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14 Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte et je donne la parole à M. Pellet. Mr. Pellet, you have the floor.

Mr. PELLET: Thank you, Mr. President.

THE REMEDIES REQUESTED BY AUSTRALIA AND CONCLUSIONS

1. Mr. President, Members of the Court, I propose to carry out two related but distinct tasks this morning. First, I shall do my best to summarize Japan's position, focusing on what we believe is essential. Secondly, I shall make a few brief remarks on Australia's submissions.

I. Japan's argument — the essentials

2. Mr. President, I shall therefore begin by trying to present a summary of Japan's argument. I am not sure that my style is, by nature, much more concise than that of Australia's Solicitor-General[1], and I cannot hope to equal him; I shall, however, do my utmost to be brief, so as to set out the crux of Japan's argument in eight propositions.

[Slide 1.1: The Court lacks jurisdiction to rule on the Application]

3. First proposition: this Court *does not have jurisdiction to rule on the Application* which Australia believed it could submit to it. Reservation *(b)* of Australia's 2002 optional declaration recognizing the jurisdiction of the Court as compulsory precludes the Court from exercising jurisdiction over disputes "arising out of, concerning, or relating to the exploitation of any disputed [maritime] area of or adjacent to any such maritime zone pending its delimitation". However, Japan contests the maritime rights claimed by Australia off the so-called Australian Antarctic Territory, and it is in that disputed zone and those adjacent to it that JARPA II, the sole subject of our case, is in operation. That programme is essentially aimed at determining whether the conditions for the sustainable exploitation of certain whale stocks have been met. There can be no

15 doubt, therefore, that it clearly falls within the provisions of reservation *(b)*. I shall not dwell on this point, which I demonstrated yesterday morning.

[1] See CR 2013/11, p. 52, para. 1 (Gleeson).

4. My second proposition and the ones that follow, Mr. President, are of a different nature. We are presenting the arguments on which they are based only in the alternative. You need only consider them, Members of the Court, if you reject the objection to jurisdiction which I have just outlined.

[Slide 1.2: Issuing special permits falls within the discretionary power of the Contracting Governments]

5. *If, however, you were to* exercise jurisdiction, you should recognize that *the issuing of special permits falls within the discretionary power of the Contracting Governments* — that is my second proposition. This is clear from the text of Article VIII — I know that you must be tired of hearing it, but the text is so clear (and the hour of your deliverance so near at hand) that I cannot resist the temptation to recall one last time the obvious case for the validity of my second proposition — although I would not be so bold as to project Article VIII on the screen again!

— The issuing of such permits is authorized *"[n]otwithstanding anything contained"* in the Convention;

— the conditions to which the permits are subject are such "as the Contracting Government thinks fit";

— "the killing, taking, and treating of whales in accordance with the provisions of [Article VIII] *shall be exempt from the operation of [the] Convention*";

— it is also, expressly, the Government granting the permit that issues the directions applicable to the treatment of the whales taken and the utilization of the products obtained.

Mr. President, I continue to believe that it is difficult to envisage a clearer resolve to confer on the States parties to a treaty a wider margin of appreciation in respect of its application.

[End of slide 1.2; slide 2: New Zealand, Discussion Document, Protocol Amending the International Convention for the Regulation of Whaling, 24 March 2005]

6. And the 1946 Convention has never been amended in that regard — even though Australia and the intervening State have both proposed the outright deletion of Article VIII or its

16 amendment — by way of a protocol — in order to align the text to their eccentric interpretation of it in this forum. As New Zealand quite correctly pointed out in its 2005 proposal, "the removal of special permit whaling . . . cannot be achieved through an amendment to the Schedule"[2]. Mr. President, I have the great pleasure of wholeheartedly agreeing with Professor Crawford's point of view when he states that "that is irrelevant for present purposes: what we seek [he speaks for Australia of course, but this is true for us as well . . .] is the interpretation and application of the Convention in accordance with international law — the Convention *as it stands* and international law *as it stands*"[3]. In that spirit — and contrary this time to what my opponent asserts — it is particularly relevant for the interpretation of Article VIII to note that the two other Parties appearing before the Court (for one can now clearly consider New Zealand to be a Party) wanted that Article to be deleted or amended along the lines they set out today; it would appear that, "as it stands", Article VIII cannot be interpreted in the way these two States claim that it can: if that were not the case, it would not be necessary to amend or delete it.

7. At the same time, Australia and New Zealand recognize that the only other binding provision directly linked to Article VIII — paragraph 30 of the Schedule — cannot satisfy their purpose. Quite correctly, Ms Ridings regards it as containing mere "procedural requirements"[4]. And Professor Crawford affirmed that "there can be no question of the Scientific Committee assuming a power to authorize or disallow a permit under paragraph 30"; according to what has become his mantra in recent days: *"that is not the point"*[5]. *Ergo*, no organ of the IWC can object to the issuing of special permits, although they can, of course, review and comment on them. The

17 consequences of that review are the same as those for any recommendations adopted by the organs of the Commission: they must be duly taken into consideration by the members of the organization, but they are still not legally binding.

