

INTERNATIONAL COURT OF JUSTICE

WHALING IN THE ANTARCTIC

(Australia v Japan)

New Zealand Intervening

WRITTEN OBSERVATIONS

OF

NEW ZEALAND

4 APRIL 2013

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SECTION I: INTRODUCTION

1. These Written Observations are submitted to the Court in accordance with its Order of 6 February 2013 in relation to the intervention of the Government of New Zealand pursuant to Article 63 of the Statute of the Court in the case concerning *Whaling in the Antarctic (Australia v Japan)*¹. In that Order, the Court decided that the Declaration of Intervention filed by New Zealand pursuant to Article 63, paragraph 2, of the Statute was admissible, and fixed the time-limit for the filing of these Written Observations, as provided for in Article 86, paragraph 1, of the Rules of the Court².

2. New Zealand intervenes in its capacity as a party to the treaty at the centre of these proceedings, the International Convention for the Regulation of Whaling (“Convention”)³. These Written Observations present to the Court New Zealand’s views on the issues of interpretation under the Convention that are relevant to a determination of the case before the Court. In accordance with the Order of the Court, New Zealand’s intervention is confined to observations on the construction of the convention at issue in the proceedings, and does not deal with any other aspect of the case before the Court.

3. As outlined in its Declaration of Intervention, New Zealand considers that the proper construction of Article VIII of the Convention, and in particular

¹ *Whaling in the Antarctic (Australia v Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013 (“Order”)*.

² *Ibid.*, paragraph 23.

³ *International Convention for the Regulation of Whaling*, Washington D.C., 2 December 1946, 161 UNTS 74 (entered into force on 10 November 1948) (“Convention”).

paragraph 1 of that Article, is in question in the case⁴. In its Declaration of Intervention, New Zealand has provided the following summary of the proper interpretation of Article VIII of the Convention⁵:

- (a) Article VIII forms an integral part of the system of collective regulation established by the Convention.
- (b) Parties to the Convention may engage in whaling by Special Permit only in accordance with Article VIII.
- (c) Article VIII permits the killing of whales under Special Permit only if:
 - i. an objective assessment of the methodology, design and characteristics of the programme demonstrates that the killing is only “for purposes of scientific research”; and
 - ii. the killing is necessary for, and proportionate to, the objectives of that research and will have no adverse effect on the conservation of stocks; and
 - iii. the Contracting Government issuing the Special Permit has discharged its duty of meaningful cooperation with the Scientific Committee and the Commission.
- (d) Whaling under Special Permit that does not meet the requirements of Article VIII, and is not otherwise permitted under the Convention, is prohibited.

⁴ *Declaration of Intervention Pursuant to Article 63 of the Statute by the Government of New Zealand, Whaling in the Antarctic (Australia v Japan)*, 20 November 2012 (“*Declaration of Intervention*”), paragraph 16.

⁵ *Ibid.*, paragraph 33.

4. An outline of the interpretation of the Convention in these four respects was provided in New Zealand's Declaration of Intervention⁶. These Written Observations further elaborate on the reasoning and authority for this interpretation.

A: Outline of Written Observations

5. Section I of these Written Observations provides an introduction, including a summary of the principles that guide the interpretation of Article VIII.

6. Section II describes the development and scheme of the Convention, and identifies its object and purpose, which is to replace unilateral whaling with a system of collective regulation in order to provide for the interests of the parties in the proper conservation and management of whales.

7. Section III addresses the role of Article VIII within the structure of the Convention. It establishes that Article VIII forms an integral part of the system of collective regulation under the Convention, not an exemption from it. Article VIII cannot be applied to permit whaling where the effect of that whaling would be to circumvent the other obligations of the Convention or to undermine its object and purpose.

8. Sections IV to VI then describe the requirements for the application of Article VIII in detail, namely that Article VIII only permits the killing of whales: "for purposes of scientific research" (Section IV); where that is necessary and proportionate to the purposes of research and will have no adverse effect on the conservation of the stock (Section V); and where the Contracting Government

⁶ *Ibid.*, paragraphs 18 to 32.

issuing the Special Permit has discharged its duty of meaningful cooperation and taken proper account of the views of the Scientific Committee and the Commission (Section VI).

9. On the basis of that analysis, Section VII concludes with a summary of the proper construction of Article VIII.

B: Principles of Interpretation

10. The interpretation of the Convention, as an international agreement, is governed by the provisions of Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (“Vienna Convention”)⁷. Article 31 provides as the general rule of interpretation that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”⁸. The “context” includes the text and structure of the treaty as a whole⁹, including its preamble and any annexes¹⁰. The “object and purpose” may emerge from a consideration of the aims of the treaty as may be reflected, for example, in the scheme of the treaty and its preamble¹¹.

⁷ *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969, II55 UNTS 331 (entered into force on 27 January 1980) (“*Vienna Convention*”). Australia acceded to the *Vienna Convention* on 13 June 1974; Japan acceded on 2 July 1981.

⁸ Article 31(1) of the *Vienna Convention*.

⁹ See, for example, *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v Greece)*, Judgment of 5 December 2011, at paragraphs 97 and 98.

¹⁰ Article 31(2) of the *Vienna Convention*.

¹¹ See, for example, *Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996, p. 803 at p. 813 (paragraph 27); *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, Award, 18 February 1977, XXI UNRIAA 53 at p. 89 (paragraph 19).

11. Such interpretation must also take account of the subsequent practice of the parties to the treaty¹², and may also be confirmed by reference to supplementary means of interpretation¹³. This Court has frequently examined the subsequent practice of the parties in the application of a treaty as an aid to its interpretation and such reference is not conditional upon ambiguity in the text¹⁴. In the context of a multilateral treaty, decisions or resolutions of constituent organs have routinely been referred to as evidence of such practice, including where these have been adopted by a vote¹⁵. Similarly, this Court has referred to supplementary means of interpretation for confirmation when it has found that useful in conjunction with the general rule¹⁶. Such “supplementary means of interpretation” are not restricted to the preparatory work of a treaty¹⁷, and may include statements or decisions of the parties or related bodies concerning the treaty’s interpretation or application¹⁸.

¹² Article 31(3)(a) and (b) of the *Vienna Convention*.

¹³ Article 32 of the *Vienna Convention*.

¹⁴ See, for example, *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, *I.C.J. Reports 1999*, p. 1045 at p. 1076 (paragraph 50) and the authorities cited therein.

¹⁵ See, for example: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports 2004*, p. 136 at pp. 149-150 (paragraphs 27 & 28); *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, *I.C.J. Reports 1962*, p. 151 at pp. 160-161; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion, *I.C.J. Reports 1960*, p. 150 at p. 168.

¹⁶ See, for example: *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *I.C.J. Reports 1994*, p. 6 at p. 27 (paragraph 55); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia)*, Preliminary Objections, Judgment of 1 April 2011, at paragraph 142.

¹⁷ Article 32 of the *Vienna Convention*: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion...” (emphasis added).

¹⁸ See, for example: *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, *I.C.J. Reports 1999*, p. 1045 at p. 1096 (paragraph 80); *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body, WT/DS285/AB/R (7 April 2005); [2005] WTO AB 2 at paragraph 196; R Jennings & A Watts *Oppenheim’s International Law*, 9th ed (Oxford University Press, 2008), Vol I §633 at p. 1276.

12. An interpreter must also take into account any relevant rules of international law applicable in the relations between the parties, including any developments in those rules since the adoption of the treaty¹⁹. Furthermore, the principle of good faith requires a party to apply a treaty provision “in a reasonable way and in such a manner that its purpose can be realised”²⁰.

13. On that basis, when interpreting Article VIII of the Convention, the ordinary terms of the article have to be considered in the context of the Convention as a whole including the provisions of its Schedule, which is an “integral part” of the Convention²¹, and in light of its object and purpose. Consideration must be given to the practice of the parties under the Convention, including decisions and resolutions adopted by the International Whaling Commission and its Committees²². Both as evidence of subsequent practice under Article 31(3)(b), or as supplementary means of interpretation under Article 32, of the Vienna Convention, such decisions and resolutions shed valuable interpretative light on the meaning of the terms of Article VIII and their proper application. In so doing, they do not modify the terms of Article VIII, but rather confirm the interpretation that flows from their ordinary meaning in their context.

¹⁹ Article 31(3)(c) of the *Vienna Convention*; see, for example: *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, *I.C.J. Reports 2003*, p.161 at p. 182 (paragraph 41); *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, p.7 at pp. 67-68 (paragraph 112); and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (S.W. Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports 1971*, p.16 at p. 31 (paragraph 53).

²⁰ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, *I.C.J. Reports 1997*, p.7 at p. 79 (paragraph 142).

²¹ Article 1(1) of the *Convention*.

²² Copies of all resolutions adopted by the International Whaling Commission referred to in these Written Observations are published and readily available at: <<http://iwc.int/resolutions>>. Annual Reports of the International Whaling Commission are published and readily available at: <<http://iwc.int/annual-reports>>. The text of the Convention, Schedule, and Rules of Procedure are published and readily available at: <<http://iwc.int/convention>>.

Interpretation of the Convention must also take account of other relevant rules of international law applicable to the parties to the Convention.

SECTION II: THE SYSTEM OF COLLECTIVE REGULATION UNDER THE CONVENTION AND ITS SCHEDULE

14. The International Convention for the Regulation of Whaling was concluded on 2 December 1946 and entered into force on 10 November 1948. Eighty-nine countries are currently party to the Convention²³. Minor amendments were made by way of a Protocol adopted in 1956²⁴.

15. The Convention creates a system for the collective regulation of whaling in light of the common interest of States in the long-term future of whale stocks. Whatever their individual interests in relation to whaling, parties to the Convention have agreed to work collectively “to ensure proper conservation and development of whale stocks”²⁵. The history, preamble, and scheme and structure of the Convention each affirm that collective character. Its central objective is to replace unregulated whaling conducted unilaterally by States with a binding system of collective regulation in order to provide for the interests of the parties in the proper conservation and management of whales. States that have become party to the Convention have in so doing chosen to forgo unilateral whaling and to engage in whaling only in accordance with the Convention.

²³ *Website of the International Whaling Commission*, “IWC Members and Commissioners”, at <<http://iwc.int/members>> accessed on 15 March 2013.

²⁴ *Protocol to the International Convention for the Regulation of Whaling*, Washington D.C., 19 November 1956, 338 UNTS 366 (entered into force 4 May 1959).

²⁵ Paragraph 6 of the Preamble to the *Convention*.

A: History of the Development of the Convention

16. The Convention was developed against the backdrop of a significant decline in global whale stocks, following the dramatic increase in commercial catches during the late 19th and early 20th centuries²⁶. It followed various efforts, commencing in 1927, to “control the enormous expansion of the whaling industry, which was constituting a real menace to the maintenance of the whale stocks”²⁷. As a first step, a Convention for the Regulation of Whaling was developed under the auspices of the League of Nations, and opened for signature in Geneva in 1931 (“1931 Geneva Convention”)²⁸. Although attracting twenty-eight parties, the 1931 Geneva Convention failed to attract the membership of several countries actively engaged in whaling²⁹. It thus similarly failed to curb catch levels, which continued to rise significantly³⁰.

17. In 1937 the British Government invited a group of interested nations to meet in London “in the hope that we may all agree upon measures of protection so that the endeavours of some countries may not be defeated by the enterprise of others”³¹. That conference concluded with the adoption of the International Agreement for the Regulation of Whaling (“1937 Agreement”)³². This

²⁶ See International Whaling Commission Report, *Eighth Report of the Commission*, 1957, at pp. 3-5.

²⁷ *Ibid.*, at p. 3 (paragraph 4).

²⁸ *Convention for the Regulation of Whaling*, Geneva, 24 September 1931, 155 LNTS 349 (entered into force 16 January 1935).

²⁹ See L. Leonard “Recent Negotiations toward the International Regulation of Whaling” (1941) 35 *Am. J. Int’l L.* 90, (“Leonard, Recent Negotiations toward Regulation of Whaling”), at p. 100.

³⁰ *Ibid.*, at p. 93.

³¹ Minister of Agriculture and Fisheries for the United Kingdom, “Minister’s Speech at the Opening of the Conference”, (ICW/1937/3), 24 May 1937, *Japan’s Counter-Memorial*, Annex 7, Vol II, at p. 101.

³² *International Agreement for the Regulation of Whaling*, London, 8 June 1937, 190 LNTS 79 (entered into force 7 May 1938).

Agreement was extended by the agreement of the parties through a number of Protocols adopted between 1937 and 1945³³.

18. As with its predecessor, the 1937 Agreement was less than fully comprehensive. It provided for restrictions on whaling to be renegotiated annually on a season by season basis³⁴. In addition, despite efforts to meet their concerns, some of the major whaling nations (including Japan) did not join and continued to develop their whaling industries outside the framework of the 1937 Agreement³⁵. Despite the efforts of the 1937 Agreement, whaling thus remained largely uncontrolled.

19. Such uncontrolled whaling continued to pose a significant risk to the long-term survival of whale stocks. That risk was foreshadowed in the Final Act on the adoption of the 1937 Agreement itself: “the purpose of this present agreement may be defeated by the development of unregulated whaling by other countries”³⁶. As the Minister for Agriculture and Fisheries for the United Kingdom put it when the parties to the 1937 Agreement met one year later, regulation under that agreement was ineffective so long as “other Governments stand aside and, under whatever excuse, permit, or even encourage, uncontrolled exploitation”³⁷.

³³ These are outlined in detail in *Australia’s Memorial* at p. 14 (note 34).

³⁴ International Whaling Commission Report, *Eighth Report of the Commission*, 1957, at p. 3 (paragraph 5).

³⁵ Leonard, *Recent Negotiations toward Regulation of Whaling*, at pp. 105, 111

³⁶ *International Agreement for the Regulation of Whaling [with Final Act of the Conference]*, UKTS 037/1938: Cmd 5757, pp 9-11, at p. 11 (paragraph 10), *Japan’s Counter-Memorial*, Annex 13, Vol II, p. 119.

³⁷ Minister of Agriculture and Fisheries for the United Kingdom, “Minister’s Speech at the Opening of the Conference”, 14 June 1938, London, quoted in Leonard, *Recent Negotiations toward Regulation of Whaling*, at p. 103.

20. As the Commission itself has noted, with that in mind “the member governments now decided that a reappraisal of the whole situation was required and that a new and more abiding agreement would be preferable to the 1937 [Agreement]”³⁸. In 1946 the United States’ Government convened an International Conference in Washington D.C., to negotiate a new agreement “to place whale conservation on a permanent basis”³⁹. The purpose of the agreement, as explained by the Chairman of the Conference, was “to develop a sound conservation program which will maintain an adequate and healthy breeding stock”⁴⁰. And the task set was that of “concluding an international convention which will give further impetus to world-wide cooperation in the conservation of whale resources”⁴¹.

21. The Convention concluded in 1946 represented the outcome of those negotiations. It was signed on 2 December of that year, and entered into force two years later.

B: The Object and Purpose of the Convention as set out in its Preamble

22. The preamble to the Convention reflects the history behind its development and provides valuable insight into the objectives of the negotiating

³⁸ International Whaling Commission Report, *Eighth Report of the Commission*, 1957, at p. 4 (paragraph 8).

³⁹ Statement of the Delegate of the United States of America; *International Whaling Conference, Washington D.C., 1946*, Opening Session, *Japan’s Counter-Memorial*, Annex 16, at p. 129.

⁴⁰ Statement of the Chairman; *International Whaling Conference, Washington D.C., 1946*, “Minutes of the Second Session” (IWC/14), p. 13, para 137, *Japan’s Counter-Memorial*, Annex 17, Vol II, at p. 140.

⁴¹ Address by the Hon. C Girard Davison, Assistant Secretary of the United States Department of the Interior at a Dinner in Honor of the Delegates to the International Whaling Conference”, *Japan’s Counter-Memorial*, Annex 21, Vol II, at p. 171.

parties⁴². It is generally accepted that the provisions of the preamble to a treaty “may be relevant and important as guides to the manner in which the Treaty should be interpreted, and in order, as it were, to ‘situate’ it in respect of its object and purpose”⁴³.

