INTERNATIONAL COURT OF JUSTICE

WHALING IN THE ANTARCTIC
(AUSTRALIA v. JAPAN: NEW ZEALAND INTERVENING)

WRITTEN OBSERVATIONS OF JAPAN
ON
NEW ZEALAND'S WRITTEN OBSERVATIONS

31 MAY 2013

TABLE OF CONTENTS

I. PRELIMINARY MATTERS

A. Issues regarding intervention of a third State under Article 63 of the Statute

1. Japan has received and considered the Written Observations dated 4 April 2013, submitted by New Zealand in this case. This is the first case in which the intervention of a third State under Article 63 of the Statute has been admitted by the Court under the 1978 Rules of Court,[1] and Japan hopes that some observations on the procedure may be found helpful by the Court.

2. Japan recalls the words of a former President of the Court, who wrote that one of the purposes of the 1978 revision of the Rules concerning intervention was to afford litigants "an important protection against protracted uncertainty."[2] The equality of the Parties is also a fundamental principle of international justice. In this context, Japan finds itself in a regrettable position.

3. New Zealand's interpretation of Article VIII of the 1946 International Convention for the Regulation of Whaling (hereafter: "Convention" or "ICRW") differs from that of Australia in significant respects. For example, New Zealand has a different conception of what

[1] Both the PCIJ and the ICJ admitted requests for intervention under Article 63 of the Statute. The PCIJ admitted a request for intervention by Poland and requalified it as a request under Article 63 of the Statute, *S.S. Wimbledon, Judgment (Question of Intervention by Poland), 1923, P.C.I.J., Series A, No. 1*, pp. 12-13; the ICJ admitted Cuba's request in the *Haya de la Torre* case, *Haya de la Torre (Colombia v. Peru), Judgment, I.C.J. Reports 1951*, pp. 74-77. This however would be the first case of Article 63 intervention under the 1978 Rules.

[2] Manfred Lachs, "The Revised Procedure of the International Court of Justice", quoted in Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005*, 2006, p. 1455.

counts as "scientific research", and has offered a different understanding of the role of the International Whaling Commission ("IWC") and the status of its resolutions and recommendations.[3] Japan has, accordingly, to address two different cases against it, emanating from two States that have stated openly that they are acting in a common cause.

4. This submission by New Zealand of a lengthy and detailed pleading, after written proceedings have closed and only a short time before the hearing, at which New Zealand will make oral submissions after the close of Japan's first round of oral argument, will require Japan to answer in its final round of oral pleading two sets of arguments, put forward by two opposing States, each within its own allotted intervention in the schedule of the oral proceedings. Japan has already drawn to the attention of the Court[4] certain serious anomalies that arise from New Zealand's admission as an intervenor; and it has recalled the context of the co-operation between Australia and New Zealand in which this intervention takes place, as evidenced by the joint statement from their respective Foreign Ministers.[5] Both States have kept silent on this co-operation in their communications with the Court[6] in response to Japan's observations of 21 December 2012.

---

[3] *See* further below, para. 8.
[4] Japan's Written Observations of 21 December 2012 on the Declaration of Intervention filed by New Zealand.
[5] The Joint Media Release dated 15 December 2010, issued by the Australian and New Zealand Ministers for Foreign Affairs.
[6] The letter dated 10 January 2013 from the Agent of Australia and that of 1 February 2013 from the Agent of New Zealand.

B. New Zealand's intervention cannot affect Japan's objection to jurisdiction

5. In its Counter-Memorial, Japan raised an objection to the jurisdiction of the Court. Japan submits that New Zealand's intervention cannot have any bearing upon the decision that the Court will take in respect to jurisdiction, or upon Japan's right to raise any further arguments concerning jurisdiction that it would otherwise have been able to raise in response to Australia's arguments. The jurisdictional question must be addressed as a matter of priority in the hearings in this case, because the admissibility of the New Zealand's intervention presupposes that the Court has jurisdiction:

> "Whereas the Declaration of Intervention of the Republic of El Salvador (...) addresses itself also in effect to matters, including the construction of conventions, *which presuppose that the Court has jurisdiction to entertain the dispute* between Nicaragua and the United States of America and that Nicaragua's Application against the United States of America in respect of that dispute is admissible."[7]

6. It must also be kept in mind in this respect that, in the *Nuclear Tests* case, the Court dismissed a request from Fiji to intervene. The Court took its decision considering:

> "1. Whereas the application of Fiji by its very nature presupposes that the Court has jurisdiction to entertain the dispute between New Zealand and France and that New Zealand's Application against France in respect of that dispute is admissible;

---

[7] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Declaration of Intervention of the Republic of El Salvador, Order, I.C.J. Reports 1984*, p. 216, para. 2, emphasis added.