[End of slide 2]

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[2]Proposed cover page of the document entitled "Protocol Amending the International Convention for the Regulation of Whaling" prepared by New Zealand, 24 March 2005, Ann. 4 to the Written Observations of Japan on New Zealand's Written Observations; see also the Discussion Document entitled "Protocol Amending the International Convention for the Regulation of Whaling" prepared by New Zealand, 24 March 2005, Ann. 5 to the Written Observations of Japan on New Zealand's Written Observations and CR 2013/17, p. 22, para. 25 (Finlayson).

[3]CR 2013/18, p. 39, para. 1 (3).

[4]CR 2013/17, p. 34, para. 65 (Finlayson); see also *ibid*., p. 42, para. 23 (Ridings).

[5]CR 2013/8, p. 33, para. 29 (Crawford).

8. In this connection, permit me to offer an anecdote, Mr. President. Last week I had the privilege of attending the first session of the general course which James Crawford is giving at the Academy of International Law — I cannot recommend it highly enough: it is quite remarkable in terms of both its content and structure. To his course outline, the Professor attached a ballot paper, inviting the students to vote for one of the fifteen images he proposes to use on the cover page of the published version of the course. I should have liked to show that ballot paper on the screen, but was deterred from doing so by the Court's excessively rigid and stringent Practice Direction IX*quater*. My friend thus asked the students to vote, but was careful to state (I am citing from memory but am confident that I am not misrepresenting his words): "Please vote for your favourite image; however, the result will not be binding on me — I only pledge to take it into consideration". This is an excellent illustration of the legal value of the recommendations adopted by both the Scientific Committee and the Commission itself: the Contracting Governments must take them into consideration in good faith, in a spirit of co-operation — but they are not bound by them [Slide 1.3: Australia is seeking to change the IWC into a supranational authority] . . . otherwise, *we would no longer have before us an international organization for co-operation, but a supranational organization for integration* — which the IWC is not, despite what Australia would like to have you believe.

9. As I recalled yesterday, Mr. President, although it was an instrument that was ahead of its time in certain respects, the 1946 Convention does not prefigure the European Union, nor the African organizations for integration, nor Mercosur: member States are bound only by that which they have expressly accepted — in ratifying the Convention — or that which they have not expressly refused to accept by virtue of the "opt out" clause in Article V, paragraph 3, a clause which applies only in respect of amendments to the Schedule annexed to the Convention. Member States are not legally bound by the resolutions of the IWC, irrespective of whether they are adopted by consensus or even unanimously. Japan is not bound by the recommendations of the Scientific

18 Committee or the Commission, whether they concern special permits in general or JARPA II directly. It need only review them in good faith and draw from that review the consequences that it thinks fit. It has done so. And, in particular, *one cannot reasonably claim that those*

recommendations prohibited, or prohibit, it from employing lethal methods. That is my fourth proposition.

[Slide 1.4: Lethal research is lawful]

10. Mr. President, man is a predator — and generally speaking a carnivore — and traditional hunting bears witness to the fact that there is nothing scandalous per se or unnatural in engaging in whaling, contrary to the certainty posited by Australia, which prides itself, like some omniscient deity, on being able to distinguish good from evil. However, that is (perhaps unfortunately — but "that is not the point"[6]) — as I was saying, that is essential in order to assess whether the conditions are in place for relaxing the Southern Ocean moratorium, which today would appear to be maintained against all scientific reason — against all reason, period, in fact — in respect of certain whale species and, in any event, with regard to minke whales, whose population in that region of the world is most probably (and quite appreciably) in excess of 500,000[7] animals according to the most cautious estimates. Contrary to what Australia suggests, minke whales are not at all, in fact, an endangered species[8].

11. There is no doubt that minke whales *can* be taken — within reasonable limits; and I shall come back to this. The wording of Article VIII of the 1946 Convention leaves no doubt: States parties to the Convention *can* issue special permits which are defined as authorizing their holders "to kill, take and treat whales for purposes of scientific research". As I have just recalled, this provision has never been amended and the recommendations adopted by the IWC from time to

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time, calling for the cessation or the suspension of scientific whaling, are not binding and do not in any way constitute a customary modification of Article VIII.

[Slide 1.5: Lethal research is necessary]

12. So, the killing of whales for the purposes of scientific research is *permitted*. Is it *useful* or indeed *necessary*, Mr. President? It is, and for reasons which I think can be summarized fairly easily — although I have found myself wondering whether the experts, being completely absorbed

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[6]CR 2013/8, p. 33, para. 29 (Crawford).

[7]See Report of the Scientific Committee, *J. Cetacean Res. Manage*. 14 (Suppl.), 2010, table 9, p. 40, available at: http://iwc.int/cache/downloads/3v5a930vw6ww0o080wswckwo0/pp001-086-SC-Report-2012.pdf.

