms Takashiba, and confine my remarks to matters not yet addressed by Australia. You might recall that the primary purpose she gave for her speech was to show you that Japan had scrupulously complied with paragraph 30[73]. I need to go back one step to how Japan, in the Counter-Memorial, said it would prove "scrupulous compliance". As you know, one of Australia's complaints[74] was that, on a plain reading of paragraph 30, Japan is required to provide the Secretary of the IWC with *proposed* permits *before* they are issued in *sufficient time* to allow the Scientific Committee to review and comment on them. Australia's factual allegation was that this occurred only in 2005 and has not effectively occurred since.

20. Japan's response in the Counter-Memorial[75] was that providing details of the JARPA II plan in 2005 was sufficient compliance then and for each year thereafter without a need to supply further permits in advance.

21. Ms Takashiba took what might be a different approach — if you will forgive me to express it in our English translation, before the official translations are available — she said this:

> "It is indisputable that Japan has never issued special permits without beforehand giving the Scientific Committee the possibility to examine and formulate an opinion on projected permits. This happened prior to the expiry of the deadlines and throughout the entire periods of JARPA and JARPA II."[76]

22. I would ask you to reflect upon those words of Ms Takashiba. If she was merely saying what was said in the Memorial, namely the JARPA II plan submission in 2005 was good enough for every year thereafter, that is not "scrupulous compliance".

23. On the other hand, if she meant to assert that Japan positively, each year, in advance, complies with paragraph 30 by providing proposed permits in advance, the evidence is to the

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[73]CR 2013/15, p. 27 (Takashiba); CMJ, para. 8.102 (iii).

[74]MA, paras. 4.20-4.24.

[75]CMJ, para. 9.37.

[76]CR2013/15, p. 30, para. 9 (Takashiba).

contrary. I will ask for you to be shown on the screen a slide for which the full document is found at tab 48 of our materials. [Slide] That is what happened at the Scientific Committee the other day and it is pretty clear that the permits are not being provided and considered and commented upon on a year by year basis.

24. Ms Takashiba's *second* proof of "scrupulous compliance" was her assertion that the partial and limited review of the JARPA II proposal by the Scientific Committee in 2005 gave Japan the approval it needed between 2005 and 2013 and beyond.

25. If you will forgive me for expressing it this way: Professor Sands has this morning smashed this soft lob away and to go over his territory would be like trying to steal the Wimbledon crown from the first English winner in 76 years, which I do not do. I will leave that topic.

26. Her third point was that "Japan was prepared to modify its programme if necessary, on the basis of the 2014 evaluation"[77]. Professor Crawford has disposed of that point.

Response to Professor Pellet

27. Let me move finally to Professor Pellet's address last Thursday. You do not need me to remind you now — earlier counsel have drawn attention to it — that a large part of this presentation by Professor Pellet, ostensibly in defence of his client's good faith, consisted in a rather indiscriminate attack upon Australia, other unidentified countries and other unidentified scientists of from many nations[78]. Could I simply respond with these observations, looking at that submission of Professor Pellet, through a good faith framework. As Professor Crawford reminded you this morning, the decision to amend the Schedule, to introduce the moratorium or other restrictions and subsequent decisions to vary it, are made by the three-quarters majority[79]. They are the terms of the bargain between the parties. If Japan wishes the current provisions of the Schedule to change, it has options available to it and it may seek to obtain a 75 per cent majority. As with any voting majority, Contracting Governments are entitled to take into account a range of considerations in determining how to vote on amendments. This Court would be very slow — very

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[77]CR 2013/15, p. 36, para. 27 (Takashiba).

[78]CR 2013/16, p. 49, para. 30 (Pellet).

[79]ICRW, Art. III (2).

slow, we suggest — to impugn the good faith of many countries, not parties before the Court in these proceedings, in the manner Professor Pellet invited you to.

28. Secondly, you will have observed that his attack had it at its heart the further legal error which Professor Boisson de Chazournes dealt with yesterday. His assumption that conservation and recovery can never be more than a mere means to a contractual end of killing commercially the maximum sustainable number of whales wrongly subverts the Convention. There can be no bad faith or departure from the Convention for Australia, or any other Contracting Government, when it comes to questions of voting on Schedule amendments to form views that a present larger rather than smaller population of whales is a good thing, particularly having regard to intergenerational equity and the precautionary principle.