23. As expressed in the preamble, the adoption of the Convention results from the acknowledgement by the negotiating governments of their common interest in whale stocks, their recognition of the threat to that interest posed by unregulated whaling, and their accompanying desire to establish a collective regime for the regulation of all aspects of whaling. That collective purpose stands in contrast to what had occurred before - rampant uncontrolled whaling and the consequent catastrophic decline in whale stocks.

24. The preamble opens with the recognition of the “interest of the nations of the world in safeguarding for future generations the great natural resources represented by whale stocks”⁴⁴. Governments additionally recorded their “common interest” in the restoration of whales stocks “as rapidly as possible”⁴⁵. They identified the greatest threat to that common interest as “the history of whaling [which had seen] over-fishing of one area after another and of one species of whale after another”⁴⁶. The negotiating governments accordingly acknowledged the need for whaling to be “properly regulated”⁴⁷ and for whaling

⁴² See, for example, *Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996, p. 803 at p. 813 (paragraph 27).

⁴³ *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel, Award*, 18 February 1977, XXI UNRIAA 53 at p. 89 (paragraph 19).

⁴⁴ Paragraph 1 of the Preamble to the *Convention*.

⁴⁵ Paragraph 4 of the Preamble to the *Convention*.

⁴⁶ Paragraph 2 of the Preamble to the *Convention*.

⁴⁷ Paragraph 3 of the Preamble to the *Convention*.

operations to be “confined”⁴⁸, and recorded their desire to “establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks”⁴⁹.

25. On that basis, the parties “decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry”⁵⁰. The object and purpose of the Convention was, and is, therefore to replace unregulated, unilateral whaling by States with a system of collective regulation through which the interests of the parties in the proper conservation and management of whales can be achieved.

C: The Scheme and Structure of the Convention Provide for Collective Regulation

26. That object and purpose is evident from the scheme and structure of the Convention itself. In order to achieve the aims of the Convention, no room is left for the parties to engage in whaling outside the Convention’s rules. No aspect of whaling is left unaddressed within the Convention - regulation extends to all activities associated with whaling⁵¹, wherever and however conducted⁵². In support of this the regulations in the Schedule contain an extensive number of restrictions on whaling activity, including restrictions on seasons⁵³, methods and means of capture⁵⁴, catch limits⁵⁵, and the treatment of whales after capture⁵⁶.

⁴⁸ Paragraph 5 of the Preamble to the *Convention*.

⁴⁹ Paragraph 6 of the Preamble to the *Convention*.

⁵⁰ Paragraph 7 of the Preamble to the *Convention*.

⁵¹ See Article V(1) of the *Convention*, and the detailed regulations contained in the *Schedule to the Convention (as amended by the Commission at the 63rd Annual Meeting, July 2011)* (“*Schedule*”).

⁵² Article I(2) of the *Convention*.

⁵³ See Part II of the *Schedule*.

⁵⁴ See Part III of the *Schedule*.

27. Reflecting the “interest of the nations of the world” in safeguarding whale stocks, as recognized in the preamble, membership of the Convention is open to all States, not merely those with an active whaling industry⁵⁷. All parties, whether they have a whaling industry or not, are placed on an equal footing under the Convention because all parties share an interest in the proper conservation and management of whales. It is therefore not correct to characterise “the key and final aim” of the Convention solely as “the orderly development of the whaling industry”, as Japan attempts to do⁵⁸.

28. The Convention’s objective of collective regulation is in turn achieved through a process of collective decision making. The Convention establishes the International Whaling Commission, composed of one member from each Contracting Government⁵⁹. The Commission may adopt regulations governing protected and unprotected species, whaling seasons, open and closed waters including sanctuaries, size and catch limits, methods of whaling including gear types, and methods of measurement and catch returns⁶⁰.

29. The regulations adopted by the Commission take the form of amendments to the Schedule, which forms an integral part of the Convention⁶¹. The Schedule as it currently stands consists of 31 paragraphs, containing detailed

⁵⁵ See Part III of the *Schedule*, in particular paragraphs 10 to 13.

⁵⁶ See Part IV of the *Schedule*.

⁵⁷ Article X(2) of the *Convention*.

⁵⁸ *Japan’s Counter-Memorial*, paragraph 6.11.

⁵⁹ Article III(1) of the *Convention*. In these Written Observations, “IWC” is used to refer to the inter-governmental organisation established under the Convention (including its Secretary, the Commission and its committees), while the term “Commission” is used to refer to the organ responsible for exercising the functions set out in the *Convention*.

⁶⁰ Article V(1) of the *Convention*.

⁶¹ Article I(1) of the *Convention*.

restrictions on all aspects of whaling. Central within those restrictions are three prohibitions on commercial whaling activity. Paragraph 7 of the Schedule prohibits all commercial whaling in certain areas of the Indian and Southern Oceans that have been designated as sanctuaries⁶². Paragraph 10(e), commonly referred to as “the moratorium”, provides that “the catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero”. Paragraph 10(d) imposes a moratorium on the use of factory ships, except in relation to minke whales.

30. A regulation can be adopted by a three-fourths majority of those casting an affirmative or negative vote⁶³. Once adopted it is binding on each Contracting Government unless it presents an objection to it⁶⁴. Each Contracting Government is required to take appropriate measures to ensure the application of the provisions of the Convention and the punishment of infractions committed by persons or vessels under its jurisdiction⁶⁵. Information on any such infractions is to be transmitted to the Commission⁶⁶. Parties to the Convention have therefore agreed to abide by the outcomes of the collective decision making mechanisms it contains, and have accepted that they may not engage in whaling except in compliance with the Convention’s rules.

31. In addition, the Commission may make recommendations to “any or all” of the Contracting Governments to the Convention “on any matters which relate

⁶² Provided for at paragraphs 7(a) and (b) of the *Schedule*.

⁶³ International Whaling Commission July 2012, *Rules of Procedure and Financial Regulations (as amended by the Commission at the 64th Annual Meeting)* (“*Rules of Procedure*”), Rule E (3)(a).

⁶⁴ Article V(3) of the *Convention*.

⁶⁵ Article IX(1) of the *Convention*.

⁶⁶ Article IX(4) of the *Convention*.

to whales or whaling and to the objectives and purposes of [the] Convention”⁶⁷. Such recommendations can be adopted by the vote of a simple majority of those casting an affirmative or negative vote⁶⁸. Since its first meeting in 1949, the Commission has adopted over 200 resolutions, both directed to all members and to specific States, on a wide range of issues relating to whales and whaling⁶⁹. Those resolutions serve as an expression of the collective views of parties under the Convention in relation to the protection of their interests in the proper conservation and management of whales.

D: Recognition of the System of Collective Regulation under the Convention

32. The preeminent role of the IWC in regulating whaling, rather than leaving it in the hands of individual States, is reflected in the fact that its membership has grown over time from twelve States at its first meeting in 1949⁷⁰ to eighty-nine today⁷¹. Many of the Contracting Governments have no whaling industry, or history of whaling activity. Their interest therefore lies in the proper conservation and management of whales themselves, not in the preservation of the whaling industry. That wider emphasis is supported by the repeated acknowledgement of the role of the IWC in the regulation of whaling in international conferences and by other bodies, including the 1972 Stockholm Conference on the Human Environment, the 1992 Rio Conference on Environment and Development and the Conference of the Parties to the

⁶⁷ Article VI of the *Convention*.

⁶⁸ *Rules of Procedure*, Rule E (3)(a).

⁶⁹ *Website of the International Whaling Commission*, “Resolutions”, <<http://iwcoffice.org/resolutions>>, accessed on 15 March 2013.

⁷⁰ International Whaling Commission Report, *First Report of the Commission*, 1950, at p. 3 (paragraph 8).

⁷¹ *Website of the International Whaling Commission*, “Membership and Contracting Governments”, <<http://iwc.int/members>>, accessed on 15 March 2013.

Convention on International Trade in Endangered Species of Wild Fauna and Flora⁷². The system of collective regulation under the Convention has thus been recognised as the mechanism by which the proper conservation and management of whales can be achieved.

E: Conclusion

33. The preamble to the Convention and its scheme and structure indicate clearly the object and purpose of the Convention. It flows from the “interest of the nations of the world in safeguarding for future generations the great natural resources represented by whale stocks”⁷³. Whatever their individual interests in relation to whaling, parties to the Convention have agreed to work collectively “to establish a system of international regulation...to ensure proper conservation and development of whale stocks”⁷⁴. The Convention provides for the “proper conservation of whale stocks” and the “orderly development” of the whaling industry - both to be achieved through collective rather than unilateral State action. The object and purpose of the Convention was, and is, therefore to replace unregulated, unilateral whaling by States with collective regulation as a mechanism to provide for the interests of the parties in the proper conservation and management of whales. This object and purpose of the Convention provides an important background against which Article VIII of the Convention is to be understood.

⁷² See, for example: Recommendation 33 adopted by the UN Conference on the Human Environment at Stockholm, 16 June 1972 (II ILM 1416 (1972)); paragraph 17.62 of *Agenda 21* approved by the UN Conference on Environment and Development at Rio de Janeiro, 13 June 1992 (UN Doc A/CONF.151/26 (Vols I, II & III) (1992)); Resolution 11.4 adopted by the 11th Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora at Gigiri, 10-20 April 2000 (Conf 11.4 (Rev. CoP12)).

⁷³ Paragraph 1 of the Preamble to the *Convention*.

⁷⁴ Paragraph 6 of the Preamble to the *Convention*.

SECTION III: THE ROLE OF ARTICLE VIII WITHIN THE CONVENTION

34. Scientific information is central to the role of the IWC under the Convention and forms a key part of the system of collective regulation under the Convention. The Commission must base its regulations “on scientific findings”⁷⁵. Article IV of the Convention identified the collection of scientific information as a core function of the Commission⁷⁶. Accordingly the Commission has specifically established a Scientific Committee to review scientific information and research programmes⁷⁷. The Convention provides for such information to be gathered in connection with the operation of whaling activities⁷⁸, and by research encouraged, recommended or organised by the Commission itself⁷⁹, or conducted by individual parties under Special Permit⁸⁰. Contracting Governments are obliged to transmit data and statistical information relating to whales and whaling to a central body designated by the Commission⁸¹. The collection and sharing of scientific information by the IWC and its individual members is thus intended as a means, within the system of collective regulation under the Convention, to achieve its object and purpose.

35. The conduct of scientific research by individual Contracting Governments through Special Permits is provided for in Article VIII as follows:

⁷⁵ Article V(2)(b) of the *Convention*.

⁷⁶ Article IV of the *Convention*.

⁷⁷ *Rules of Procedure*, Rule M(4)

⁷⁸ Articles VII and VIII(4) of the *Convention*.

⁷⁹ Article IV of the *Convention*.

⁸⁰ Article VIII of the *Convention*.

⁸¹ Articles VII and VIII(3) of the *Convention*; Section VI of the *Schedule*.

- (1) Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.
- (2) Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.
- (3) Each Contracting Government shall transmit to such body as may be designated by the Commission, insofar as practicable, and at intervals of not more than one year, scientific information available to that Government with respect to whales and whaling, including the results of research conducted pursuant to paragraph 1 of this Article and to Article IV.
- (4) Recognizing that continuous collection and analysis of biological data in connection with the operations of factory ships and land stations are indispensable to sound and constructive management of the whale fisheries, the Contracting Governments will take all practicable measures to obtain such data.

36. Whaling under an Article VIII Special Permit has a character that is distinct from other whaling provided for in the Convention, in that it is permitted only for the specific limited purpose of “scientific research”. Article VIII has accordingly been described as a “concession”⁸². It enables a party to the Convention to carry out research to obtain scientific data necessary to support the

⁸² P. Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching* (Oceana Publications, 1985), Vol 1, (“Birnie, *International Regulation of Whaling*”), at p. 190.

work of the IWC freed from the constraints placed on commercial whaling operations⁸³. In that sense, it forms an integral part of the system of collective regulation under the Convention rather than a complete exemption from it. That is clear both from the terms of the article and its context. In this regard, the analogy that Japan attempts to draw in its Counter Memorial between Article VIII and “self-contained regimes” is misplaced⁸⁴.

37. An indication of the link between the provision for Special Permits in Article VIII and the Convention as a whole is the fact that Article VIII itself is not limited to Special Permit whaling. While the first two paragraphs of the article relate to issuing permits for whaling for the purposes of scientific research, the third and fourth paragraphs are broader in scope, relating to scientific information acquired by Contracting Governments more generally, and not just scientific information acquired under Special Permits. This reinforces the fact that Special Permit whaling is an integral part of the overall Convention regime for the gathering of scientific information and not something that is separate and apart from the rest of the Convention.

38. The scope of the discretion granted to Contracting Governments in respect of issuing Special Permits is set out in the first paragraph of Article VIII. This provides that “any Contracting Government *may* grant to any of its nationals a Special Permit” (emphasis added). It is a discretion to grant Special Permits for purposes of scientific research, “notwithstanding anything contained in this

⁸³ See comments of the Chairman introducing draft Article VIII to the negotiating conference, *International Whaling Conference, Washington D.C., 1946: Minutes of the Third Session* (IWC/20), p. 10 at para 103, *Australian Memorial*, Annex 69, Vol II, pp. 315-316: “It exempts certain scientific investigations from the Conservation Regulations applicable to ordinary commercial operation.”

⁸⁴ *Japan’s Counter-Memorial*, paragraph III.6, p. 299.

Convention”. In its Counter Memorial Japan seeks to interpret these words as a blanket exclusion of Article VIII from the provisions of the Convention⁸⁵. But, this is to ignore the words as they are actually used in their particular context in paragraph one and in Article VIII as a whole. As already mentioned, Article VIII does more than provide for Special Permit whaling - it contains provisions applicable to information gained from scientific research by all means. On that basis alone the Article clearly is intended to form part of the fabric of the Convention and cannot be viewed as “free-standing”.

39. The words “notwithstanding anything contained in this Convention” do not apply to Article VIII as a whole, or even to the whole of the first paragraph of Article VIII. They apply only to the words that immediately follow them – “any Contracting Government may grant to any of its nationals a Special Permit...”. They relate to the discretion of Contracting Governments to grant Special Permits. In other words, a Contracting Government may issue a Special Permit for purposes of scientific research despite the restrictions imposed on commercial and other forms of whaling under the Schedule. The words provide no greater concession from the Convention provisions than that. And their need is obvious. Without such a provision, a “Special Permit” could not be issued; the rules relating to commercial whaling would continue to apply. But the words do not constitute a blanket exemption for Special Permit whaling from all aspects of the Convention. They provide a limited discretion for Contracting Governments to issue Special Permits for the specific articulated purpose of scientific research.

⁸⁵ *Japan’s Counter-Memorial*, paragraph 7.8: “The opening words of Article VIII (“Notwithstanding anything contained in this Convention”) make clear that the provisions of Article VIII are free-standing and not to be read down by reference to any other provision of the ICRW.”

40. The interpretation that the words “notwithstanding anything contained in the Convention” were intended to apply only to the granting of a permit and not to all aspects of Special Permit whaling is reinforced by what is contained in the rest of the first paragraph. The paragraph contemplates that Special Permits will be subject to conditions, specifically mentioning restrictions as to the number of whales to be taken, and gives the Contracting Government granting the Special Permit some discretion in the setting of those conditions. If the opening words of the first paragraph had intended to be a complete exemption from the provisions of the Convention for all aspects of Special Permit whaling, then no such reference to the discretion of the Contracting Government in relation to the conditions attached to a Special Permit would have been necessary.

41. A further indication that the words “notwithstanding anything contained in this Convention” were not to apply to all aspects of Special Permit whaling is found in the latter part of the first paragraph of Article VIII. There it is provided that the “killing, taking or treating” of whales in accordance with Article VIII, is “exempt from the operation of this Convention”. Again such a provision would have been unnecessary if the opening words of the paragraph, “notwithstanding anything in the Convention”, were intended to cover all aspects of Special Permit whaling. It is contrary to basic principles of treaty interpretation to assume that the Parties intended to include in their treaty a provision that was meaningless⁸⁶.