[8]CR 2013/18, p. 40, para. 2 (Crawford); CR 2013/20, p. 43, para. 4 (Dreyfus); CR 2013/12, p. 43, para. 10 (Akhavan).

in their subject, have not at times obscured rather than clarified what I consider to be one of the most important factual questions of the case before us:

— first, the experts of both Parties have expressly acknowledged[9] that it might be necessary to have recourse to lethal research;

— next, they are not alone and, in particular, this view has been widely expressed within the IWC Scientific Committee and beyond[10];

[End of slide 1.5. Slide 3: Biological and ecological data that can be obtained only by lethal methods]

— lastly, these positive opinions rest, with only minor variations, on the same reasoning:

  — first, lethal methods are the only methods capable of determining trends in the age of whales at sexual maturity and, even though this seems to be less universally agreed upon, in their diet, stock structure and the degree of contamination by pollutants[11]; and

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  — second, these determinations are essential for assessing the dynamics of stock development and the biological parameters of whales, as well as the effects of "competition"[12] (competition between whale species);

— only on this basis is it possible to decide whether to end or relax the moratorium — which, from the outset, was intended to be temporary and to be kept under review based upon "the best scientific advice" with a view to establishing, if necessary, other catch limits[13].

13. It is also this information alone which is likely to enable the goals set by the parties to the Convention to be achieved, which are, I would remind you, to permit "increases in the number of whales which may be captured without endangering these natural resources . . . and thus make

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[9]See CR 2013/9, p. 66 (Mangel) and CR 2013/14, p. 18 (Walløe).

[10]See, for example, Report of the Scientific Committee, *J. Cetacean Res. Manage*. 9 (Suppl.), 2007, p. 56, available at: http://iwc.int/cache/downloads/3zowb6m9ln40ccw0s08w8o8wc/2006%20SC%20REP.pdf; see also Report of the Intersessional Working Group to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic, Tokyo, 12-16 May 1997, *Rep. Int. Whal. Commn* 48, (1998), p. 386; see also Report of the Expert Workshop to review the ongoing JARPN II Programme, 2009, pp. 25-26, available at: http://archive.iwcoffice.org/_documents/sci_com/SC61docs/SC-61-Rep1.pdf; and Chair's Report of the 61st Annual Meeting, *Annual Report of the International Whaling Commission 2009*, p. 27.

[11]See CMJ, pp. 166-178, paras. 4.55-4.83.

[12]See Government of Japan, Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II), pp. 11-12 (CMJ, Ann. 150); CMJ, paras. 5.28-5.31. See also CR 2013/14, p. 38 (Walløe).

[13]Paragraph 10 *(e)*.

possible the orderly development of the whaling industry". I would further recall that under Article VIII, paragraph 4, Contracting Governments are required to undertake the continuous collection and analysis of biological data which are indispensable "to sound and constructive management of the whale fisheries".

[End of slide 3. Slide 1.6: The JARPA II sample size has a scientific basis]

14. Even more than Australia, New Zealand feigns indignation at the apparently large sample size adopted under JARPA II. On closer analysis, however, it is hardly shocking or surprising. Given the subject of the research, namely the temporal trends in several biological parameters for establishing whale stock distribution and the dynamics of stock renewal (parameters which, I would recall, can only be established on the basis of the age and sexual maturity of the whales studied), it is clear that those data could not be obtained from a small number of units. And I would point out that the increase in authorized catches was justified (and is still justified) by the loss of scientific data sourced from commercial whaling, which is excluded under the moratorium, and not by considerations of a commercial nature.

21 15. Apart from these common-sense considerations, more strictly science-based arguments support this sixth proposition. In this connection, Mr. President, I find it quite scandalous (and I am choosing my words carefully) that Australia has stated that Japan was "unable to offer any explanation as to how sample size was fixed"[14]. Highly detailed explanations, readily understandable to lay persons, are contained in the judges' folder and, in particular, on pages 17 to 19 of Annex 150 to Japan's Counter-Memorial, an annex which concerns the JARPA II plan, and in Appendices 4 and 6 to 8[15] to that document. The most relevant extracts (I have omitted the Annexes) can be found — in French and English — in the judges' folder at tab 26.

16. This is not the time to discuss this document, extracts from which were analysed by Professor Boyle yesterday. It need only be observed that it is both comprehensible and comprehensive and that it shows that the selection of samples — which, I would remind you, are

[14]CR 2013/19, p. 37, para. 34 (Sands); see also *ibid*., pp. 19-21, paras. 18-25 (Sands); CR 2013/17, p. 37, para. 9 (Ridings).

[15]See Government of Japan, Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II), pp. 12-13 (CMJ, Ann. 150) and Apps. 4 (pp. 57-59) and 6 to 8 (pp. 63-80). See also The Research Advisors, "Sample Size Table from the Research Advisors", (CMJ, Ann. 205).

used to determine *trends* in accordance with changes in certain parameters over time — was not made at random, or in accordance with alleged commercial needs or markets. Japanese scientists took into account a range of biological parameters (that can be obtained only through lethal methods): age at sexual maturity, pregnancy rate, blubber thickness and pathological monitoring (linked to the effects of contaminants). In each instance, they assessed the optimum catches in the light of changes in JARPA II objectives as compared with those of JARPA, as well as in the light of the specific changes to be identified and the length of the programme (six years before the first JARPA II review, a period set by the Scientific Committee for the implementation of the RMP). In order to achieve this, they used statistical rules which are indisputably in common use and which were applied in accordance with best practice. And finally, they selected a sample size that satisfied the research requirements for most of the parameters adopted.