29. Thirdly, you will recall Professor Pellet's rather savage attack on Australia and its scientists in their dealing with the IWC and the community of scientists generally[80].

30. The Attorney-General has responded to this unfortunate attack. Might I be permitted to add this: Australia and its scientists have contributed in the most valuable and varied ways to research, conservation and management of whales in the IWC and as you know in close partnership with many other countries including Japan. This includes Australia's work in non-lethal methods and the SOWER sighting surveys, in promoting SORP and other co-operative research between States, under Article IV of the Convention, as Dr. Gales explained. [Slide] Also, I might note that Professor Pellet forgot that Australia has provided three of the Chairs of the Scientific Committee of the IWC [tabs 56 and 57] — a not insignificant achievement — and he also forgets that it was in fact Australian scientists whose pioneering research led to the development of the RMP itself. The article which pioneered the RMP is at tab 58[81].

31. Let me move beyond submissions of counsel inflamed by an invective that Cicero would have been proud of and return to the substance: it is now common ground that Japan has an obligation "to give a degree of consideration to the guidelines and resolutions of the IWC and the reports of its Scientific Committee"[82], that is common ground with Professor Pellet, although not

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[80]CR 2013/16 p. 40, para. 7 (Pellet).

[81]William K. de la Mare, "Further Simulation Studies on Management Procedures", *Rep Int Whal Commn (Special Issue 11)*, pp. 157-169 [tab 58].

[82]CR 2013/16, p. 43, para. 18 (Pellet).

perhaps with Professor Lowe. The critical point of evidence — I mentioned this in the first round, and we submit it has not changed — is that Professor Pellet cannot point you to a single document, or piece of evidence, where Japan gave real consideration to the recommendations of the IWC under Article VI in any of the core aspects. No document where Japan considered reducing the take — other than the temporary deferral of humpbacks, for ostensible political reasons. No document where Japan put measures in place to adopt or investigate alternative non-lethal methods. No document where Japan gave consideration to revising its objectives to better align them with critical research needs identified by the Scientific Committee.

32. Professor Pellet's only response was to attack the integrity of the IWC. Again, if you will forgive the English, he described its recommendations as *ultra vires*, as the work of a tyrannous majority, and so on, as a work violating Japan's large margin of appreciation[83]. We, to the contrary, would respectfully suggest that Japan was required to take into account the interests of the other members of the Treaty as well reflected in these resolutions, made under the voting rules adopted by the parties[84]. We respectfully adopt what New Zealand put to you on Monday[85], about the content of this part of the good faith obligation.

33. What I have said this afternoon has focused on the facts through the prism of good faith. For similar reasons, Australia reiterates that, if it be necessary to find, Japan has exercised its rights in a manner so departing from the standards of bona fides and reasonableness to have eviscerated its treaty obligations.

Conclusion

34. Finally, Mr. President, Members of the Court, you may recall that late last Thursday, Professor Pellet ended his presentation on this topic, by telling you that he or his client, or both, were left feeling rather bitter and disillusioned. To the contrary, I trust that Australia has succeeded in presenting our submissions on this difficult, but important, alternative part of our case, in a manner which neither displays nor provokes bitterness.

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[83]CR 2013/16, p. 58, para. 54 (Pellet).

[84]ICRW, Art. III (2).

[85]CR 2013/17, p. 19.

Mr. President, that is the end of my presentation. It may be convenient after a short adjournment, if that were suitable, to call upon the Attorney-General.

The PRESIDENT: Thank you, Mr. Solicitor-General. The Court is ready to listen to the Attorney-General now. If you would like to take the floor. So, I give the floor to the Honourable Mark Dreyfus, Attorney-General of Australia. You have the floor, Sir.

Mr. DREYFUS:

AUSTRALIA'S CASE — CONCLUDING REMARKS

1. Mr. President, Members of the Court, it is an honour to present the concluding remarks of Australia's case. I want to conclude by looking forward to the resolution of this case rather than looking back over the arguments that have been made with clarity and force by my colleagues during the course of these oral presentations.