42. There is further confirmation for this more limited scope of the words “notwithstanding anything contained in this Convention” when the phrase is considered within the context of the Convention’s provisions requiring a

⁸⁶ See, for example, R. Jennings & A. Watts *Oppenheim’s International Law*, 9th ed. (Oxford University Press, 2008), Vol I §633 at pp. 1280-1281.

Contracting Government to submit Special Permits to the Scientific Committee for prior review and comment, notify them to the Commission once issued, and report the results obtained through the Commission and Scientific Committee. Article VIII, paragraph 1, requires that “[e]ach Contracting Government shall report at once to the Commission” any Special Permit it has issued. Paragraph 3 of the Article further requires that the Contracting Government “shall transmit to such body as may be designated by the Commission...the results of research conducted pursuant to paragraph 1 of this Article”. Under Paragraph 30 of the Schedule to the Convention, Contracting Governments are obliged to submit proposed Special Permits to the Scientific Committee before they are issued in order “to allow the Scientific Committee to review and comment on them”. Such requirements are fundamentally at odds with Japan’s characterisation of Special Permit whaling as “entirely outside the scope of the [Convention]”⁸⁷. But they are fully consistent with Article VIII’s role as an integral part of the collective regime of the Convention. As will be described in detail in Section VI, the established practice of the Commission and Scientific Committee in monitoring the issue of Special Permits further underscores the fact that Contracting Governments see Special Permit whaling as firmly within and not outside the Convention regime⁸⁸.

43. Thus, Article VIII provides that Contracting Governments may issue Special Permits for whaling subject to important restrictions. A Contracting Government may issue a Special Permit “notwithstanding” the ordinary rules of the Convention, provided it does so for the “purposes of scientific research” and subject to conditions, including limiting the number of whales to be killed or taken. Only Special Permit whaling that is conducted “in accordance with” the

⁸⁷ *Japan’s Counter-Memorial*, paragraph 7.8.

⁸⁸ *Infra* paragraphs 90 to 93.

requirements of Article VIII is exempt from the operation of the Convention. Contrary to Japan's claims in its Counter Memorial⁸⁹, there is no regime of Special Permits for whaling for the purposes of scientific research that is separate and apart from the rest of the Convention. Special Permits are a mechanism authorized under the Convention to aid in fulfilling the needs of the Contracting Governments to obtain the scientific research necessary for the IWC to carry out its functions. As such, they form an integral part of the collective regime of the Convention, not a free-standing "right" as Japan seeks to characterise it⁹⁰.

44. In light of this, Contracting Governments issuing Special Permits have certain obligations. They can issue permits only for the purposes of scientific research. They have an obligation to set a limit on the catch under any Special Permit. And they have an obligation to comply with procedural requirements in the issuing of Special Permits. As will be described in Section VI, that obligation requires meaningful cooperation between a Contracting Government granting a Special Permit and other Contracting Governments through the Scientific Committee and the Commission.

45. Beyond this, Contracting Governments have obligations under customary international law when acting under Article VIII. Any discretion that Contracting Governments have with respect to Special Permits, including the discretion to determine the number of whales to be taken under a Special Permit, is not unfettered and its exercise remains subject to review to ensure that it is exercised properly and in good faith⁹¹. A "proper" exercise of discretion requires that

⁸⁹ *Japan's Counter-Memorial*, paragraph 7.8.

⁹⁰ *Ibid.*, paragraph 7.9.

⁹¹ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment, *I.C.J. Reports 2008*, p. 177 at p. 229 (paragraph 145): "The Court begins its examination of

Article VIII must be applied for the purpose for which it has been included in the Convention, namely “scientific research”⁹². The principle of good faith requires not merely a proper purpose, but also the exercise of the powers provided under Article VIII in a reasonable way within the collective regulatory regime of the Convention so that its object and purpose can be achieved: “The principle of good faith obliges the Parties to apply [the treaty] in a reasonable way and in such a manner that its purpose can be realized”⁹³. As an integral part of the Convention, Article VIII forms part of the collective system by which the parties’ interests in the proper conservation and management of whales are to be realised. It follows that Article VIII cannot be applied to permit whaling where the effect of that whaling would be to circumvent the other obligations of the Convention or to undermine its central objective⁹⁴. This has been specifically acknowledged by the Commission⁹⁵. Indeed, Japan appears to accept this in its Counter Memorial⁹⁶.

Article 2 of the 1986 Convention by observing that, while it is correct, as France claims, that the terms of Article 2 provide a State to which a request for assistance has been made with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties [...]. This requires it to be shown that the reasons for refusal to execute the letter rogatory fell within those allowed for in Article 2.”

⁹² See, for example: *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment, I.C.J. Reports 2008, p. 177 at p. 229 (paragraph 145); *Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213, at p. 241 (paragraph 61): “Thus, the language found in Article VI means that the right of free navigation granted to Costa Rica in that provision applies exclusively within the ambit of navigation “for the purposes of commerce” and ceases to apply beyond that ambit.”

⁹³ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, I.C.J. Reports 1997, p. 7, at pp. 78-79 (para 142).

⁹⁴ See, for example, the International Law Commission commentary to what became Article 26 of the *Vienna Convention*: “Some members felt that there would be advantage in also stating that a party must abstain from acts calculated to frustrate the object and purpose of the treaty. The Commission, however, considered that this was clearly implicit in the obligation to perform the treaty in good faith and preferred to state the *pacta sunt servanda* rule in as simple a form as possible.” (*Yearbook of the International Law Commission*, 1966, Vol II, at p. 211 (paragraph 4))

⁹⁵ *IWC Resolution 1995-9*, “Resolution on Whaling under Special Permit”, (adopted by majority vote; 23 Y: 5N: 2A), at preambular paragraph 4: ““WHEREAS Contracting Governments, in exercising their rights under Article VIII, should nevertheless respect fully the Commission’s

46. The particular characteristics of Special Permit whaling under Article VIII, which is conducted by individual States within the framework of a Convention that focuses on collective regulation in place of unilateral action, suggests that caution has to be exercised in the interpretation and application of Article VIII. An expansive interpretation of Article VIII could lead to an undermining of the system of collective regulation under the Convention – flying in the face of its very object and purpose. In light of this, a restrictive rather than an expansive interpretation of the conditions in which a Contracting Government may issue a Special Permit under Article VIII is warranted.

47. In the following sections, New Zealand will elaborate on, first, the content of the requirement that permits be granted only for purposes of scientific research; second, the nature of the obligation on Contracting Governments granting Special Permits to limit the number of whales taken under such permits; and third, the content of the procedural requirements for the granting of Special Permits and the fact that they must be complied with in a way that involves meaningful cooperation on the part of the granting Contracting Government with the Scientific Committee and the other Contracting Governments through the Commission.

arrangements to conserve whales and ensure that the killing, taking and treating of whales for scientific research is only undertaken in a manner consistent with the provisions and principles of the Convention.”

⁹⁶ *Japan’s Counter-Memorial*, paragraph 7.16. See also *Australia’s Memorial*, paragraph 4.54.

SECTION IV: ARTICLE VIII ONLY PERMITS WHALING “FOR PURPOSES OF SCIENTIFIC RESEARCH”

A: Whaling must be Exclusively for “Purposes of Scientific Research”

48. Article VIII, paragraph 1, provides that Special Permits may only authorise “killing, taking or treating of whales *for purposes of scientific research*” (emphasis added). The terms of the article are thus clear that it does not permit whaling for purposes other than “scientific research”. As the Court observed in *Navigational and Related Rights (Costa Rica v Nicaragua)* “expressly stating the purpose for which a right may be exercised implies in principle the exclusion of all other purposes”⁹⁷. This is reinforced when Article VIII is read in the broader context of the Convention as a whole, which elsewhere refers to whaling “for commercial purposes”⁹⁸ and “aboriginal subsistence whaling”⁹⁹. The statement of a specific purpose in Article VIII clearly indicates that other purposes referred to elsewhere in the Convention are not intended to be included within that provision.

49. While Article VIII, paragraph 2, recognises that meat and other products obtained from a whale killed under a Special Permit may be distributed, it is equally clear that whaling for the purpose of the sale or supply of whale meat is not a permitted purpose under Article VIII. If the whaling is directed or designed towards another purpose, such as the sale or supply of meat, then its purpose ceases to be “scientific” and becomes “commercial”, even if it still involves the collection of some scientific data. The Commission has emphasised that any whaling under Special Permit must be “conducted strictly in accordance with

⁹⁷ *Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213 at p. 241 (paragraph 61).

⁹⁸ Paragraph 10(e) of the *Schedule*.

⁹⁹ Paragraph 13(a) of the *Schedule*.

scientific requirements”¹⁰⁰. This is confirmed by subsequent statements of the Commission that “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”¹⁰¹.

50. The exclusivity of purpose in Article VIII is further confirmed by subsequent State practice under the Convention. As discussed further in Section VI, at the eighth meeting of the Commission, Norway formally objected to a permit that had been issued by the United Kingdom on the grounds that the stated purpose (to test an electric harpoon) was “outside the ambit of Article VIII”¹⁰². The United Kingdom subsequently suspended the application of the permit and no whales were taken¹⁰³. Russia, too, has in the past refrained from pursuing Special Permit whaling in light of concerns expressed about the design and purpose of its proposed programme by the Scientific Committee and the Commission¹⁰⁴. These examples underscore an acceptance by the parties to the Convention that Article VIII does indeed mean what it says – the only purpose for which a Special Permit may be issued is “scientific research”.

¹⁰⁰ *IWC Resolution 1985:2* “Resolution on Special Permits” (adopted by consensus), at paragraph 4.

¹⁰¹ *IWC Resolution 2003:2* “Resolution on Whaling under Special Permit” (adopted by majority vote, 24Y:20N:1A), at paragraph 3.

¹⁰² International Whaling Commission Report, *Eighth Report of the Commission*, 1957, at p. 8 (paragraph 31).

¹⁰³ *Ibid.*

¹⁰⁴ Chairman’s Report of the 43rd Annual Meeting, *Rep. Int. Whal. Commn.* 42, 1992 at pp. 14-15; Chairman’s Report of the 44th Annual Meeting, *Rep. Int. Whal. Commn.* 43, 1993, at p. 29.

B: Whether a Special Permit has been issued for the “Purposes of Scientific Research” is to be Determined Objectively

51. “Scientific research” is the only purpose for which a Special Permit may be issued. It is thus the essential condition on which invocation of Article VIII is predicated. Whether whaling is conducted for “purposes of scientific research” is not a matter for unilateral determination by a Contracting Government issuing a Special Permit. The question is not “self-judging” - the language of the provision does not leave it to the Contracting Party to determine whether an activity is “for purposes of scientific research”¹⁰⁵. Further, Article VIII is clearly distinguishable from classic “self-judging” provisions, such as Article XXI of the General Agreement on Tariffs and Trade (GATT), which authorizes a Contracting Party to take measures “which it considers necessary”. The first sentence of Article VIII paragraph 1 does not provide for such subjectivity. It simply provides that a Contracting Government may grant a permit “for purposes of scientific research”. It is stated as an objective requirement, not as something to be determined by the granting Contracting Government. And in any event “self-judging” provisions typically relate to the essential sovereign interests of a State, such as national security¹⁰⁶. No such essential sovereign interest is engaged by Article VIII. To the contrary, scientific research provided for in Article VIII relates directly to the collective interests of the parties to the Convention in obtaining scientific information necessary for the proper conservation and management of whales.

¹⁰⁵ See, for example: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Merits, Judgment*, *I.C.J. Reports 1986*, 14, at p. 116 (para 222) and p. 141 (para 282); *Sempra Energy Limited v Argentine Republic*, ICSID Case No Arb/02/16, Award, 28 September 2007, at pp. 111-112 (para 379) and p. 113 (para 383).

¹⁰⁶ See, for example: S Schill/R Briese “If the State Considers: Self-Judging Clauses in International Dispute Settlement” (2009) 13 *Max Planck UNYB* 61 at p. 63; S. Rose-Ackerman/B. Billa “Treaties and National Security”, (2009) 40 *N.Y.U.J. Int’l L. & Pol.*, 437 et seq.

52. It is therefore not enough that a Contracting Government itself describes its whaling as “for purposes of scientific research”. That purpose must also be demonstrable from an objective assessment of the activity. It is a question of substance, not form. Parties to the Convention have unanimously recognised that whaling conducted for self-declared “scientific purposes” may in fact have the “characteristics of commercial whaling”¹⁰⁷. Hence, it is important that whaling for scientific purposes can be objectively demonstrated to be so. Contrary to Japan’s suggestion¹⁰⁸, the Court can determine whether that purpose has been demonstrated in a particular case¹⁰⁹.

53. The objective character of the requirement that whaling under Special Permits be conducted only for purposes of scientific research is further apparent when Article VIII is read in the context of the Convention as a whole, in particular the procedural obligations under Article VIII and Paragraph 30 of the Schedule. A proposed Special Permit must state the “objectives of the research” in order to enable the Scientific Committee to “review and comment on them”¹¹⁰. The Scientific Committee’s Rules of Procedure further provide that the Committee “shall review the scientific aspects of the proposed research”¹¹¹. This requirement was adopted expressly in order to “assure the validity and utility of the proposed research”¹¹². The review process required by Paragraph 30 of the Schedule clearly indicates that the question of whether a proposed whaling programme

¹⁰⁷ *IWC Resolution 1985-2* “Resolution on Scientific Permits” (adopted by consensus), at paragraph 3.

¹⁰⁸ *Japanese Counter-Memorial* at paragraph 9.7.

¹⁰⁹ See, for example: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Merits, Judgment*, *I.C.J. Reports 1986*, 14, at p. 116 (para 222) and p. 141 (para 282).

¹¹⁰ Paragraph 30(a) of the *Schedule*.

¹¹¹ *Scientific Committee Rules of Procedure*, Rule F.

¹¹² Report of the Scientific Committee to the 29th Meeting of the Commission, *Rep. Int. Whal. Comm*, 28, 1978, p. 41 at paragraph 9.3.2; and *infra* paragraphs 87 to 89.

under Special Permit is for “scientific purposes” is intended to be capable of objective assessment. It is not determined simply by the expressed intention of the Contracting Government proposing to issue the permit.

54. The point is further reinforced when Article VIII is considered in light of the object and purpose of the Convention as a whole. The object and purpose of the Convention is to replace unilateral whaling by States with a binding system of collective regulation through the IWC. It would be entirely inconsistent with that objective if a Contracting Government could just *state* that its whaling is “for purposes of scientific research” whether or not it could be shown objectively to be so. Such an interpretation would undermine the collective regulatory system established by the Convention, rendering much of that collective effort essentially worthless.

C: The Scientific Committee and the Commission itself have provided guidance on the meaning of “Scientific Research”

55. The Commission has adopted a series of resolutions providing guidance to the Scientific Committee when carrying out its review of Special Permits under Paragraph 30 of the Schedule. Those resolutions, and the Guidelines adopted by the Scientific Committee in accordance with them, shed significant light on what constitutes “scientific research” under Article VIII. They confirm the intended meaning of, rather than modify, the terms of Article VIII. As such, the resolutions provide a valuable interpretative aid, in accordance with both Articles 31(3) and 32 of the Vienna Convention¹¹³.