17. The same document also shows that the Japanese authorities were concerned about the effect of catches on stocks and that they took steps to ensure that those catches could not be

22 detrimental[16]: 850 animals out of a population of at least 515,000, representing a proportion of 0.15 per cent (0.35 per cent if we consider only the area in which JARPA II operates — even Alan Boyle could have worked that out); and there is no need for a degree in biology to understand that this poses no risk at all of harm to stocks. All of this is well thought out, reasonable and in line with the precautionary principle.

[Slide 1.7: The Court cannot decide between opposing scientific views]

18. Mr. President, the Court is the "organ" of "international law"[17]; it has the utmost authority to settle the legal disputes submitted to it. However — and this is my seventh proposition — with all due respect, *it cannot decide between opposing scientific views.*

19. It is a fact that the Parties' views on JARPA II differ markedly, in particular as regards:

— whether or not that programme is intrinsically scientific: here, Australia has chosen to position itself systematically as an advocate of an elitist, metaphysical and sectarian conception of "Science", with a capital "S", whereas we are in a field of research that is very much

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[16]See JARPA Plan, CMJ, Ann. 150, in particular p. 19 and App. 9, pp. 81-89.

[17]*Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J. Series A, No. 7*, p. 19; *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 35.

applied — which explains, I might add in passing, why JARPA II is designed in terms of "management objectives"[18]; the Parties' positions also diverge as regards, in particular,

— the necessity of having recourse to lethal methods; and

— the criteria for determining catch samples.

These last two points, which are of particular importance, were the subject of my fifth and sixth propositions, and I have shown that, contrary to Australia's brazen assertions, Japan had taken great care to explain both why there is recourse to lethal methods, and what parameters are used to determine the size of the samples of whales taken under JARPA II.

23 20. These explanations have not sufficed to convince other experts — whose anti-whaling bias might sometimes (perhaps often?) be suspected of taking precedence over scientific objectivity. Be that as it may, I willingly concede — whatever their ulterior motives — that they take a negative view of JARPA II, which is also the subject of certain reservations in the IWC Scientific Committee, even though that organ's overall assessment of the JARPA II programme is positive. Moreover, I would reiterate that a majority of the scientists that constitute the Committee are government experts and, as has been pointed out many times during the oral pleadings[19], the debates are highly polarized around extreme positions. Under these circumstances, it is even more difficult to see how the Court might interfere in scholarly discussions between experts, given that they cannot agree amongst themselves, and that no reasonable person could ever claim to discern an indisputable truth and thus make it possible to decide between the expert proponents of JARPA II and their opponents.

21. I repeat, Members of the Court: it is not your responsibility — it is not our responsibility, as jurists — to pass judgment on the substantive merits of particular scientific positions: this is not the medieval Inquisition. All we can do is note that the Japanese researchers, who designed and are applying JARPA II, have justified both the usefulness and the methods of

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[18]Government of Japan, Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II), p. 11 (CMJ, Ann. 150); see also *ibid*., p. 12.

[19]CR 2013/10, p. 16 (Gales); see also Statement by Dr. Nick Gales, 15 April 2013, para. 4.3; CR 2013/19, p. 30, para. 20, and pp. 31-32, para. 23 (Sands).

that programme, the unconcealed objective of which is "to resolve the scientific uncertainties and pave the way for the resumption of sustainable whaling"[20].

[Slide 1.8: Japan has exercised in good faith its right to issue special permits]

22. Mr. President, in the speech with which he opened Australia's second round of oral argument, the Attorney-General declared that the doubts which I had expressed about his country's good faith within the IWC were an "offence — in both senses of the meaning of that word"[21]. Perhaps the applicant State might consider whether Japan has not also felt offended by that charge,

24 on the basis of which Australia is claiming to engage its responsibility — although last week Australia did seem to have somewhat toned down the vehemence of that accusation, while still maintaining it, albeit now only as an alternative argument[22].

23. Moreover, as the Solicitor-General of Australia recalled: "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 lightly make the findings sought."[23] Nevertheless, it is on the basis of fragile conjecture and contrived reasoning that Australia would like you to declare that Japan is acting in bad faith. Here, its arguments fall into two categories:

— first, that the special permits are fig leaves for commercial whaling, since they are issued for economic gain — that is not the case: part of the meat from scientific whaling is indeed sold, as the Convention permits, but the operation is run at a very considerable loss; furthermore, and above all, the manner in which whales are taken under JARPA II is completely different from commercial whaling, which seeks to maximize catches (and profits);

— secondly, that Japan is acting in bad faith by failing to comply with the IWC's recommendations — but that is precisely the point: they are merely recommendations, and it is difficult to see where the bad faith might lie, given that Japan has participated very actively in nearly all the organization's activities, that it has never shied away from dialogue, and that it has often softened its positions to be more in line with views opposed to its own.

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[20]Government of Japan, Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II), p. 5 (CMJ, Ann. 150).

[21]CR 2013/18, p. 18, para. 13 (Dreyfus).