2. Mr. President, there is great interest in this case in Australia and in many other countries. In publicly addressing that interest, I have invariably made the point that Australia and Japan are friends. And that, as friends, we have brought the dispute to the Court for resolution consistent with the strong commitment of both countries to resolving disputes in accordance with international law.

3. The vigour of the advocacy you have heard from counsel is part of litigation, and it serves the important purpose of rigorously testing the evidence and arguments that are presented to the Court. I hope that the end product of our exchanges is a clearer view of the facts and legal issues that are before you.

4. Mr. President, the Court has an important role in interpreting the Convention and reviewing Japan's compliance with it. As the final arbiter of legal disputes between nations, the Court's decision in this matter is of broad significance for international law, particularly in the fields of environment and science. As Professor Crawford pointed out yesterday, this is the first time the Court has been faced with a multilateral convention for the conservation of endangered species.

5. In this case, the Court has an important opportunity to confirm what does and what does not constitute genuine scientific research, and to ensure that activities conducted in reliance upon a treaty that requires a scientific purpose are demonstrably undertaken on an objectively determined scientific basis. In particular, the Court now has an opportunity to assist in contributing to the integrity and effectiveness of the Whaling Convention, a pioneering convention that has truly been for the benefit of the "nations of the world". I would add that the "future generations" to whom the framers of the Convention referred in 1946 are here in this room. And I believe that we have a matching and a continuing responsibility to the generations that will follow us.

6. As I said at the outset, and I am sure that you will be relieved to hear, I will not attempt to summarize the extensive arguments that Australia has made during the course of this case. I would only assert that Australia's arguments on the law and the facts are persuasive, and I would urge the Court to accept them and to make the specific orders sought by Australia that will be outlined by our Agent after I conclude.

7. In essence, Australia respectfully requests the Court to make orders to bring JARPA II to an end, because the large-scale killing of whales under that program is commercial, and wholly outside what is permitted by Article VIII of the Convention. Of course, Australia understands that Article VIII forms part of the 1946 Convention. Australia accepts too that lethal whaling for scientific purposes may occur in exceptional circumstances to meet critical needs, and provided the other relevant requirements of the Convention are met. Indeed, a paper entitled *Addressing Special Permit Whaling and the Future of the IWC* submitted in 2009 to IWC 61 by the Government of Australia (tab 37) recognizes that such lethal research on whales may take place, provided that all the necessary prerequisites are satisfied. In the present case, the evidence is clear and compelling that those prerequisites are not met.

8. If the orders sought by Australia are made we hope that this will bring an end to lethal activity under Article VIII. In any event, any lethal research that is undertaken under that article in the future would need to meet the criteria of the kind outlined by Professor Sands earlier today, including:

(a) A review of previous scientific practice to identify a real gap that would be filled by the objective for the new proposal;

(b) Evidence to show that critical needs relating to the conservation and recovery of whales will be met by the research;

(c) Identified objectives that set out clearly the questions (or hypotheses) that the research is intended to explore and how those questions inform the methodologies proposed;

(d) Evidence clearly demonstrating that lethal take is necessary because the research could not be carried out by other means and that the level of that lethal take is strictly limited to the level necessary to carry out the research;

(e) The undertaking of independent peer review, before any proposal is finalized, during the implementation of the proposal and in the consideration of any results; and

(f) Strict adherence to the procedures of the Convention, and in particular, paragraph 30 of the Schedule.

9. Mr. President, before closing, I want to emphasize that orders of the nature that Australia is seeking would have positive consequences. In particular, such orders could lead to greater co-operation and collaboration among the parties to the Convention on scientific research relating to whales. This would assist in meeting the objective of the Convention of the conservation and recovery of whale stocks, an objective with which both parties agree.

10. Although Article VIII, properly implemented, would continue to be available, Australia strongly holds the view that scientific research for the purposes of the Convention is best carried out on a collective and collaborative basis using non-lethal methods. The effectiveness of these non-lethal methods is no better demonstrated than in the activities of the Southern Ocean Research Partnership, as illustrated by the satellite tagging of minke whales by Australian scientists which the Court saw in the course of the presentation of evidence by Australia. In undertaking such research on a collective and collaborative basis, more attention should be paid by the Commission and the Contracting Governments to undertaking co-operative efforts pursuant to Article IV of the Convention, which envisages that the Commission will:

> "*(a)* encourage, recommend, or . . . organize studies and investigations relating to whales and whaling
>
> *(b)* . . .
>
> *(c)* . . . study, appraise and disseminate information concerning methods of maintaining and increasing the populations of whale stocks."