¹¹³ See, for example: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136 at pp. 149-150 (paragraphs 27 & 28); *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory*

56. In 1986, the Commission unanimously recommended that when considering issuing special research permits Contracting Governments:

“should take into account whether:

- (1) the objectives of the research are not practically and scientifically feasible through non-lethal research techniques;
- (2) the proposed research is intended, and structured accordingly to contribute information essential for rational management of the stock;
- (3) the number, age and sex of whales to be taken are necessary to complete the research and will facilitate the conduct of the comprehensive assessment;
- (4) whales will be killed in a manner consistent with the provisions of Section III of the Schedule, due regard being had to whether there are compelling scientific reasons to the contrary.”¹¹⁴

57. In 1987, the Commission further recommended that the Scientific Committee report its views as to whether Special Permit programmes:

“at least satisfy the following criteria in addition to such guidelines as may be applicable, including the criteria in the Resolution adopted in 1986...:

- (1) The research addresses a question or questions that should be answered in order to conduct the comprehensive assessment or to meet other critically important research needs;

Opinion, I.C.J. Reports 1962, p. 151 at pp. 160-161; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, p. 150 at p. 168; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045 at p. 1096 (paragraph 80); *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body, WT/DS285/AB/R (7 April 2005); [2005] WTO AB 2 at paragraph 196; R Jennings & A Watts *Oppenheim’s International Law*, 9th ed (Oxford University Press, 2008), Vol I §633 at p. 1276.

¹¹⁴ *IWC Resolution 1986-2* “Resolution on Special Permits for Scientific Research” (adopted by consensus), at paragraph 5, *Australia’s Memorial*, Annex 43, Vol II, pp. 148-9.

- (2) The research can be conducted without adversely affecting the overall status and trends of the stock in question or the success of the comprehensive assessment of such stock;
- (3) The research addresses a question or questions that cannot be answered by analysis of existing data and/or use of non-lethal research techniques; and
- (4) The research is likely to yield results leading to reliable answers to the question or questions being addressed.”¹¹⁵

58. Those recommendations were further updated in 1995¹¹⁶ and 1999¹¹⁷. In both of those resolutions, the Commission requested the Scientific Committee to advise on the necessity of the proposed research for the management of the species or stock in question and the possibility of delivering the proposed research objectives by non-lethal means.

59. In accordance with those resolutions, the Scientific Committee has elaborated a detailed series of Guidelines to enable it to carry out its review function. Under the most recent Guidelines adopted in 2008¹¹⁸ the Scientific Committee’s review concentrates on whether:

- “(1) the permit adequately specifies its aims, methodology and the samples to be taken;
- (2) the research is essential for rational management, the work of the Scientific Committee or other critically important research needs;

¹¹⁵ *IWC Resolution 1987-1* “Resolution on Scientific Research Programmes” (adopted by majority vote; 19Y: 6N: 7A), at paragraph 1, *Australia’s Memorial*, Annex 44, Vol II, pp 150-151.

¹¹⁶ *IWC Resolution 1995-9* “Resolution on Whaling Under Special Permit” (adopted by majority vote; 23Y: 5N: 2A), paragraph 2.

¹¹⁷ *IWC Resolution 1999-2* “Resolution on Special Permits for Scientific Research” (adopted by a majority), paragraph 1.

¹¹⁸ “Process for the Review of Scientific Permits and Research Results from Existing Permits”, Report of the Scientific Committee, Annex P, *J. Cetacean Res. Manage. II (Suppl.)*, 2009, 398-401, *Australia’s Memorial*, Annex 49, Vol II, pp. 158-161.

- (3) methodology and sample size are likely to provide reliable answers to the questions being asked;
- (4) the questions can be asked using non-lethal research methods;
- (5) the catches will have an adverse effect on the stock;
- (6) the potential for scientists from other nations to join the research is adequate.”¹¹⁹

60. Those elements provide a useful indication of the key characteristics of whaling carried out “for purposes of scientific research” under Article VIII as identified by the IWC’s own scientific representatives. In particular, they indicate the expectation of parties that such research must: be specifically defined; be essential for rational management under the Convention; be likely to provide reliable answers; avoid lethal methods where possible; and have no adverse effect on the stock.

D: Whether Whaling is for the Purposes of Scientific Research can be ascertained from the Methodology, Design and Characteristics of a Proposed Whaling Programme

61. An objective identification of the purpose of a programme of whaling necessarily requires consideration not only of its stated purpose, but also the facts and circumstances surrounding its development and implementation. In this respect, assistance can be drawn from the Appellate Body of the World Trade Organisation (WTO), which has provided guidance on how an objective determination can be made of whether a trade measure taken by a State has a protectionist purpose. It said:

¹¹⁹ *Website of the International Whaling Commission* “Scientific Permit Whaling: Scientific Committee Review” <<http://iwc.int/permits>> accessed on 15 March 2013.

“Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure. The very magnitude of the dissimilar taxation in a particular case may be evidence of such a protective application, as the Panel rightly concluded in this case. Most often, there will be other factors to be considered as well. In conducting this inquiry, panels should give full consideration to all the relevant facts and all the relevant circumstances in any given case.”¹²⁰

62. Applying such an approach in the context of Article VIII, whether or not a programme of whaling can be characterised as being for “scientific purposes” can be determined from a consideration of the methodology, design and characteristics of the programme, giving full consideration to all relevant factors. In this regard, those factors that reflect purely scientific requirements must be balanced against those that reflect commercial considerations. Drawing on the Scientific Committee’s Guidelines key factors to be considered include: the scale of the programme; its structure; the manner in which it is conducted; and its results.

63. These factors need to be taken into account and assessed as a whole. In that regard, the fact that a programme of whaling might have generated some scientific information is not in itself determinative of purpose. It is clear from the Convention that information about whale stocks can, and should, be collected in the course of all whaling activities, including commercial whaling. The Convention requires Contracting Governments to take “all practicable measures” to collect biological data in connection with the operations of factory ships and land stations¹²¹, and imposes concurrent obligations to report information to the

¹²⁰ *Japan - Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (1 November 1996), at p. 29.

¹²¹ Article VIII(4) of the *Convention*.

IWC¹²². The fact that a programme of whaling may have generated some scientific information therefore does not necessarily mean that its *purpose* was scientific research as required under Article VIII.

E: Conclusion

64. Article VIII only permits a Special Permit to be issued for the exclusive “purposes of scientific research”. The question of the purpose for which a Special Permit has been issued is not a matter for unilateral determination, but is subject to review and objective determination by the Court. Any other interpretation is inconsistent with the terms of Article VIII and its role within the Convention, and would undermine the object and purpose of the Convention as a whole. The resolutions and Guidelines adopted by the Commission and its Scientific Committee provide useful guidance as to what is meant by “scientific research” under Article VIII, in particular the requirements that such research must: be specifically defined; be essential for rational management under the Convention; be likely to provide reliable answers; avoid lethal methods where possible; and have no adverse effect on the stock. The purpose of a programme of whaling emerges from a consideration of its methodology, design and characteristics including: the scale of the programme; its structure; the manner in which it is conducted; and its results.

¹²² Article VIII(3) of the *Convention*; Section VI of the *Schedule*.

**SECTION V: THE NUMBERS TAKEN UNDER A SPECIAL PERMIT
MUST BE NECESSARY AND PROPORTIONATE AND HAVE NO
ADVERSE EFFECT ON THE STOCK**

65. Article VIII, paragraph 1, provides that a Contracting Government may issue a Special Permit authorising its nationals to “kill, take and treat” whales. The terms of the article therefore recognise that killing of whales may be permitted under Article VIII in certain circumstances. However, the number of whales that may be killed must be limited under the terms of the Special Permit to a number that is necessary and proportionate to the objectives of the research, and will have no adverse effect on the stock.

66. The first paragraph of Article VIII requires that Special Permits are to be granted “subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit”. While this clearly gives the granting Contracting Government discretion in determining a range of conditions, the specific mention of restrictions as to number places this condition in a separate category. What Article VIII does is to give the granting Government a discretion as to what that number should be, but the discretion does not include making no restriction at all as to numbers. In short there must be some restriction on the number of whales to be taken under any Special Permit.

67. This interpretation of the first paragraph of Article VIII flows clearly from the language itself. The provision does not say that the Contracting Government can establish “whatever conditions it thinks fit”, thus allowing a Government to decide whether it wanted to place a restriction on the numbers of whales to be taken under a Special Permit. Instead it refers specifically to

“restrictions as to number” as a condition to be attached to a Special Permit. This is simply giving effect to the ordinary meaning of the terms used in the first paragraph.

68. As noted above¹²³, the discretion of a Contracting Government to determine the number of whales to be killed under Special Permit under Article VIII is not a blank cheque - its exercise remains subject to review to ensure that it is exercised properly in light of the central obligation of good faith¹²⁴. That principle requires that it must be exercised consistently with the specified purpose of Article VIII for “scientific research”¹²⁵ and in a reasonable way to achieve the object and purpose of the Convention as a whole¹²⁶. As pointed out below¹²⁷, general principles of international law also require that Contracting Governments must act in a precautionary manner when issuing Special Permits under Article VIII.

A: The Number of Whales Killed must be Consistent with the “Purposes of Scientific Research”

69. The terms of Article VIII, paragraph 1, require that a Special Permit may only authorize the holder to “kill, take and treat whales *for the purposes of*

¹²³ *Infra* paragraph 45.

¹²⁴ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France), Judgment, I.C.J. Reports 2008*, p.177, at p. 229 (paragraph 145).

¹²⁵ See, for example: *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France), Judgment, I.C.J. Reports 2008*, p.177, at p. 229 (paragraph 145); *Navigational and Related Rights (Costa Rica v Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 241 (paragraph 61).

¹²⁶ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at pp. 78-79 (para 142); *Yearbook of the International Law Commission, 1966, Vol II*, at p. 211 (paragraph 4, and the authorities cited in paragraph 2).

¹²⁷ *Infra* paragraphs 73 to 75.

scientific research” (emphasis added). A Contracting Government’s discretion to determine the number of whales to be killed is therefore not open-ended - it must be exercised consistently with the purpose of scientific research¹²⁸. That is, the number of whales to be killed under Special Permit must be determined solely by reference to scientific objectives. This clearly means that whales may only be killed under Special Permit where science requires it – where lethal research is the only means available to achieve identified scientific research objectives. It follows also that the number of whales killed cannot be greater than is required to meet those objectives. Similarly, the number of whales to be killed under a Special Permit must be reasonable in proportion to Article VIII’s limited role as a mechanism for the collection of scientific research within the collective framework of the Convention as a whole¹²⁹.

70. This is borne out by Paragraph 30 of the Schedule, which requires a Contracting Government to provide the IWC with proposed Special Permits before they are issued, specifying the “objectives of the research”¹³⁰ and the “number, size and stock of the animals to be taken”¹³¹ as well as the “possible effects on conservation of the stock”¹³² in order to “to allow the Scientific

¹²⁸ See, for example, *Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213, at p. 241 (paragraph 61): “Thus, the language found in Article VI means that the right of free navigation granted to Costa Rica in that provision applies exclusively within the ambit of navigation “for the purposes of commerce” and ceases to apply beyond that ambit.”

¹²⁹ *Case concerning rights of nationals of the United States of America in Morocco*, Judgment, I.C.J. Reports 1952, p. 176 at p. 212: “The power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith.” See also B. Cheng *General Principles of Law as Applied by international Courts and Tribunals* (Grotius Publications Ltd), 1987, at p. 136: “Where the right confers upon its owner a discretionary power, this must be exercised honestly, sincerely, reasonably, in conformity with the spirit of the law and with due regard to the interests of others.”

¹³⁰ Paragraph 30(a) of the *Schedule*.

¹³¹ Paragraph 30(b) of the *Schedule*.

¹³² Paragraph 30(d) of the *Schedule*.

Committee to review and comment on them”. The Scientific Committee in turn has an obligation – “shall” – to conduct such a review and make comments and recommendations to the Commission¹³³. In conducting its review, the Scientific Committee is to consider whether: the methodology and sample size are likely to provide reliable answers to the questions being asked; the questions can be answered using non-lethal research methods; and the catches will have an adverse effect on the stock¹³⁴. These matters are all clearly relevant to determining whether the number of whales proposed to be killed is consistent with “the purposes of scientific research”.

71. The obligation on a Contracting Government to submit the “number, size and stock” of whales to be killed under Special Permit to the Scientific Committee therefore is intended to provide an opportunity for an objective assessment of the necessity and proportionality of the proposed number of whales to be killed under the Special Permit in light of the “objectives of the research” and the “possible effects on the conservation of the stock”. The inclusion of this specific obligation underscores that Article VIII was not intended to create an unfettered discretion with respect to the number of whales to be killed under a Special Permit. It was designed to permit the killing of only that number of whales that was necessary and proportionate to the objectives of the research and that would not have any adverse effects on the conservation of the stock.

72. This interpretation is fully consistent with the Convention’s object and purpose of collective regulation in order to provide for the interests of the parties in the proper conservation and management of whales. Neither “the proper

¹³³ Paragraph 30 of the *Schedule; Rules of Procedure*, Rule M(4)(a).

¹³⁴ *Website of the International Whaling Commission*, “Scientific Permit Whaling: Scientific Committee Review”, at <<http://iwc.int/permits>> accessed on 15 March 2013.

conservation of the stock” nor the “orderly development of the whaling industry”¹³⁵ is served by interpreting Article VIII to allow for large-scale unilateral whaling outside other catch limits or moratoria imposed under the Convention. Interpreting Article VIII to provide *carte blanche* to a Contracting Government to kill more whales than is necessary or proportionate to the purposes of scientific research undermines the very objective for which the Convention was adopted.

B: International Law Requires a Precautionary Approach

73. The requirement that the numbers of whales killed must be necessary and proportionate to the objectives of the scientific research is further reinforced when Article VIII is interpreted in light of general principles of international law according to which Contracting Governments should take a precautionary approach when interpreting and applying provisions such as Article VIII¹³⁶.

74. The Court recognised the importance of such a precautionary approach in the interpretation and application of treaties in its decision in *Pulp Mills on the*

¹³⁵ Paragraph 7 of the Preamble to the *Convention*.

¹³⁶ This approach has been widely recognised in international environmental agreements, see, for example: *Rio Declaration on Environment and Development*, adopted at the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26 (Vol 1), 12 August 1992, Principle 15; *Convention on Biological Diversity*, Rio de Janeiro, 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993), Preamble; *United Nations Framework Convention on Climate Change*, Rio de Janeiro, 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994), article 3(3); *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, New York, 4 August 1995, 2167 UNTS 3 (entered into force 11 December 2001), Article 6(1) and (2); *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, Montreal, 29 January 2000, 2226 UNTS 208 (entered into force 11 September 2003), article 1; *Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area* adopted by the Assembly of the International Seabed Authority, 7 May 2010, Regulations 2(2), 5(1) and 33(2) (available at: < <http://www.isa.org.jm/en/mcode>>).

*River Uruguay (Argentina v Uruguay)*¹³⁷. Subsequent decisions of other tribunals have drawn on that recognition to note the “trend towards making this approach part of customary international law”¹³⁸. While there are various formulations of the precautionary approach, at its most basic expression in relation to the conservation and management of living marine resources, that approach requires parties to act with “prudence and caution”¹³⁹. The need for caution is greatest where information is uncertain, unreliable or inadequate¹⁴⁰. It also carries with it the requirement that a State interested in undertaking or continuing an activity has to prove that such activities will not result in any harm¹⁴¹.

75. A precautionary application of Article VIII necessarily requires that no whales will be killed unless that is necessary to achieve the objectives of the intended research - non lethal research alternatives should be given preference. If whales are to be killed, precaution requires that the number taken must be as low as necessary to meet those objectives. And, it must also be set at a level that the Contracting Government issuing the Special Permit can demonstrate will avoid any adverse effect on the conservation of the stock.

¹³⁷ *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, *I.C.J. Reports 2010*, p. 14, at p. 51 (paragraph 164).

¹³⁸ *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, Advisory Opinion, 1 February 2011; (2011) 50 ILM 458 at paragraph 135. The customary nature of the precautionary principle was also earlier addressed in: *EC Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS26/AB/R (16 January 1998); 1998 WL 25520 (WTO) at paragraph 123; and the dissenting judgments of Judge Weeramantry and Judge *Ad Hoc* Palmer in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case*, *I.C.J. Reports 1995*, 288 at pp. 342-344 and 412.