[22]See CR 2013/20, p. 34, paras. 2 and 3 (Gleeson).

[23]CR 2013/20, p. 34, para. 4 (Gleeson); see also CR 2013/19, p.64, para. 19 (Crawford).

24. In this regard, I would like to draw attention to a particularly extravagant accusation which has been made — persistently — by Australia[24]: that Japan has not taken any humpback whales and only a very small number of fin whales. That limited take is part of Japan's policy of appeasement within the IWC, and contrasts with Australia's intransigence.

25. As Professor Crawford quite rightly said (when concluding some highly inappropriate and rather vengeful remarks on an entirely different matter): "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."[25] As Professor Lowe already said yesterday afternoon, Japan shares that view. And I am pleased to note that counsel for Australia acknowledged in his speech that the resources of the Southern Ocean do not belong to any particular State, despite the unlawful proclamation by Australia of a continental shelf and exclusive economic zone off what it claims to be the Australian Antarctic Territory.

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26. Mr. President, as we have frequently recalled, Japan did not launch the JARPA and JARPA II programmes in order to circumvent the moratorium, but rather, in complete transparency, to help to persuade its partners in the IWC to lift that moratorium partially on the basis of the best scientific advice — at least as far as minke whales are concerned. Their undisputed abundance makes the continued ban on hunting them completely indefensible on rational and scientific grounds, it being understood that the resumption of commercial whaling will obviously have to be limited and controlled so as to remain sustainable.

27. In fact, it is scientific considerations alone which must guide the IWC's decisions on the matter. It is they which should have been taken into account as early as 1990, on the occasion of the "comprehensive review" of the moratorium which was promised by paragraph 10 *(e)* of the Schedule[26]; it is they which should have informed — and should in future inform — the periodic review contemplated by that same text; it is they which, more generally, should form the basis of all the positions adopted, not only by the Scientific Committee — that goes without saying — but

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[24]See CR 2013/18, p. 41, para. 5 (2) (Crawford); CR 2013/20, p. 19, para. 47, and p. 20, para. 51 (Crawford).

[25]CR 2013/19, p. 65, para. 22 (Crawford).

[26]CR 2013/16, pp. 58-60, paras. 55-56 (Pellet).

also by the Commission itself. However, Australia and its friends — but primarily Australia, despite the suddenly modest denials of its representatives in this Chamber[27] — have replaced those conventional requirements with purely ideological considerations, which are not consistent with either the object and purpose of the Convention, or its text: by opposing any re-examination of the moratorium; by seeking to make the RMP unusable; by preventing the adoption of the RMS; and by thwarting the negotiations on the future of the IWC.

26 28. Mr. President, in its Resolution 2006-1, the St. Kitts and Nevis Declaration, the IWC noted that "the position of some members that are opposed to the resumption of commercial whaling on a sustainable basis irrespective of the status of whale stocks is contrary to the object and purpose of the International Convention for the Regulation of Whaling". Japan fervently hopes that Australia is prepared to examine in good faith that recommendation, which was adopted by a majority of members of the organization, and that it will draw the necessary conclusions in the spirit of co-operation that it claims to advocate. Unfortunately, there are several reasons to suggest otherwise, given that the Attorney-General has declared categorically that: "if the International Court of Justice rules against us that the whaling convention does permit Japan to do what it has been doing for many years, we will keep arguing in the whaling commission with other nations."[28] No comment . . .

II. Australia's claims

29. Mr. President, before the Agent of Japan presents a number of concluding remarks and reads out our submissions in accordance with the provisions of Article 60, paragraph 2, of the Rules of Court, allow me to make some comments on Australia's claims.

30. Australia has marginally altered its final submissions in relation to those set out in its Memorial. There, it requested the Court to make three declarations concerning Japan's alleged violations (of paragraph 10 *(d)* of the Schedule (which establishes the moratorium on factory ships), of paragraph 10 *(e)* (which imposes the moratorium on commercial whaling), and of the

[27]CR 2013/18, p. 17, para. 11 (Dreyfus), and p. 38, para. 1 (Crawford).

[28]Australian Broadcasting Corporation, Attorney-General Mark Dreyfus has told the International Court of Justice there is evidence Japanese whaling is commercial not scientific, as the Government challenges Japan's program in The Hague, 10 July 2013, available at http://www.abc.net.au/7.30/content/2013/s3800400.htm.

sanctuary decreed by paragraph 7 *(b)*). To these three claims, Australia has added a fourth, calling on the Court to find that Japan is not in compliance with the requirements of paragraph 30. However, as I said yesterday, in response to the question from Judge Gaja[29], these claims are inconsistent. Australia cannot have it both ways: either the JARPA II programme is a scientific programme and is exempt from the rules applicable to commercial whaling — which means that Australia cannot invoke Japan's responsibility for the breach of paragraphs 7 *(b)*, 10 *(d)* and 10 *(e)* of the Schedule; or else it involves commercial whaling, and paragraph 30 is not applicable and cannot have been breached by Japan. The cumulation of inconsistent claims testifies to their fanciful nature. The addition of this new submission is a sign either of the confusion felt by the applicant State at the close of its pleadings, or of a prudent retreat: having been forced to accept the obvious fact that its criticisms concerning the scientific character of JARPA II were unfounded, it seeks to save face by invoking Japan's failure to comply with purely procedural rules.