11. Mr. President, both science and international law have evolved significantly since 1946, when the community of nations recognized the need for a binding convention to protect and manage the world's whale stocks. In the decades since, our collective efforts have given us a second chance to conserve whale species that humanity once hunted to the brink of extinction.

12. Developing proper and more detailed models for Antarctic ecosystems that will allow us to better understand whales and the environment in which they live is a huge task that is beyond the reach of any one nation's research programme. On behalf of the Australian Government and the Australian people, I would welcome partnership with other countries, including Japan, in a new era of collaborative non-lethal whale science. The Court has an opportunity to assist in creating the conditions in which that collective action can occur. This will strengthen the Convention and also strengthen respect for the scientific process and international law.

13. Mr. President, Members of the Court, I thank you for your attention. I would now ask that you give the floor to the Agent of Australia, Mr. Campbell, to make Australia's final submissions.

The PRESIDENT: Thank you very much, Sir. I give the floor to the Agent of Australia so that he can present the final submissions of his Government. You have the floor, Sir.

Mr. CAMPBELL: Thank you, Mr. President. Mr. President, Members of the Court, it is a privilege to appear before you in order to bring to a close the oral arguments of Australia in this, the second round. Before doing so, Mr. President, I would like to thank the Court for its attentiveness and the manner in which it has conducted this case. In particular, I would mention, as did my colleague, Professor Crawford, the Court's involvement in the examination of experts and also the forensic questions from Members of the Court, both to the witnesses and to the Parties, which I believe demonstrates the Court's interest in the case.

I would also like to thank the Registrar and the staff at the Court for their assistance, efficiency and professionalism which has assisted us greatly in presenting our case to the Court. I take this opportunity also to highly commend the work of the interpreters who have not only had to cope with interpreting counsel sometimes at pace, but also the examination of the experts involving as it did difficult scientific terms.

Finally, I would like to thank sincerely our counsel and the whole of the Australian delegation for the effort they have put into the presentation of a case which is so important to Australia.

Mr. President, Members of the Court, I will now present Australia's formal submissions. These are the final submissions of Australia.

FINAL SUBMISSIONS OF AUSTRALIA

1. Australia requests the Court to adjudge and declare that the Court has jurisdiction to hear the claims presented by Australia.

2. Australia requests the Court to adjudge and declare that Japan is in breach of its international obligations in authorizing and implementing the *Japanese Whale Research Program under Special Permit in the Antarctic Phase II* (JARPA II) in the Southern Ocean.

3. In particular, the Court is requested to adjudge and declare that, by its conduct, Japan has violated its international obligations pursuant to the International Convention for the Regulation of Whaling to:

(a) observe the zero catch limit in relation to the killing of whales for commercial purposes in paragraph 10 *(e)* of the Schedule;

(b) refrain from undertaking commercial whaling of fin whales in the Southern Ocean Sanctuary in paragraph 7 *(b)* of the Schedule;

(c) observe the moratorium on taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships in paragraph 10 *(d)* of the Schedule; and

(d) comply with the requirements of paragraph 30 of the Schedule.

4. The Court is requested to adjudge and declare that JARPA II is not a program for purposes of scientific research within the meaning of Article VIII of the International Convention for the Regulation of Whaling.

5. Further, the Court is requested to adjudge and declare that Japan shall:

(a) refrain from authorizing or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII;

(b) cease with immediate effect the implementation of JARPA II; and

(c) revoke any authorization, permit or licence that allows the implementation of JARPA II.

Mr. President, Members of the Court, that concludes Australia's oral submissions in this case. Thank you, Mr. President; thank you, Members of the Court.

The PRESIDENT: Thank you, Mr. Campbell. The Court takes note of the final submissions which you have now read on behalf of Australia. The Court will meet again on Monday 15 July at 10.00 a.m. to hear Japan begin its second round of oral argument. The sitting is closed.

The Court rose at 4.40 p.m.