¹³⁹ See *Southern Bluefin Tuna cases (New Zealand v Japan; Australia v Japan)*, *Provisional Measures Order*, 27 August 1999; (1999) 38 ILM 1624 at paragraph 77.

¹⁴⁰ See *Rio Declaration on Environment and Development*, adopted at the United Nations Conference on Environment and Development, on 13 June 1992, (UN Doc. A/CONF.151/26 (Vol 1)), Principle 15.

¹⁴¹ See, for example, *Mox Plant Case (Ireland v UK)*, *Provisional Measures Order*, 3 December 2001; (2002) 41 ILM 405 (Separate Opinion of Judge Wolfrum).

**C: The Practice of the IWC Confirms that the Number of Whales Killed
under a Special Permit must be “Necessary and Proportionate” to the
Objectives of the Scientific Research**

76. The practice of the IWC is fully consistent with this interpretation, and clearly reflects the parties’ expectation that the number of whales to be killed under Special Permit will be necessary and proportionate to its objectives. The statements and resolutions adopted by the Commission on this point are fully consistent with the language of Article VIII, further confirming the interpretation that flows naturally from its terms in their context. As such, they are a valuable interpretative guide, in accordance with both Articles 31(3) and 32 of the Vienna Convention¹⁴².

77. At its Fifteenth meeting in 1963, the Commission unanimously endorsed the proposals of the Scientific Committee, which had noted “that there had been recent instances of special permits having been given by Contracting Governments for the taking of much larger number of whales [...] than in the past”¹⁴³, and had agreed that “the numbers shown in each permit should be the *lowest necessary for the purposes indicated* in the permit”¹⁴⁴ (emphasis added).

¹⁴² See, for example: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136 at pp. 149-150 (paragraphs 27 & 28); *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151 at pp. 160-161; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, p. 150 at p. 168; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045 at p. 1096 (paragraph 80); *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body, WT/DS285/AB/R (7 April 2005); [2005] WTO AB 2 at paragraph 196; R Jennings & A Watts *Oppenheim’s International Law*, 9th ed (Oxford University Press, 2008), Vol I §633 at p. 1276.

¹⁴³ Chairman’s Report of the 15th Meeting, *Fifteenth Report of the Commission*, 1965, at p. 20 (paragraph 17).

¹⁴⁴ *Ibid.*

A year later, the Commission again noted that the Scientific Committee had commented negatively on the size of catches taken under Special Permits, observing that “rather large samples had been taken lately”¹⁴⁵. The “rather large” samples in question were between two and 120 whales¹⁴⁶.

78. Consistent with this clearly expressed expectation that the number of whales taken under Special Permit would be “the lowest necessary for the purposes indicated in the permit”, the overwhelming majority of catches under Special Permit prior to the commencement of the commercial moratorium in 1985 numbered less than 25 whales, with many less than 10¹⁴⁷. The average number of whales taken under each Special Permit prior to 1985 was 33, with the largest single Special Permit take being Japan’s catch of 240 Bryde whales in 1978¹⁴⁸. Since the commencement of the commercial moratorium in 1985 only Iceland, Norway, Republic of Korea and Japan have issued Special Permits under Article VIII. Since 1985, the average annual catch under Special Permit by Iceland, Norway, and Republic of Korea was 60 whales, while that of Japan has been 570¹⁴⁹.

79. In 1986, the Commission recommended by consensus that the Scientific Committee “should take into account whether [...] the objectives of the research are not practically and scientifically feasible through non-lethal research

¹⁴⁵ International Whaling Commission Report, *Sixteenth Report of the Commission*, 1966 at p. 20 (paragraph 18).

¹⁴⁶ *Ibid.*, at pp.9-10 (paragraph 12).

¹⁴⁷ International Whaling Commission, *Circular Communication to Commissioners and Contracting Governments: Special Permits for Scientific Research*, 5 January 1987 [Annex 1].

¹⁴⁸ *Ibid.*

¹⁴⁹ *Website of the International Whaling Commission*, “Special Permit Catches Since 1985”, at <http://iwc.int/table_permit.htm> accessed on 15 March 2013 [Annex 2].

techniques”¹⁵⁰. This clearly indicates an expectation that whales would be killed under Special Permit only where the objectives of the research could be met no other way. In the same resolution the Commission emphasised that Special Permit catches should not have an adverse effect on the conservation of the stock¹⁵¹. It reiterated this point the following year¹⁵². Over the past four decades, the Commission has repeatedly encouraged Contracting Governments to carry out their research through non-lethal means¹⁵³, stating that “scientific research involving killing should only be permitted in exceptional circumstances”¹⁵⁴, and that Contracting Governments should “refrain from issuing Special Permits for research involving the killing of cetaceans in [the Indian and Southern Ocean Sanctuaries]”¹⁵⁵.

¹⁵⁰ *IWC Resolution 1986-2* “Resolution on Special Permits for Scientific Research” (adopted by consensus), at paragraph 5(1).

¹⁵¹ *Ibid.*, at paragraph 8.

¹⁵² *IWC Resolution 1987-1* “Resolution on Scientific Research Programmes” (adopted by majority vote; 19Y: 6N: 7A) at paragraph 1(2).

¹⁵³ See, for example: *IWC Resolution 1990-5* “Resolution on Redirecting Research Towards Non-Lethal Methods” (adopted by majority vote; 23 Y: 0N: 6A), at paragraph 2; *IWC Resolution 1994-10* “Resolution on Special Permit Catches by Japan in the Southern Hemisphere” (adopted by consensus), at paragraph 4; *IWC Resolution 1995-9* “Resolution on Whaling under Special Permit” (adopted by majority vote; 23Y: 5N: 2 A), at paragraph 1; *IWC Resolution 1996-7* “Resolution on Special Permit Catches by Japan” (adopted by majority vote 21Y:7N:1A), at paragraph 4; *IWC Resolution 1997-6* “Resolution on Special Permit Catches in the North Pacific by Japan” (adopted by majority vote; 15Y:10N:6A), at paragraph 3; *IWC Resolution 2003-2* “Resolution on Whaling under Special Permit” (adopted by majority vote; 24Y: 20N: 1A), paragraph 5; *IWC Resolution 2003-3* “Resolution on Southern Hemisphere Minke Whales and Special Permit Whaling” (adopted by majority vote; 24Y:20N:1A), at paragraph 2; *IWC Resolution 2005-1* “Resolution on JARPA II” (adopted by majority vote; 30Y: 27N: 1A), at paragraph 2; *IWC Resolution 2007-1* “Resolution on JARPA” (adopted by majority vote; 40Y:2N:1A), at paragraph 2.

¹⁵⁴ *IWC Resolution 1995-9* “Resolution on Whaling under Special Permit” (adopted by majority vote; 23Y: 5N: 2A), paragraph 1.

¹⁵⁵ *IWC Resolution 1995-8* “Resolution on Whaling under Special Permit in Sanctuaries” (adopted by majority vote; 23Y: 7N: 1A), paragraph 1.

D: Conclusion

80. Article VIII requires that a Contracting Government issuing a Special Permit must also set some restriction on the number of whales to be killed or taken under that Special Permit. Its discretion in doing so is not unfettered. It must be exercised consistently with the purpose for which it is given, “scientific research”, and in a reasonable and precautionary way. That requires that whales may be killed under Special Permit only where that is necessary for scientific research and it is not possible to achieve the equivalent objectives of that research by non-lethal means. Where whales are to be killed, the number killed must be “the lowest necessary” to achieve the objectives of the research and in proportion to Article VIII’s role within the Convention as a whole. Further, the Contracting Government issuing the Special Permit must be able to demonstrate that the number of whales killed will not have an adverse effect on the conservation of the stock. In this way, Article VIII can be applied in a manner that does not undermine the collective regime of the Convention and is consistent with its object and purpose.

SECTION VI: A CONTRACTING GOVERNMENT GRANTING A SPECIAL PERMIT HAS PROCEDURAL OBLIGATIONS AND AN OBLIGATION OF MEANINGFUL COOPERATION WHICH CAN BE DISCHARGED ONLY BY TAKING ACCOUNT OF THE VIEWS OF THE SCIENTIFIC COMMITTEE AND THE COMMISSION

A: Contracting Governments Issuing Special Permits must comply with Procedural Obligations set out in Article VIII and elsewhere in the Convention

81. As set out in Section III, the qualification “notwithstanding anything in this Convention” applies only to the discretion to grant a Special Permit. It clarifies that a Special Permit may be issued despite the rules that would otherwise apply to whaling – creating a limited discretion within the collective system of regulation under the Convention rather than an exemption from it.

82. Thus, the qualification “notwithstanding anything in this Convention” does not provide a barrier to the application of procedural obligations that the Convention specifically applies to the granting of Special Permits. Indeed, the first paragraph of Article VIII itself imposes such a procedural obligation – to report any Special Permits that have been issued to the Commission. Moreover, the language of Article VIII is clear that only the “killing, taking and treating of whales *in accordance with the provisions of this Article* shall be exempt from the operation of the Convention” (emphasis added). Accordingly, only those acts of whaling carried out under a Special Permit that has been issued in compliance with the requirements of Article VIII as a whole are exempt from the other provisions of the Convention.

83. In fact, Special Permits under Article VIII are subject to distinct procedural requirements. The very existence of these specific procedural requirements, which in fact Japan acknowledges in its Counter Memorial¹⁵⁶, contradicts Japan’s claim that “[s]pecial permit whaling under Article VIII is entirely outside the scope of the ICRW”¹⁵⁷. Article VIII itself requires that the Contracting Government must not only notify the Commission “at once” when a Special Permit has been issued¹⁵⁸, but it must also transmit the “results of the research conducted” to the Commission¹⁵⁹. Further, there are obligations on Contracting Governments even before Special Permits are issued. In accordance with Paragraph 30 of the Schedule Special Permits under Article VIII are subject to prior review and comment by the IWC through the Scientific Committee¹⁶⁰.

84. Paragraph 30 of the Schedule obliges a Contracting Government to provide proposed Special Permits to the IWC “in sufficient time to allow the Scientific Committee to review and comment on them”. Such proposed permits “shall be reviewed and commented on by the Scientific Committee”¹⁶¹, which “shall submit reports and recommendations to the Commission”¹⁶². The Commission may then in turn make recommendations to the Contracting Government in relation to the proposed Special Permit¹⁶³. As a provision of the

¹⁵⁶ *Japan’s Counter-Memorial*, paragraph 7.8 and footnote 880.

¹⁵⁷ *Ibid.*, paragraph 7.8.

¹⁵⁸ Article VIII(1) of the *Convention*.

¹⁵⁹ Article VIII(3) of the *Convention*.

¹⁶⁰ Paragraph 30 of the *Schedule*, Rule M(4)(a) *Rules of Procedure*, Rules F(1) to (4) *Scientific Committee Rules of Procedure*.

¹⁶¹ Paragraph 30 of the *Schedule*.

¹⁶² *Rules of Procedure*, Rule M(4)(a).

¹⁶³ Article VI of the *Convention*.

Schedule, Paragraph 30 forms an integral part of the Convention¹⁶⁴. No party has issued an objection to Paragraph 30 of the Schedule under Article V of the Convention, and it is therefore binding on all Contracting Governments¹⁶⁵.

85. Japan's Counter Memorial demonstrates a curious ambivalence towards Paragraph 30. On the one hand it appears to describe it as "secondary legislation" or a "secondary instrument" which "cannot claim to provide for an authentic interpretation of the Convention"¹⁶⁶. On the other hand, Japan goes on to state that "[o]f course, Paragraph 30 of the Schedule is binding on Contracting Governments by virtue of Article V of the Convention"¹⁶⁷. And, ultimately, Japan confirms that it regards Paragraph 30 as having "introduced an obligation for the Contracting Governments to notify the Secretariat of the IWC and, through it, the Scientific Committee and the Commission, of any Special Permits they propose to grant"¹⁶⁸. Such a final concession by Japan is inevitable because Article 1(1) of the Convention provides expressly that the Schedule is an "integral part of the Convention" and that all references to "the Convention" are to be understood as including the Schedule as amended from time to time. There can be no doubt, then, that Paragraph 30 imposes an obligation on a Contracting Government that is planning to grant a Special Permit.

86. There is a natural linkage between the procedural obligations of notification and reporting in Article VIII and the provisions for prior review under Paragraph 30 of the Schedule, and the substantive objectives of Article VIII and of the Convention as a whole. The gathering and disseminating of scientific

¹⁶⁴ Article I(1) of the *Convention*.

¹⁶⁵ Article V(3) of the *Convention*.

¹⁶⁶ *Japan's Counter-Memorial*, paragraph 8.22.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*, paragraph 8.28.

research is central to the functioning of the IWC and forms part of the system of collective regulation under the Convention. The Paragraph 30 review procedure thereby serves as the mechanism through which the use of Special Permits may be monitored and the interests of the parties in the Special Permit process can be protected. Indeed, it was adopted by the Commission for that very purpose¹⁶⁹. The important link between procedural obligations and substantive obligations was noted by the Court in *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, where the Court said that procedural obligations had been established to “enable the parties to fulfil their substantive obligations”¹⁷⁰.

87. This role of procedural requirements in securing the fulfilment of substantive obligations is illustrated by the history of the development of the prior review mechanism in Paragraph 30. The requirement for prior review was instituted as a result of “allegations that some States abused [the Article VIII] concession to evade the increasingly stringent regulations of the Commission”¹⁷¹. In the words of the IWC’s Scientific Committee, the purpose of prior review was to “recognise and assure validity and utility of the proposed research, and to assure that proposed permits will not adversely affect the conservation of whale stocks”¹⁷². This procedural requirement was thus deliberately created in order to ensure proper compliance with the substantive obligations under Article VIII, and to avoid Contracting Governments using Article VIII in a way that would

¹⁶⁹ *Birnie, International Regulation of Whaling*, at p. 190.

¹⁷⁰ *Pulp Mills on the River Uruguay (Argentina v Uruguay) Judgment, I.C.J. Reports 2010*, p. 14 at p. 49 (paragraph 78): “The Court notes that the 1975 Statute created CARU and established procedures in connection with that institution, so as to enable parties to fulfil their substantive obligations. However, nowhere does the 1975 Statute indicate that a party may fulfil its substantive obligations by complying solely with its procedural obligations, nor that a breach of procedural obligations automatically entails the breach of substantive ones.”

¹⁷¹ *Birnie, International Regulation of Whaling*, at p. 190.

¹⁷² Report of the Scientific Committee to the 29th Meeting of the Commission, *Rep. Int. Whal. Commn.* 28, 1978, p. 41 at paragraph 9.3.2.

circumvent the other obligations of the Convention or undermine its object and purpose.

88. In 1963, both the Scientific Committee and the Infractions Sub-Committee of the Technical Committee drew attention to “recent instances of special permits having been given by Contracting Governments for the taking of much larger numbers of whales under this Article than in the past”¹⁷³. As a consequence, the Commission unanimously endorsed the Scientific Committee’s proposal that the Committee should be consulted before permits were granted under Article VIII¹⁷⁴. The review process was formalised through the Scientific Committee’s Rules of Procedure in 1977, following Japan’s granting of a Special Permit for the catch of 240 Bryde’s whales, the commercial catch limit for which had been set at zero¹⁷⁵. Prior review was further entrenched in 1979 through the amendment to the Schedule and the adoption of Paragraph 30 in its current form¹⁷⁶.

89. The prior review procedure was thus designed to ensure that Article VIII is applied as the parties to the Convention intended. To that end, all aspects of a Special Permit are subject to prior review by the Scientific Committee, including its “objectives”, the “number, sex, size and stock of the animals to be taken”, “opportunities for participation in the research by scientists of other nations”, and

¹⁷³ Chairman’s Report of the 15th Meeting, *Fifteenth Report of the Commission*, 1965, at p. 20 (paragraph 17).

¹⁷⁴ *Ibid.*

¹⁷⁵ Chairman’s Report of the 29th Meeting, *Rep. Int. Whal. Commn.* 28, 1978, p. 23 (paragraph 14(ii)).