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31. Ms Takashiba has shown that Japan had very strictly complied with the provisions of paragraph 30[30]. But let us assume, for the sake of argument, that that is not the case. That hypothesis could not constitute grounds for the invalidation, cessation or suspension of JARPA II. In the *Pulp Mills* case, the Court found that Uruguay had failed to comply with its procedural obligations under the Statute of the River Uruguay, but it held that a mere declaration to that effect on its part constituted sufficient reparation and that those breaches did not impose any particular obligation on that State[31]. If the Court were to consider that Japan had not complied with its obligations under paragraph 30 of the Schedule, *quod non*, that should be all the more reason to proceed likewise in this case, given that the alleged breach is said to have consisted essentially in failure to submit a new permit to the Scientific Committee each year[32]. In any event, therefore, there is no question of a continued breach and it would be very easy to apply a remedy.

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[29]See CR 2013/21, pp. 48-49, paras. 37-38 (Pellet).

[30]See CR 2013/15, pp. 32-34, paras. 16-19, and CR 2013/21, pp. 50-51, paras. 2-5 (Takashiba).

[31]See *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 70, para. 158, and p. 106, para. 282 (1).

[32]CR 2013/20, pp. 39-40, paras. 19-23 (Gleeson).

32. With regard to the other Australian claims, Mr. President, we do not dispute the fact that the Court may be called upon to make declaratory judgments[33]. But we are more than doubtful as to whether, irrespective of its lack of jurisdiction on the basis of reservation *(b)* of the Applicant's optional declaration, the Court has a mandate to rule on the submissions of Australia. Although they are complex and numerous, they all turn on the same question: "Does JARPA II fulfil the criteria for 'scientific' research?" As Australia seems finally to have convinced itself in the second round of argument, "[y]ou are a court of law"[34]. We, too, are convinced of that fact. But the question that Australia urges you to resolve, Members of the Court, is not one of the kind that a judicial body is in a position to decide — it is a matter for a selection board, an academic dissertation, perhaps a peer review, for which our opponents claim to have great fondness, or even an ecclesiastical excommunication, but not a judgment by the principal judicial organ of the United Nations.

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33. Matters would not be any different unless the position of one or the other Party was so outrageous and untenable that there was an *"obvious* error of judgment", to put it politely, or clear evidence of bad faith, a subject on which Australia has taken a foolhardy and uncompromising stand. Having listened to the legal and scientific arguments of both Parties, it seems to me that, leaving aside any moral, ethical, cultural or metaphysical bias, no one can claim that Australia has a monopoly on clear and indisputable scientific truth.

34. Australia, for its part, no longer seems to be at all sure of itself in this regard. In one of his second round statements, Professor Crawford asserted that "Australia seeks appropriate declarations and orders consequential on your findings, as in any other case of State responsibility"; but — and this is quite telling — he immediately added: "It will be for you to judge the opportunity of the particular declarations and orders sought".[35] That shows the extent to which the judgment you are requested to deliver can only be one based on "opportunity", on subjective personal judgment, incompatible with the broadly discretionary power — the wide

[33]See MA, p. 276, para. 7.4.

[34]CR 2013/20, p. 31, para. 85 (Crawford); see also 2013/19, p. 24, para. 2 (Sands).

[35]CR 2013/18, p. 39, para. 1 (5) (Crawford).

margin of appreciation, if you prefer — conferred on Contracting Governments, in regard to special permits, by Article VIII of the Convention for the Regulation of Whaling.

35. As this Court stated in a famous dictum in the *Northern Cameroons* case, "[t]here are inherent limitations on the exercise of the judicial function which the Court, as a court of justice,

29 can never ignore"[36]. By acceding to Australia's claims, Members of the Court, you would undoubtedly exceed the limits of your strictly judicial functions.

Mr. President, Members of the Court, I thank you for having again given me your kind attention; and I would be grateful, Mr. President, if you would now give the floor to the Vice-Minister and Agent of Japan, Mr. Tsuruoka, who will close our presentation.

The PRESIDENT: Thank you very much, Professor. I give the floor to the Agent of Japan, Mr. Tsuruoka. You have the floor, Sir.

Mr. TSURUOKA: Thank you, Mr. President.

Concluding remarks

1. Mr. President, Members of the Court, I have the signal honour to address the Court again in order to conclude Japan's pleadings.

2. My country sets great store by compliance with the rule of law. It is also proud of its contribution to many areas of science. We set about preparing this case with the utmost seriousness, not only because this is the first time that Japan is appearing before the Court, but also because it concerns two subjects of equal importance to our country: respect for the rule of law, and science. Indeed, justice, stability and development are the fundamental underpinnings of the position that Japan occupies today in the community of nations.

3. Given their scientific aspects, the arguments presented by the two Parties over the last three weeks may have appeared complex. In its legal essence, however, I would say that the case is rather simple: it concerns the lawfulness of Japanese whale research in the Southern Ocean. Our

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[36] *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29; see also *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 259, para. 23, and *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 463, para. 23.

position on this subject is just as simple and can be summarized, with your permission, in three points.