¹⁷⁶ Chairman’s Report of the 31st Annual Meeting, *Rep. Int. Whal. Commn.* 30, 1980, at p.31 (paragraph 17); Paragraph 30 of the *Schedule*. Note that Paragraph 30 was adopted following a vote within the Commission (13Y: 4N: 6A); Chairman’s Report of the 31st Annual Meeting, *Rep. Int. Whal. Commn.* 30, 1980, at p.31 (paragraph 17).

“possible effect on conservation of stock”¹⁷⁷. As will be discussed further below, the Scientific Committee is thus not merely to act as a rubber stamp – its role is substantive both in its content and its character.

B: The IWC has continued to Monitor Decisions to Issue Special Permits under Article VIII

90. Consistent with the Commission’s role in ensuring the proper application of the Convention, decisions to issue Special Permits under Article VIII have been monitored closely by the IWC from the outset. In doing so the Commission has reinforced the basic expectation of Contracting Governments that Article VIII should not be applied to permit whaling where the effect of that whaling would be to circumvent the other obligations of the Convention or undermine its object and purpose. The monitoring of Article VIII Special Permits undertaken by the Commission clearly has this objective in mind.

91. As early as 1955, the Commission unanimously recommended that Special Permits “must be issued in advance of the season and reported to the Commission at the same time”¹⁷⁸ in order to prevent such permits being issued *ex post facto* in an attempt to legitimise otherwise unauthorised catches. A year later, the United Kingdom suspended the operation of a Special Permit that had been issued “for the purpose of testing an electric harpoon” following Norway’s objection on the ground that “the purpose mentioned was outside the ambit of Article VIII”¹⁷⁹. The following year, the Commission unanimously recommended

¹⁷⁷ Paragraph 30 (a) to (d) of the *Schedule*.

¹⁷⁸ International Whaling Commission Report, *Seventh Report of the Commission*, 1956, at pp. 5-6 (paragraph 20).

¹⁷⁹ International Whaling Commission Report, *Eighth Report of the Commission*, 1957, at p. 8 (paragraph 31).

that “the taking of whales for scientific purposes should be confined by Contracting Governments to the period of the whaling season unless the reasons for permitting their capture at other times were of the utmost cogency”¹⁸⁰.

92. At its Fifteenth meeting in 1963, the Commission unanimously endorsed the proposals of the Scientific Committee, which had noted “that there had been recent instances of special permits having been given by Contracting Governments for the taking of much larger number of whales [...] than in the past”¹⁸¹ and had agreed that:

“(i) wherever possible the Committee should be consulted before the granting of such permits;

(ii) the Commission should always be advised at once, by correspondence or by report to one of its meetings of each permit given, showing the reasons for such permits;

(iii) the numbers shown in each permit should be the lowest necessary for the purposes indicated in the permit;

(iv) the Committee should be informed fully and specifically of the results obtained by taking whales under each such permit.”¹⁸²

93. A year later, the Scientific Committee again commented negatively on the size of catches taken under Special Permits¹⁸³. In the past 30 years, the Commission has adopted 40 detailed resolutions in relation to Special Permit whaling, including over 25 in relation to specific Special Permit proposals. Those resolutions (many adopted by consensus) consistently confirm the concerns of the parties to the Convention in relation to the proper interpretation and application of

¹⁸⁰ International Whaling Commission Report, *Ninth Report of the Commission*, 1958, at p. 4 (paragraph 8).

¹⁸¹ Chairman’s Report of the 15th Meeting, *Fifteenth Report of the Commission*, 1965, at p. 20 (paragraph 17).

¹⁸² *Ibid.*

¹⁸³ Chairman’s Report of the 16th Meeting, *Sixteenth Report of the Commission*, 1966, at p.20.

Article VIII. In this regard, it is noteworthy that all of the decisions of the Commission in relation to Special Permits made prior to the commencement of discussions in relation to a moratorium on commercial whaling were taken by consensus. It was only after the commercial moratorium was adopted (and Japan lifted its objection to it in 1987) that significantly different views in relation to the application of Article VIII began to emerge.

**C: The Procedural Obligation to Submit Special Permits for Prior Review
by the Scientific Committee Creates a Duty of Cooperation**

94. Paragraph 30 imposes not only a procedural obligation on Contracting Governments, it also imposes a substantive duty of cooperation between the Contracting Government and the IWC and its Scientific Committee. This is apparent from its terms. The obligation to provide proposed Special Permits to the IWC is specifically to enable the Scientific Committee to “review and comment” on them - both active verbs carrying with them the expectation that the Scientific Committee will consider the proposed permit with a view to suggesting changes if necessary¹⁸⁴. The requirement for the Scientific Committee to issue “recommendations” to the Commission with respect to a proposed Special Permit¹⁸⁵ further makes clear that it is playing an active, rather than a passive, role in the Special Permit process¹⁸⁶. The practice of the IWC is consistent with this. In 1991, for example, the Scientific Committee unanimously: “expressed serious concern that catching may have started before [the particular] proposal was

¹⁸⁴ “Review” has as its ordinary meaning “a formal assessment of something with the intention of instituting change if necessary” while “to comment” means to “express an opinion or reaction”: *Concise Oxford English Dictionary*, 12th ed (Oxford University Press, 2011) at pp.1232 and 287.

¹⁸⁵ *Rules of Procedure*, Rule M(4)(a).

¹⁸⁶ “Recommendation” has as its ordinary meaning “a suggestion or proposal as to the best course of action”: *Concise Oxford English Dictionary*, 12th ed (Oxford University Press, 2011) at p. 1201.

received by the Scientific Committee and thus before the Committee's comments could be transmitted to the Commission"¹⁸⁷. The Scientific Committee itself thus clearly expected that its comments would be received, considered and acted upon by the Commission before the proposed Special Permit was implemented.

95. Although the recommendations of the Scientific Committee and Commission are not binding on a Contracting Government, it is equally clear that a Contracting Government is required to give due consideration to them. It is a basic principle of interpretation that the parties to a treaty must be "assumed to intend the provisions of [that treaty] to have a certain effect, and not be meaningless"¹⁸⁸. That principle has been recognised and applied by this Court on numerous occasions¹⁸⁹. If the terms of Paragraph 30 of the Schedule are to have any effective meaning, then the comments it specifically requires the Scientific Committee to make must be considered to have some value and significance. At the very least, the Contracting Government must take account of the advice it receives from the Scientific Committee as well as any subsequent recommendations of the Commission. It would be fundamentally inconsistent with the obligation under Paragraph 30 for a Contracting Government to issue a Special Permit having given no consideration at all to the views of other Contracting Governments expressed through the Scientific Committee and the Commission.

¹⁸⁷ Chairman's Report of the 41st Annual Meeting, *Rep. Int. Whal. Commn.* 41, 1991, at pp. 12-13.

¹⁸⁸ R. Jennings & A. Watts *Oppenheim's International Law*, 9th ed. (Oxford University Press, 2008), Vol I §633 at pp. 1280-1281.

¹⁸⁹ See, for example: *Fisheries Jurisdiction case (Spain v Canada)*, *Jurisdiction, Judgment*, *I.C.J. Reports 1998*, p. 432 at p. 455 (paragraph 52); *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *Judgment*, *I.C.J. Reports 1994*, p. 6 at p. 23 (paragraph 47); *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion (Second Phase)*, *I.C.J. Reports 1950*, p. 64 at 77; *Corfu Channel case (United Kingdom v Albania)*, *Judgment of 9 April 1949*, *I.C.J. Reports 1949*, p.4 at p. 24.

96. The duty of cooperation is also consistent with the collective character of the Convention, and its object and purpose to replace unilateral whaling with a system of collective regulation in order to provide for the interests of the parties in the proper conservation and management of whales. That object and purpose is only achieved if parties to the Convention work together. As this Court recognised in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, membership in an organisation “entails certain mutual obligations of co-operation and good faith”¹⁹⁰.

D: The Obligation of Cooperation in Complying with Procedural Requirements is Reinforced by General International Law

97. International law recognizes a general duty of cooperation, particularly in relation to the environment. Indeed, cooperation has been described as “the overriding principle of international environmental law” ensuring that “community interests are taken into account vis-a-vis individualistic State interests”¹⁹¹. In respect of the conservation of marine mammals that general duty of cooperation is specifically acknowledged in Article 65 of the United Nations Convention on the Law of the Sea¹⁹², which provides: “States shall co-operate

¹⁹⁰ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, I.C.J. Reports 1980, p. 73 at p. 93 (paragraph 43).

¹⁹¹ *Mox Plant Case (Ireland v UK)*, Provisional Measures Order, 3 December 2001; (2002) 41 ILM 405; Separate Opinion of Judge Wolfrum at p. 4 “I fully endorse, however, paragraphs 82 to 84 of the Order, considering that the obligation to cooperate is the overriding principle of international environmental law, in particular when the interests of neighbouring States are at stake. The duty to cooperate denotes an important shift in the general orientation of the international legal order. It balances the principle of sovereignty of States and thus ensures that community interests are taken into account vis-a-vis individualistic State interests.”

¹⁹² *United Nations Convention on the Law of the Sea*, Montego Bay, 10 December 1982, 1833 UNTS 3, (entered into force 16 November 1994).

with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.” The procedural requirements applicable to Article VIII must be applied in the light of these general obligations under international law.

E: The Practice of the IWC confirms the Expectation of Cooperation by Contracting Governments

98. The duty of cooperation is further reflected in the consistent practice of the IWC. Since Paragraph 30 of the Schedule was adopted, the Commission has passed a significant body of resolutions with respect to the use of Special Permits under Article VIII. Those resolutions acknowledge that the decision to grant a Special Permit “remains the responsibility of each Contracting Government”¹⁹³ but at the same time repeatedly recommend that Contracting Governments “take account of the advice and guidelines of the Scientific Committee” when doing so¹⁹⁴. Over 25 resolutions issued after the Scientific Committee’s review of specific proposed Special Permits consistently request Contracting Governments not to proceed where the Scientific Committee had determined that the proposed activity did not satisfy the Scientific Committee’s criteria¹⁹⁵. Those recommendations provide a clear expression of the expectation of Contracting

¹⁹³ See, for example, *IWC Resolution 1987-2* “Resolution on Republic of Korea’s Proposal for Special Permits” (adopted by majority vote, 19Y: 3N: 9A), at preliminary paragraph 3.

¹⁹⁴ See *IWC Resolution 1985-2* “Resolution on Scientific Permits”, (adopted by consensus), at paragraph 2; *IWC Resolution 1986-2* “Resolution on Special Permits for Scientific Research” (adopted by consensus), at paragraph 2; *IWC Resolution 1995-9* “Resolution on Whaling under Special Permit” (adopted by majority vote, 23Y: 5N: 2A), at paragraph 6; and the country-specific resolutions at note 195 below.

¹⁹⁵ See *IWC Resolutions 1987-1, 1987-2, 1987-3, 1987-4, 1989-1, 1989-2, 1989-3, 1990-1, 1990-2, 1991-2, 1991-3, 1993-7, 1993-8, 1994-9, 1994-10, 1994-11, 1995-9, 1996-7, 1997-5, 1997-6, 2000-4, 2000-5, 2001-7, 2001-8, 2003-2, 2003-3, 2005-1, and 2007-1*.

Governments that their interests will be respected and their views taken into account when a Special Permit is issued under Article VIII. And they have been heeded as such - consistent with that expectation, for example, the USSR/Russian Federation did not proceed with its proposed Special Permit catches in 1991 and 1992 following concerns about its programme expressed by the Scientific Committee and the Commission¹⁹⁶.

F: The Obligation to Cooperate requires Meaningful Cooperation

99. The obligation of cooperation is an obligation of substance - it is not just a matter of form. As early as the *Lac Lanoux Arbitration (France/Spain)* it was recognised that “consultations and negotiations [...] must be genuine, must comply with the rules of good faith and must not be mere formalities”¹⁹⁷. This Court has recognized in *North Sea Continental Shelf cases (Germany/Denmark; Germany/Netherlands)* that the duty to negotiate, which is a specific form of the duty to cooperate, requires the Parties “so to conduct themselves that the negotiations are meaningful”¹⁹⁸. In short, the duty to cooperate requires that cooperation be meaningful.

100. Some guidance on the content of the duty of meaningful cooperation can be obtained from the practice of this Court and other international tribunals. Four specific elements can be identified.

¹⁹⁶ Chairman’s Report of the 43rd Annual Meeting, *Rep. Int. Whal. Commn.* 42, 1992 at pp. 14-15; Chairman’s Report of the 44th Annual Meeting, *Rep. Int. Whal. Commn.* 43, 1993, at p. 29.

¹⁹⁷ *Lac Lanoux Arbitration (France/Spain)* (1957) 24 ILR, p. 101, at p. 119.

¹⁹⁸ *North Sea Continental Shelf cases (Germany/Denmark; Germany/Netherlands)*, *Judgment, I.C.J. Reports 1969*, p.3, at p. 47 (paragraph 85).

101. First, as the Court made clear in *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, consultation procedures must be allowed to run their course. The Court said:

“In the view of the Court, there would be no point to the co-operation mechanism provided for by Articles 7 to 12 of the 1975 Statute if the party initiating the planned activity were to authorize or implement it without waiting for that mechanism to be brought to a conclusion. Indeed, if that were the case, the negotiations between the parties would no longer have any purpose.”¹⁹⁹

Thus, there cannot be “meaningful cooperation” where a party acts without waiting for the consultation process to be completed.

102. Second, meaningful cooperation also requires that account be taken of the views of others, with a willingness to modify one’s approach. This point was emphasised by the Court in *North Sea Continental Shelf cases (Germany/Denmark; Germany/Netherlands)* when it spoke of negotiations having to be meaningful. Negotiations would not be meaningful, the Court said, when either party “insists upon its own position without contemplating any modification of it”²⁰⁰.

¹⁹⁹ *Pulp Mills on the River Uruguay (Argentina v Uruguay) Judgment, I.C.J. Reports 2010*, p. 14 at p. 67 (paragraph 147).

²⁰⁰ *North Sea Continental Shelf cases (Germany/Denmark; Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p.3, at p. 47 (paragraph 85). See also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) Judgment, I.C.J. Reports 1997*, p 7 at p. 68 (paragraph 112): “The obligations contained in Articles 15, 19 and 20 are, by definition, general and have to be transformed into specific obligations of performance through a process of consultations and negotiation. Their implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks”.

103. Third, in the specific context of Article VIII, which has been described as a “concession” from certain other provisions of the Convention²⁰¹, due process must be observed in exercising the rights provided in order to avoid encroaching on the rights of the other Contracting Governments. Such a principle was enunciated clearly by the Appellate Body of the World Trade Organization when speaking about the invocation of “General Exceptions” to the General Agreement on Tariffs and Trade (GATT). The Appellate Body said:

“it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the Member imposing the measure and which effectively results in a suspension *pro hac vice* of the treaty rights of other Members.”²⁰²

104. Fourth, the content of the duty of meaningful cooperation is not fixed but must instead take account of the gravity of the proposed actions for the interests of the other party. Just as “the standard of due diligence against which the conduct of [a State] should be examined is that which is generally considered to be appropriate and proportional to the degree of risk [...] in the particular instance”²⁰³, so too is the standard of cooperation required. The greater the impact of a State’s action on other interests, the greater the expectation of cooperation on the part of the State proposing to act. Such is particularly true where those interests lie in a shared resource²⁰⁴. This is even more so where the express object

²⁰¹ *Birnie, International Regulation of Whaling*, at p. 190.

²⁰² *United States - Import Prohibition of Certain Shrimp And Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (12 October 1998), at paragraph 182.

²⁰³ “Draft Articles on the Prevention of Transboundary Harm”, commentary to Article 3, *Yearbook of the International Law Commission*, 2001, Vol II (Part Two) at p. 154 (paragraph 11).

²⁰⁴ *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area, Advisory Opinion*, 1 February 2011; (2011) 50 ILM 458 at paragraphs 147, 148 and 150.

and purpose of the treaty governing the action is to establish a collective cooperative mechanism to provide for the protection of those interests²⁰⁵.

105. The duty of meaningful cooperation has particular application in the context of the procedural requirements of Paragraph 30 of the Schedule. As a starting point, that procedure must be respected and allowed to run its course. Meaningful cooperation thus requires that a Contracting Government will carry out in good faith its obligation not to issue a Special Permit until the proposed Special Permit has been provided to the Scientific Committee, that it will ensure that the Scientific Committee has been able to review and comment on the proposed Permit, and the recommendations of the Scientific Committee have been considered by the Commission.

106. Over and above all this, it is incumbent on a Contracting Government to consider and take account of the advice of the Scientific Committee and Commission when issuing, renewing or authorising activity under a Special Permit. It is not just as Japan claims, that there is “a duty on the part of the Contracting Governments to consider a recommendation in good faith and, if requested, to explain their action or inaction”²⁰⁶. Meaningful cooperation requires the Contracting Government to engage with the views of other parties, with respect for their interests, and a readiness to modify its Special Permit proposal to take account of those views. The greater the impact of the proposed Special Permit programme on those interests, the greater the level of engagement with the views of other parties that is required. Greater openness to other views can be expected in the case of a Special Permit programme that proposes the catch of

²⁰⁵ *Pulp Mills on the River Uruguay (Argentina v Uruguay) Judgment, I.C.J. Reports 2010*, p. 14 at p. 77 (paragraph 188).

²⁰⁶ *Japan's Counter-Memorial*, paragraph 8.63.

hundreds of whales, for instance, than in relation to one involving no lethal catch. Such considerations may require the Contracting Government to adjust its programme to use non-lethal research techniques, or to alter the number or stock of whales to be taken, or the areas to be targeted for research. Finally, the due process element of meaningful cooperation requires that such a readiness must be demonstrable.²⁰⁷ A Contracting Government must be able to provide an explanation for any decision not to follow the recommendations of the Scientific Committee or the Commission that is itself objectively justifiable.

G: Conclusion

107. The Convention imposes specific procedural requirements in relation to the issuing of Special Permits, including the obligation under Paragraph 30 of the Schedule to provide Special Permits to the IWC before they are issued in order “to allow the Scientific Committee to review and comment on them” and give its recommendations to the Commission²⁰⁸. That requirement imposes not only a procedural obligation – it also imposes a substantive duty of cooperation between the Contracting Government and the Commission and its Scientific Committee. Such cooperation must be meaningful – that is, the Paragraph 30 process must be respected in substance, not merely in form. It must be allowed to run its full course. The Contracting Government must consider and take account of the advice it receives from the Scientific Committee and the Commission, engaging with other parties with a readiness to modify its approach to take account of their views. The greater the level of impact of the proposed Special Permit programme,

²⁰⁷ See, similarly and for example, the procedural steps from assessment and notification to consultation and taking account of interests in the "Draft Articles on the Prevention on Transboundary Harm", Articles 7-10, *Yearbook of the International Law Commission*, 2001, Vol II (Part Two) at pp. 157-164.

²⁰⁸ Paragraph 30 of the *Schedule; Rules of Procedure*, Rule M(4)(a).

the greater the level of engagement with the views of other parties that is required. Finally, it is incumbent on the Contracting Government issuing the Special Permit to demonstrate that it has in fact engaged in such a cooperative process and given proper weight to the views of other Contracting Governments, including where appropriate adaptation of its proposed programme of research.

SECTION VII: CONCLUSION – THE PROPER CONSTRUCTION OF ARTICLE VIII

108. The Convention was an historic attempt to bring whaling activity under control in recognition of the common interest of States in the long-term survival of whale stocks. Its object and purpose was to replace unilateral whaling by States with collective regulation in order to provide for the interests of the parties in the proper conservation and management of whales. By becoming party to the Convention, States have chosen to work collectively to achieve this end, and to abide by the obligations they have assumed.

109. In furthering this objective, Article VIII of the Convention creates a mechanism for States to issue permits to carry out research to obtain scientific data to support the work of the IWC and to conduct whaling in accordance with such permits freed from the constraints placed on commercial whaling operations. However, only whaling that is conducted “in accordance with the provisions of [Article VIII]” is exempt from the other provisions of the Convention. The discretion given in Article VIII is thus an integral part of the system of collective regulation under the Convention, and is both limited and conditional in its character. In accordance with the principle of good faith, Article VIII must be

applied in a reasonable way, consistent with its specified purpose, and in accordance with the object and purpose of the Convention as a whole.

110. The Convention provides that Contracting Governments issuing Special Permits have three specific obligations: the permits can be issued only for the purposes of scientific research; a limit must be set on the catch under any Special Permit; and procedural requirements in the issuing of Special Permits must be met.

111. First, Article VIII only permits a Contracting Government to issue a Special Permit for the exclusive “purposes of scientific research”. The question of the purpose for which a Special Permit has been issued is not a matter for unilateral determination, but is subject to review and objective determination. The resolutions and Guidelines adopted by the Commission and the Scientific Committee provide useful guidance as to what is meant by “scientific research” under Article VIII, in particular the requirements that such research must: be specifically defined; be essential for rational management under the Convention; be likely to provide reliable answers; avoid lethal methods where possible; and have no adverse effect on the stock. The purpose of a programme of whaling emerges from a consideration of its methodology, design and characteristics including: the scale of the programme; its structure; the manner in which it is conducted; and its results.

112. Second, Article VIII requires that a Contracting Government issuing a Special Permit for the purposes of scientific research must set some restriction on the number of whales to be killed or taken under that Special Permit. Its discretion in doing so is not unfettered. It must be exercised consistently with the purpose for which it is given, namely “scientific research”, and in a reasonable

and precautionary way. This requires that whales may be killed only where that is necessary for scientific research and it is not possible to achieve the equivalent objectives of that research by non-lethal means. Where whales are to be killed, the number killed must be “the lowest necessary” to achieve the objectives of the research and in proportion to Article VIII’s role within the Convention as a whole. In addition, the Contracting Government issuing the Special Permit must be able to demonstrate that the number of whales killed will not have an adverse effect on the conservation of the stock.

113. Third, the Convention imposes specific procedural requirements in relation to the issuing of Special Permits, including the obligation under Paragraph 30 of the Schedule to provide Special Permits to the IWC before they are issued in order “to allow the Scientific Committee to review and comment on them” and give its recommendations to the Commission²⁰⁹. That requirement imposes not only a procedural obligation – it also imposes a substantive duty of cooperation between the Contracting Government and the Commission and its Scientific Committee. Such cooperation must be meaningful – that is, the Paragraph 30 process must be respected in substance, not merely in form. It must be allowed to run its full course. The Contracting Government must consider and take account of the advice it receives from the Scientific Committee and the Commission, engaging with other parties with a readiness to modify its approach to take account of their views. The greater the level of impact of the proposed Special Permit programme, the greater the level of engagement with the views of other parties that is required. Finally, it is incumbent on the Contracting Government issuing the Special Permit to demonstrate that it has done so.

²⁰⁹ Paragraph 30 of the *Schedule; Rules of Procedure*, Rule M(4)(a).

114. In summary, the provisions of Article VIII must be interpreted in good faith in their context and in light of the object and purpose of the Convention, taking account of subsequent practice of the parties and applicable rules of international law, as confirmed by supplementary means of interpretation. On the basis of those considerations, Article VIII is properly to be interpreted as follows:

- (a) Article VIII forms an integral part of the system of collective regulation established by the Convention, not an exemption from it. As such, it cannot be applied to permit whaling where the effect of that whaling would be to circumvent the other obligations of the Convention or to undermine its object and purpose.
- (b) Only whaling that is conducted “in accordance with” Article VIII is exempt from the operation of the Convention.
- (c) Article VIII only permits a Contracting Government to issue a Special Permit for the exclusive “purposes of scientific research”. The purpose for which a Special Permit has been issued is a matter for objective determination, taking account of the programme’s methodology, design and characteristics, including: the scale of the programme; its structure; the manner in which it is conducted; and its results.
- (d) Article VIII requires a Contracting Government issuing a Special Permit to limit the number of whales to be killed under that permit to a level that is the lowest necessary for and proportionate to the objectives of that research, and that can be demonstrated will have no adverse effect on the conservation of stocks.

- (e) A Contracting Government issuing a Special Permit must discharge its duty of meaningful cooperation, and demonstrate that it has taken proper account of the views of the Scientific Committee and the Commission.
- (f) Only whaling under Special Permit that meets all three of the requirements of Article VIII outlined above is permitted under Article VIII.

P.J. Ridings

Agent of New Zealand

28 March 2013

CERTIFICATION

I certify that the annexes attached by way of Annexes to these Written Observations are true copies of the documents referred to.

P.J. Ridings

Agent of New Zealand

28 March 2013

LIST OF ANNEXES

1. International Whaling Commission, *Circular Communication to Commissioners and Contracting Governments: Special Permits for Scientific Research*, 5 January 1987.
2. International Whaling Commission, “Special Permit Catches Since 1985”, *Website of the International Whaling Commission*, at http://iwc.int/table_permit.htm accessed on 15 March 2013.

Annex 1: International Whaling Commission, *Circular Communication to Commissioners and Contracting Governments: Special Permits for Scientific Research*, 5 January 1987



**International
Whaling
Commission**

Your Ref.

Chairman
Mr I. L. G. Stewart (New Zealand)
Vice-Chairman
Mr. M. T. Haddon (United Kingdom)
Secretary
Dr. Ray Gambell

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5 January 1987

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CIRCULAR COMMUNICATION TO COMMISSIONERS AND CONTRACTING GOVERNMENTS

Special Permits for Scientific Research

The Secretary refers to the Circular Communication dated 29 August 1986 (ref: RG/VJH/16202) by which comments on a letter from the Commissioner for the USA were requested.

Copies of the responses received from Australia, Ireland, Japan, Republic of Korea, Netherlands, Norway, Seychelles, Sweden and the UK are now enclosed for the information of all Commissioners.

Also enclosed is a summary list of Permits issued since 1951, compiled by the Secretariat.

Dr R. Gambell
Secretary to the Commission

Encs.

SUMMARY OF PERMITS ISSUED FOR SCIENTIFIC PURPOSES

YEAR	COUNTRY	SPECIES OF WHALE	NO. OF WHALES	AREA	PURPOSE	RESULT	REFERENCE
1951	Canada	Californian Gray	10		Scientific Research	None taken	
1952/3	USSR	Baleen of different species	6	Antarctic	Scientific Research		
1952	Canada	Californian Gray	10		"	None taken	
1952	USSR	Baleen of different species	6	Antarctic	"		
1953	Canada	Californian Gray	10		"	10 taken April 1953	Report SC1 31A & 34 and IWC/5/11
1953/4	USSR	Baleen of different species	6	Antarctic	"		
1953	Norway	Baleen whales	5	Antarctic	"		Report IWC/6/4
1954	UK	Humpback	6	Antarctic	"	6 taken	Interim Report June 1954. Final Report Feb. 57, also file SC1 doc 103A.
1954	Japan	Right	2	Pacific coast N/E of Japan	"	None taken	
1954/55	USSR	Baleen of different species	8	Antarctic	"		
1955	USSR	Right Californian Gray Sperm	10 5 50	Kurile Isles	"	Taken & given to Oceanographic Institute of USSR Academy of Science	
1955	Australia	Humpback	6		"	2 cows and 2 calves taken	Referred to in paper presented to Scientific Sub-Committee 1957

Year	Country	Species of Whale	No. of ales	Area	Purpose	Result	Reference
1955	Netherlands	Fin	2 calves 2 mothers + 2 young fins 35-40ft.				
1955/56	USSR	Baleen of different species	12				
1956	Japan	Right	1		Scientific Research	1 female taken	IWC/8/12
1957	Japan	Right	2	Pacific N/E of Japan	"		Report March 1957 filed SCI 106 and IWC/9/6
1956	Netherlands	Fin	1 calf 1 lactating 3 x 45-50ft.				
1957	UK	Baleen	12		To test new electric harpoon	Permit suspended for consideration following objections	
1956/57	USSR	Whalebone whales various excluding Balcaenidae	10	Antarctic			
1957/58	Netherlands	Fin	2 calves 2 lactating 2x1 year olds 35-40 ft.	Antarctic			
1957/58	USSR	Fin Blue Humpback	4 2 2				
1957	USA	Any	4	Pacific off California	Live scientific Research		Report June 1958 filed SCI doc 138
1958	USA	Any	4	"	"	Renewal of above permit	

Year	Country	Species of Whale	No. of Hales	Area	Purpose	Result	Reference	- 3 -
1958	Australia	Sperm adult female Sperm juvenile female	6 6					
1958	Netherlands	Baleen	9				Report May 1959 filed SCI	
1959	USA	Any	4	Pacific off California	Specific Research	2 gray whales taken	Report Dec. 1959	
1959/60	USSR - Slava	Any	2 pre-season 2 after season					
	Ukraine	Any	4 pre-season 2 after season					
1961	Japan	Right	3	N. Pacific N of 45°N, Bering Sea, Sea of Japan, Sea of Okhotsk & Arctic Ocean	Scientific Research	3 taken	IWC/14/B	
1961/62	USSR	Right	12					
1962	Australia	Bryde's	25 less than 40ft.					
	"	Blue	10 - Nor West Whaling & 3 - Cheynes Beach all below 70 ft.					
	"	Sperm	48 less than 35 ft. Each station max. of 4 per month June/Nov.					
1962	Japan	Right	3	N. Pacific N of 45°N, Bering Sea, Sea of Okhotsk, Sea of Japan & Arctic Ocean		3 taken	IWC/15/13	

Year	Country	Species of Whale	No. of Whales	Area	Purpose	Result	Reference
1962	Japan	Sperm	Whole herd of 30-60 incl. undersized, calves & suckling whales	N. Pacific N. of 35° N Lat.	Scientific Research	Abandoned. No suitable herd found	
1962	USA	Gray	4		"	4 taken	IWC/14/8
1962/63	USSR	Whalebone	8 (2 per ship) before season and 8 after season				
1963	South Africa	Sperm	200 under-sized excl. calves - max. 40 per month		Scientific Research	350 taken	Report July 1964 filed SC2 doc 3A
	"	Sperm	150 under-sized excl. calves - max. 25 per month				
1963	South Africa	Sei	50		"	50 taken	Report July 1964 filed SC2 doc 3A
1963	Japan	Right	3	N. Pacific N. of 45° N, Bering Sea, Sea of Okhotsk & Sea of Japan & Arctic Ocean	"	3 taken	IWC/16/14
1963	Australia	Sperm	140 under-sized	off Carnarvon	"	56 taken	
1963	USA	Any except Right	4		"	Permit unused. Experiments were carried out on whales caught commercially	

Year	Country	Species of Whale	No. of Circles	Area	Purpose	Result	Reference	- 5 -
1963/64	New Zealand	Sperm	100 max. of 30 per month					
1964	Canada	Sperm	20 under- sized or lactating	N. Pacific off West coast of Canada	Scientific Research	None taken, permit re-issued 1965		
1964	USA	Gray	20		"	20 taken	Report filed SC1. and LWC/16/14	
1964	USA	Any except Right	4		"	Renewal of 1963 permit		
1964	USA	Sperm	1 entire harem school		"	None taken	Report filed SC2 doc13	
1964	Japan	Sperm	3 entire schools each not more than 30 animals	N. Pacific N. of 45°N, Bering Sea, Sea of Okhotsk, Sea of Japan & Arctic Ocean	"	None taken		
1964	USA	Gray	3	Scammon Lagoon, Baja, California				
1964	Japan	Fin	2 over 17.4m	Pacific N. of 45°N excl. Sea of Okhotsk & Sea of Japan	"	1 female fin taken	Report filed SC2 doc33	
	"	Sei	2 over 12.2m excl. females with calves and suckling whales					
1965	USA	Sperm	up to 50		"	None taken		
1965	Australia	Sperm	120 under- sized up to 40 in 3 fortnightly periods			None taken		