30 (1) First, the object and purpose of the International Convention for the Regulation of Whaling is the conservation and management of whale stocks with a view to sustainable exploitation. It was so in 1946 and it remains so today.

(2) Secondly, the whaling for scientific purposes authorized by Japan is not commercial whaling in disguise. As paragraph 10 *(e)* of the Schedule itself provides by its reference to the "best scientific advice", the objective of the programme is to gather scientific information as a basis for Japan to be able to request the lifting of the moratorium.

(3) Thirdly, Japan conducts the JARPA II programme in a manner consistent with Article VIII of the Convention, in good faith and in co-operation with its partners on the Scientific Committee.

I humbly express the hope that Japan's pleadings have presented these arguments with all necessary clarity. It is now for the Court to decide.

4. Mr. President, Members of the Court, I have no intention of repeating Japan's arguments. What I wish to say in these concluding remarks pertains neither to law nor to science, but to common sense. The experience of these last three weeks has been gratifying for Japan. We have been able to present the truth about Japanese whaling research to the Court and, by extension, to the entire world. The vehement campaign against the Japanese programme, reinforced by an attitude of rejection of any form of whaling, has resonated in all four corners of the world. Japan has perhaps failed to respond to it effectively. It has no control over the scientific journals which refuse to publish articles based on data obtained from lethal research. Our imperfect command of the English language does not serve us well, either. Before this case was brought before the Court, I had never had the opportunity to develop arguments in depth on the special permits granted by Japan. As a result of this case, however, Japan has been able to disseminate the truth about its scientific programme to the whole world. Australia can be thanked for that. We are also grateful to the Court for the keen interest it has displayed in this subject, an interest reflected in particular in the many questions from judges.

31 5. Of course, this Court is an arbiter of law, not of scientific truth. Nevertheless, we felt it necessary to put before you the relevant facts on the subject of Japanese whaling, and we have done our best to reply to the questions posed, as we are convinced that your decision must be based on the facts and not on rhetoric. Australia claims to have been offended by some of our remarks. While all credit for the quality of our work belongs to counsel and my team, I myself assume full responsibility for any reproach that may be made against us. That said, we do not wish this case to turn in the direction of emotion, and I therefore have no intention of dwelling on the fact that we ourselves have had some reason to feel offended.

6. Permettez-moi plutôt de formuler quelques-unes de nos observations générales. En résumé, alors que nous approchons de la fin des audiences, je dois dire que je n'ai toujours pas trouvé de cohérence, ni de prudence, dans les plaidoiries de l'Australie. Tout d'abord, son argumentation juridique, changeante, était pour le moins difficile à suivre. La théorie selon laquelle la convention avait évolué avec le temps a presque disparu[37]. L'Australie a finalement choisi de plaider que l'objet et le but de la convention ont toujours été la conservation et la reconstitution des peuplements baleiniers. Après avoir affirmé en termes vigoureux que le Japon agissait de mauvaise foi[38], l'Australie a atténué ses propos au cours du second tour pour insister sur les violations de la convention.

7. Ensuite, les faits ont souvent été dénaturés. Affirmer que le Japon a refusé de participer à des discussions sur l'observation des baleines alors qu'un éminent scientifique membre de la délégation japonaise a présidé le sous-comité chargé de la question pendant plus de dix ans, puis a continué d'y siéger en qualité de membre, ne saurait passer pour une simple erreur[39].

8. J'ajouterai que l'utilisation tendancieuse par l'Australie de références et citations choisies est fort regrettable. En particulier, lorsqu'elle a déformé les propos de M. Walløe lors du second tour, l'Australie est allée trop loin. Elle ne s'est pas comportée avec l'honnêteté et le respect exigés par le professionnalisme et l'intégrité d'un scientifique aussi éminent. M. Walløe a comparu

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[37] CR 2013/7, p. 48, par. 31 (Boisson de Chazournes) ; CR 2013/8, p. 34, par. 23 (Boisson de Chazournes). A l'inverse, voir MA, par. 2.20.

[38] CR 2013/18, p. 40, par. 4 (Crawford) ; CR 2013/20, p. 28-29, par. 76 (Crawford) ; p. 34-35, par. 3 (Gleeson). A l'inverse, voir CR 2013/7, p. 23, par. 17 (Campbell) ; CR 2013/11, p. 24-40 (Gleeson) ; et MA, par. 5.126.

[39] CR 2013/18, p. 19, par. 16 (Dreyfus) ; CR 2013/22, p. 39-40, par. 106 (Boyle).

devant la Cour à la demande du Japon pour présenter ses vues en tant qu'expert indépendant. Et il s'est parfaitement acquitté de sa mission.

32 9. Je voudrais également souligner que le Japon continue d'être préoccupé par les arguments présentés la semaine dernière par la Nouvelle-Zélande. Bien qu'il appartienne à la Cour d'en décider, le Japon tient à faire observer que ces arguments dépassent le cadre de l'interprétation des traités.

10. Monsieur le président, Mesdames et Messieurs de la Cour, tournons-nous à présent vers l'avenir. L'année prochaine, le comité scientifique de la CBI procédera à une évaluation de JARPA II. Le Japon se félicite qu'un projet dans lequel il a investi tant de ressources et d'efforts fasse l'objet d'un examen scientifique approfondi et constructif. Le Japon est tout à fait disposé à modifier son programme de recherche si nécessaire, en prenant dûment en considération la teneur des débats et les résultats de cette évaluation.

11. Pour conclure, il me faut revenir au leitmotiv de ma première intervention. *Pacta sunt servanda*. Un engagement accepté doit être respecté. *A contrario*, un engagement non accepté ne crée pas d'obligation. Il s'agit là d'un principe essentiel du droit international. Le Japon respecte le moratoire parce qu'il est tenu de le faire aux termes du paragraphe 10 *e)* du règlement annexé à la convention. Mais le Japon estime que la convention ne lui interdit pas de mener des programmes de chasse à la baleine à des fins de recherche scientifique, car la conduite de tels programmes est conforme à la convention. Les orientations générales de l'Australie et ses activités diplomatiques au sein de la CBI concernant une série de résolutions non contraignantes n'y changent rien.

12. Monsieur le président, Mesdames et Messieurs de la Cour, dans un monde qui se définit par la diversité des cultures, des traditions et des valeurs, le multilatéralisme est une sagesse issue des expériences de l'humanité, un legs précieux. Le principe *Pacta sunt servanda* forme aussi la clé de voûte de plusieurs cadres multilatéraux de coopération. Les Etats choisissent d'y adhérer s'ils obtiennent l'assurance qu'ils ne seront pas liés par des obligations auxquelles ils n'auront pas souscrit. Mais qu'adviendra-t-il de la stabilité de ces cadres multilatéraux si ces assurances disparaissent, si un Etat se rend soudainement compte qu'il est lié par une politique de la majorité et que la seule issue possible est de quitter l'organisation ? Le Japon, très attaché au respect de la

règle de droit, espère fermement que l'issue de cette affaire contribuera à renforcer la stabilité créée par le multilatéralisme.

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Conclusions finales

13. Monsieur le président, Mesdames et Messieurs de la Cour, mes collègues et moi-même tenons à vous exprimer notre sincère gratitude pour l'attention, la patience et la courtoisie dont vous avez fait preuve tout au long de ces audiences.

14. J'aimerais également remercier, au nom de l'ensemble de la délégation japonaise, le greffier, M. Philippe Couvreur, et l'ensemble de son personnel, y compris les interprètes, qui ont veillé au bon déroulement de ces audiences et à la bonne administration de cette affaire dans son ensemble.

15. Permettez-moi d'adresser également mes remerciements à l'équipe australienne. Je suis admiratif de toutes les ressources que l'Australie a consacrées à cette affaire. Je remercie également la délégation de la Nouvelle-Zélande.

16. Enfin, j'aimerais saisir cette occasion pour remercier tous les membres de la délégation japonaise de leur professionnalisme et de leur ardeur à la tâche.

17. Monsieur le président, Mesdames et Messieurs de la Cour, je vais à présent vous donner lecture des conclusions finales du Japon.

Le Japon prie la Cour de dire et juger :

1. — qu'elle n'a pas compétence pour connaître des demandes présentées à son encontre par l'Australie dans sa requête introductive d'instance du 31 mai 2010 ; et

— qu'en conséquence, la requête par laquelle la Nouvelle-Zélande a demandé à intervenir dans l'instance introduite par l'Australie contre le Japon tombe ;

2. — à titre subsidiaire, que les demandes de l'Australie sont rejetées.

Monsieur le président, Mesdames et Messieurs de la Cour, voilà qui clôt les plaidoiries du Japon en la présente instance. Je ne peux néanmoins conclure sans adresser un mot à mon défunt père. Monsieur le président, si vous me le permettez, je dirai à mon père : «C'est fini à présent. Tu peux reposer en paix.» Je vous remercie infiniment de votre attention.

LE PRESIDENT : Je vous remercie M. Tsuruoka de vos remarques finales en qualité d'agent du Gouvernement japonais. La Cour prend acte des conclusions finales dont vous venez de donner lecture au nom du Japon. Ainsi s'achève la procédure orale en l'espèce. Je tiens à remercier les agents, conseils et avocats pour leurs exposés.

Conformément à la pratique, je prierai les agents des Parties et de la Nouvelle-Zélande de demeurer à la disposition de la Cour pour tous renseignements complémentaires dont celle-ci
34 pourrait avoir besoin. Sous cette réserve, je déclare maintenant close la procédure orale en l'affaire relative à la *Chasse à la baleine dans l'Antarctique (Australie c. Japon ; Nouvelle-Zélande (intervenant))*. La Cour va à présent se retirer pour délibérer. Les agents des Parties et de l'Etat intervenant seront avisés en temps utile de la date à laquelle la Cour rendra son arrêt. La Cour n'étant saisie d'aucune autre question aujourd'hui, l'audience est levée.

L'audience est levée à 11 h 5.

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