Year	Country	Species of Whale	No. of Whales	Area	Purpose	Result	Reference
1965	Canada	Sperm	20 under-sized or lactating	N. Pacific off West coast of Canada	Scientific Research	None taken, permit re-issued 1966	IWC/19/9
1965	Japan	Sperm	school up to 30	N. Pacific N of 35°N	"	26 taken	Report filed SC2 doc60 and IWC/18/12
1965	USA	Any except Right	12 (not more than 6 gray)				
1965/66	USSR	Sei Fin Blue Bryde	6 6 3 4		"	1 female fin taken	IWC/18/12
1965	USA	Gray	3	Magdalene Bay, Scammon Lagoon & E. Pacific	Live Research		Report filed SC2 doc82
1966	Norway	Blue Humpback	1 1				
1966	USA	Gray	40 later amended to 60		"	26 taken	IWC/18/12 and IWC/19/9
	"	Sperm	50			Renewal of 1965 permit. 22 taken	IWC/19/9
1966	Canada	Sperm	20 under-sized or lactating	N. Pacific off West coast of Canada	"	Renewal of 1965 permit	IWC/19/9
1966	USA	Minke	2		For live public display	None taken	

Year	Country	Species of Whale	% of whales	Area	Purpose	Result	Reference
1966/67	Japan	Fin	2 females + calves	S. of 40°S Lat.	Scientific Research	3 female fins + calves taken,	Report filed SC2 doc140 and IWC/19/9
		Blue Sperm Fin	3 100 1 female + calf	S. of 40°S Lat. S. of 30°S Lat. S. of 40°S Lat.		3 pygmy blues and 51 sperm whales taken	
1966/67	USSR	Bryde Sei Pygmy blue Fin	3 3 1 2		"	3 Bryde and 1 Blue taken	IWC/20/10
1967	USA	Gray	100		"	99 taken	IWC/19/10
1967	USA	Minke	2		For live public display, re- newal of 1966 permit	None taken	Sightings report filed SC2 doc169
1967	USA	Sperm	50				
1967/68	Canada	Fin Sei Sperm	5 under 40ft. 5 under 33ft. 5 under 32ft.		Scientific Research "	1 taken 1 taken 5 taken	IWC/20/10 and report filed SC2 doc145
1968	USA	Gray	100		"	66 taken	Report filed SC3 doc23A and IWC/20/10
1968	USA	Gray	5 max.		Live Research		Report filed SC3 doc13
1968	USA	Sperm	100		Scientific Research	53 taken	Report filed SC3 doc23A
1968	USA	Minke	2		For live public display, renewal of 1967 permit		

Year	Country	Species of Whale	No. of Whales	Area	Purpose	Result	Reference - 8 -
1968	Japan	Sei	5 lactating + 5 calves		Scientific Research	1 mother + calf taken	Report filed SC3 doc28A, IWC/20/10 and SC/21/10
1968	USA	Humpback	unspecified	Off Bermuda	To attach acoustic beacons		
1968	Japan	Right	2	Okhotsk Sea	Scientific Research	2 taken	Report filed SC3 doc28A and SC/21/10
1969	USA	Gray	100		"		
1969	USA	Gray	1		To allow stranded whale to be kept in captivity	Whale died	Report filed SC3 doc23B
1969	USA	Minke	2		For live public display, renewal of 1968 permit		
1969	USA	Sperm	100		Scientific Research	31 taken	Report filed SC3 doc40D and SC/22/8
1969	USA	Gray	1 or more		Live research to attach electronic tracking devices		
1969	USA	Humpback	unspecified	Off Bermuda	To attach acoustic beacons		Report filed SC3 42A
1969	Canada	Humpback	20 over 45ft.	NW Atlantic off east coast of Canada	Scientific Research	None taken	
1969/70	Japan	Pygmy Blue	9	40°S Lat. - N. of 55°S Lat. from 30°E Long.	"	2 taken	Report filed SC3 doc54 and SC/22/4

Year	Country	Species of Whale	No. of Whales	Area	Purpose	Result	Reference - 9 -
1970	USA	Sperm	3		Live public display		
1970	USA	Sperm	100			30 taken	Report filed SC3 doc67A and SC/22/8
1970	USA	Humpback	unspecified		To attach acoustic beacons		
1970	USA	Sperm Humpback	4 2		To maintain in captivity	None taken	
1970	Norway	Fin	20	E. Greenland waters	Scientific Research	19 taken	Report filed SC4 doc1 and IWC/23/SC/18
1970	Canada	Fin	40	NW Atlantic			
1970	Canada	Humpback	20	NW Atlantic	Renewal of 1969 permit	20 taken	IWC/24/SC7
1970	South Africa	Minke	25 lactating + calves	SW Indian Ocean off E. coast S. Africa	Scientific Research	12 lactating + 2 calves taken	Report filed SC3 doc65C and IWC/23/SC/19
1970	Japan	Sei	5 lactating + calves	N. Pacific	"	None taken	IWC/SC/22/4 and IWC/23/17
1970/71	USSR	Pygmy right Bryde Pygmy blue Humpback	3 10 5 2	N. from 40°S Lat.	"	3 pygmy right, 5 blue & 24 Bryde's taken	IWC/23/SC22
1971	USA	Sperm Humpback	4 2		To maintain in captivity, renewal of 1970 permit	None taken	
1971	South Africa	Sperm	15 calves	SW Indian Ocean off E. coast S. Africa	Scientific Research	9 taken	Report filed SC3 doc81A and IWC/23/SC/19 and IWC/24/SC7

Year	Country	Species of Whale	No. of Whales	Area	Purpose	Result	Reference
1971	USA	Sperm	3		To maintain in captivity		
1971	USA	Gray	2 calves		For live research		
1971	South Africa	Minke	12 lactating + 2 calves	SW Indian Ocean off E. coast S. Africa	Scientific Research	9 taken	Report filed SC4 doc22B and IWC/24/7
1971	Canada	Fin Humpback	40 30	NW Atlantic	"	20 humpbacks taken	IWC/24/7
1971	Japan	Sei	5 lactating + calves	N. Pacific	Renewal of 1970 permit	None taken	Report filed SC4 doc41
1971	USA	Sperm	unspecified		Live research	None taken	Report filed SC4 doc28A
1971	South Africa	Sperm	15 calves	SW Indian Ocean off E coast S. Africa	Scientific Research	None taken	Report filed SC4 doc22A
1971	USA	Humpback	2		For live display		
1971	Japan	Sperm	200		Scientific Research	200 taken from 15 schools	Report filed SC4 doc41 and IWC/24/7
1971/72	USSR	Sei & Bryde Pygmy Blue Humpback	12 6 3		"	8 sei, 1 Bryde, 3 pygmy blue and 3 humpback taken	IWC/24/7
1971/72	Japan	Fin	15 females + calves	S. of 40°S Lat.	"	2 taken	Report filed SC4 doc 42A

Year	Country	Species of Whale	of Calves	Area	Purpose	Result	Reference
1972	USA	Sperm Humpback	4 2		For live studies. Renewal of 1971 permit		
1972	USA	Sperm Gray	up to 5 up to 5		For live studies		
1972	South Africa	Sperm	10 calves	Off E coast of S. Africa	Scientific Research	None taken	Report filed SC4 doc31A
1972	USA	Gray	2 juveniles		For live studies		
1972	USSR	Bryde Sperm	20 under 12.2m 1 or 2 harem schools	N. Pacific	Scientific Research	13 Bryde & 11 Sperm taken	SC/25/39
1973	USSR	Humpback Blue Pygmy Blue Dwarf Right	5 5 5 3	S. Hemisphere	Scientific Research	6 humpback & 6 blue taken	SC/25/39
1973	South Africa	Sperm	15 calves		Renewal & extension of 1972 permit	10 calves taken	IWC/SC/25/38
1973	USSR	Fin Sei Bryde Sperm	5 5 5 5		Scientific Research		
1976	Japan	Sperm	80	N. Pacific	"		
1976	Japan	Minke	100	N. Pacific	"	1 taken	SC/29/Doc39
1976	Japan	Bryde	240	S. Hemisphere	Population Studies	105 taken	SC/29/Doc38

Year	Country	Species of Whale	No. of Whales	Area	Purpose	Result	Reference
1977	Japan	Bryde	120	S. Hemisphere	Population Studies	120 taken	SC/30/Doc30
1977	USSR	Bryde	5	S. Hemisphere	Population Studies	5 taken	SC/30/Doc55
1978	Japan	Bryde	120	S. Hemisphere	Population Studies	120 taken	SC/31/Doc31
1985	Iceland	Fin	80	N. Atlantic	5-year Research Programme		
		Sei	40				
		Minke	80 annually				

Annex 2: International Whaling Commission, "Special Permit Catches Since 1985", Website of the International Whaling Commission, at <http://iwc.int/table_permit.htm> accessed on 15 March 2013



International Whaling Commission

SPECIAL PERMIT CATCHES SINCE 1985

Nation	Area	Dates	Fin	Sperm	Sei	Brydes	Minke	Total
1986 (86/87)								
Iceland	NA	Jun-Sep86	76	0	40	0	0	116
Republic of Korea	NP	Apr-Jul86	0	0	0	0	69	69
Total			76	0	40	0	69	185
1987 (87/88)								
Iceland	NA	Jun-Sep87	80	0	20	0	0	100
Japan (pelagic)	SH	Jan-Mar88	0	0	0	0	273	273
Total			80	0	20	0	273	373
1988 (88/89)								
Iceland	NA	Jun-Aug88	68	0	10	0	0	78
Japan (pelagic)	SH	Jan-Mar89	0	0	0	0	241	241
Norway (small type)	NA	Aug-88	0	0	0	0	29	29
Total			68	0	10	0	270	348
1989 (89/90)								
Iceland	NA	Jun-Jul89	68	0	0	0	0	68
Japan (pelagic)	SH	Dec89-Feb90	0	0	0	0	330	330
Norway (small type)	NA	Jul-89	0	0	0	0	17	17
Total			68	0	0	0	347	415
1990 (90/91)								
Norway (small type)	NA	Aug-90	0	0	0	0	5	5
Japan (pelagic)	SH	Dec90-Mar91	0	0	0	0	327	327
Total			0	0	0	0	332	332
1991 (91/92)								
Japan (pelagic)	SH	Dec91-Mar92	0	0	0	0	288	288
1992 (92/93)								
Norway (small type)	NA	Jul-Aug92	0	0	0	0	95	95
Japan (pelagic)	SH	Dec92-Mar93	0	0	0	0	330	330
Total			0	0	0	0	425	425
1993 (93/94)								
Norway (small type)	NA	Apr-Sep93	0	0	0	0	69	69
Japan (pelagic)	SH	Dec93-Mar94	0	0	0	0	330	330
Total			0	0	0	0	399	399
1994 (1994/95)								
Norway (small type)	NA	May-Sep94	0	0	0	0	74	74
Japan	NP	Jul-Sep94	0	0	0	0	21	21
Japan (pelagic)	SH	Dec94-Mar95	0	0	0	0	330	330

http://iwc.int/table_permit.htm

Total			0	0	0	0	425	425
1995 (1995/96)								
Japan	NP	Jun-Aug95	0	0	0	0	100	100
Japan (pelagic)	SH	Nov95-Mar96	0	0	0	0	440	440
Total			0	0	0	0	540	540
1996 (1996/97)								
Japan	NP	Jul-Sep96	0	0	0	0	77	77
Japan (pelagic)	SH	Nov96-Mar97	0	0	0	0	440	440
Total			0	0	0	0	517	517
1997 (1997/98)								
Japan	NP	May-Jul97	0	0	0	0	100	100
Japan (pelagic)	SH	Dec97-Mar98	0	0	0	0	438	438
Total			0	0	0	0	538	538
1998 (1998/99)								
Japan	NP	May-Jun98	0	0	0	1	100	101
Japan (pelagic)	SH	Jan-Mar99	0	0	0	0	389	389
Total			0	0	0	1	489	490
1999 (1999/2000)								
Japan	NP	Jun-Jul99	0	0	0	0	100	100
Japan (pelagic)	SH	Dec99-Mar00	0	0	0	0	439	439
Total			0	0	0	0	539	539
2000 (2000/01)								
Japan	NP	Aug-Sep00	0	5	0	43	40	88
Japan (pelagic)	SH	Dec00-Mar01	0	0	0	0	440	440
Total			0	5	0	43	480	528
2001 (2001/02)								
Japan	NP	May-Aug 01	0	8	1	50	100	159
Japan (pelagic)	SH	Nov01-Mar02	0	0	0	0	440	440
Total			0	8	1	50	540	599
2002 (2002/03)								
Japan (pelagic)	NP	Jul-Sep02	0	5	40	50	102	197
Japan (coastal)	NP	Sep-Oct02	0	0	0	0	50	50
Japan (pelagic)	SH	Dec02-Mar03	0	0	0	0	441	441
Total			0	5	40	50	593	688
2003 (2003/04)								
Iceland	NA	Aug-Sep03	0	0	0	0	37	37
Japan (pelagic)	NP	May-Aug03	0	10	50	50	101	211
Japan (coastal)	NP	April-May03	0	0	0	0	50	50
Japan (pelagic)	SH	Nov03-Mar04	0	0	0	0	443	443
Total			0	10	50	50	631	741
2004 (2004/05)								
Iceland	NA	June-July04	0	0	0	0	25	25
Japan (pelagic)	NP	June-Sept04	0	3	100	51	100	254
Japan (coastal)	NP	Sept-Oct04	0	0	0	0	60	60
Japan (pelagic)	SH	Dec04-Mar05	0	0	0	0	441	441
Total			0	3	100	51	626	780
2005 (2005/06)								

Iceland	NA	July-Aug05	0	0	0	0	39	39
Japan (pelagic)	NP	May-Aug05	0	5	100	50	101	256
Japan (coastal)	NP	Apr-Oct05	0	0	0	0	121	121
Japan (pelagic)	SH	Dec05-Mar06	10	0	0	0	856	866
Total			10	5	100	50	1117	1282
2006 (2006/07)								
Iceland	NA	Jun-Aug06	0	0	0	0	60	60
Japan (pelagic)	NP	May-Aug06	0	6	101	51	100	258
Japan (coastal)	NP	Apr-Oct06	0	0	0	0	97	97
Japan (pelagic)	SH	Dec06-Feb07	3	0	0	0	508	511
Total			3	6	101	51	765	926
2007 (2007/08)								
Iceland	NA	Apr-Sep07	0	0	0	0	39	39
Japan (pelagic)	NP	Apr-Oct07	0	3	100	50	100	253
Japan (coastal)	NP	May-Aug07	0	0	0	0	108	108
Japan (pelagic)	SH	Dec07-Mar08	0	0	0	0	551	551
Total			0	3	100	50	798	951
2008 (2008/09)								
Japan (pelagic)	NP	Jun-Aug08	0	2	100	50	59	211
Japan (coastal)	NP	Apr-Oct08	0	0	0	0	112	112
Japan (pelagic)	SH	Dec08-Mar09	1	0	0	0	680	681
Total			1	2	100	50	851	1004
2009 (2009/10)								
Japan (pelagic)	NP	May-Jul09	0	1	101	50	43	195
Japan (coastal)	NP	Apr-Oct09	0	0	0	0	122	122
Japan (pelagic)	SH	Dec09-Mar10	1	0	0	0	507	508
Total			1	1	101	50	672	825
2010 (2010/11)								
Japan (pelagic)	NP	Jun-Aug10	0	3	100	50	14	167
Japan (coastal)	NP	Apr-Oct10	0	0	0	0	105	105
Japan (pelagic)	SH	Dec10-Feb11	2	0	0	0	171	173
Total			2	3	100	50	290	445
2011 (2011/12)								
Japan (pelagic)	NP	Jun-Aug11	0	1	96	50	49	196
Japan (coastal)	NP	May-Oct11	0	0	0	0	77	77
Japan (pelagic)	SH	Jan11-Mar12	1	0	0	0	266	267
Total			1	1	96	50	392	540
Overall Total:								15,123

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