> 2. Having regard to the position taken by the French Government in a letter dated 16 May 1973 from the Ambassador of France to the Netherlands, handed by him to the Registrar the same day, that the Court was manifestly not competent to entertain New Zealand's Application;
>
> 3. Having regard to the fact that by its Order dated 22 June 1973 the Court decided that the written proceedings in the case should first be addressed to the questions of the jurisdiction of the Court to entertain the dispute between New Zealand and France and of the admissibility of New Zealand's Application;"[8]

The Court decided in consequence

> "to defer its consideration of the application of the Government of Fiji for permission to intervene in the proceedings instituted by New Zealand against France until it has pronounced upon the questions to which the pleadings mentioned in its Order dated 22 June 1973 are to be addressed."[9]

7. Similarly, in the present case, Japan submits that the Court should defer its consideration of New Zealand's request until it has decided whether it has jurisdiction to examine Australia's Application. If, for practical reasons, the Court finds it impossible to change at this stage the arrangements adopted for the organization of the hearings in this case, it should be with the understanding that nothing written or said by New Zealand may be taken into account by the Court for deciding on the existence or scope of its jurisdiction in the case introduced by Australia.

---

[8] *Nuclear Tests (New Zealand v. France), Application by Fiji for Permission to Intervene, Order, I.C.J. Reports 1973*, p. 325.

[9] *Ibid.* p. 325; in its Order of 20 December 1974, *Application by Fiji for Permission to Intervene*, the Court stated that as by its Judgment of 20 December 1974 the Court had found "that the claim of New Zealand no longer has any object and that the Court is therefore not called upon to give a decision thereon" there is, in consequence, no longer "any proceedings before the Court to which the Application for permission to intervene could relate" (*I.C.J. Reports 1974*, p. 535).

C. Points of concurrence between New Zealand and Japan

8. It was noted above that the position of New Zealand is not the same as that adopted by Australia. The most important differences are that New Zealand does not share Australia's dogmatic approach to the definition of what counts as "scientific research" for the purposes of Article VIII of the ICRW,[10] and that New Zealand has a more nuanced approach to the question of the role of the IWC and the status of its resolutions and recommendations[11]; moreover, while declaring that its policy is "to work to end whaling in the Southern Ocean"[12], New Zealand accepts, contrary to Australia's position, that the object and purpose of the Convention is not only the conservation, but also the proper regulation and development, of the whale stocks.[13]

9. There is a considerable degree of concurrence between the position of New Zealand and that of Japan. Japan considers that special permits may be granted only for whaling that has scientific purposes, and not for commercial purposes. It considers that Article VIII of the ICRW does not establish a completely unreviewable and self-judging right to designate any whaling activity as whaling "for purposes of scientific research". It considers that Contracting Governments are obliged to set catch limits in special permits, and that those catch limits must be set at a level no higher than the Government believes necessary for the purpose of the successful completion

---

[10] Compare Memorial of Australia (AM) paras. 4.92-4.115, 4.119, with Written Observations of New Zealand (NZWO) paras. 48-64.
[11] Compare AM, paras. 4.29-4.30. with NZWO, paras. 55-60.
[12] Statement of 16 April 2013 by Mr. McCully, the Foreign Minister of New Zealand [Annex 6] <http://www.mccully.co.nz/foreign-affairs/press-releases/2012/icj-sets-date-for-whaling-submission> accessed 24 May 2013.
[13] *E.g.*, NZWO, paras. 6, 15, 25, 27, 31, 32, 33, 51, 72, 74, 96, 108.

of the scientific expedition, and that the catch limit must be such as not to have an adverse effect on the status of the targeted stocks. Japan considers that a duty of cooperation arises under paragraph 30 of the Schedule, which obliges all Contracting Governments to give an adequate opportunity for the IWC Scientific Committee to comment upon proposed special permits before they are issued, and requires that such comments be given due consideration with a readiness to modify the terms of the Permit or the decision to issue it.

10. Japan does, however, part company with New Zealand on a number of points which have considerable importance in the context of this case. Japan's position will be spelled out fully during the oral pleadings in this case; but there are five main areas where differences of approach appear to have a bearing upon the questions before the Court.

II. APPROACH TO TREATY INTERPRETATION

A. That there is no subsequent agreement between the ICRW parties, and that resolutions of treaty bodies do not qualify ipso facto as subsequent practice

11. The first area where Japan's view of the law differs from that set out in New Zealand's Written Observations is the approach to treaty interpretation.

12. Section B ("Principles of Interpretation") of New Zealand's Written Observations refers to the need to "take account of the subsequent practice of the parties to the treaty", citing the Vienna Convention on the Law of Treaties ("VCLT") Article 31(3)(a) and (b).[14] Japan considers that this formulation of the principle omits two crucial elements.

13. First, the VLCT in fact refers in Article 31(3)(a) to "any subsequent *agreement* between the parties regarding the interpretation of the treaty or the application of its provisions"; and in Article 31(3)(b) to "any subsequent practice in the application of the treaty *which establishes the agreement of the parties* regarding its interpretation" (emphasis added). In the present case, there is no such agreement between the ICRW parties. On the contrary, they differ strongly on the meaning and scope of Article VIII of the Convention, as witnessed by the present dispute. New Zealand's formulation in effect elevates the view of the majority of the parties to a treaty, or of an articulate and expressive minority of parties, into a definitive interpretation of that

[14] NZWO, para. 11.

treaty. Japan considers that to be a perilous move that is unwarranted under the VCLT and under the customary international law on treaty interpretation. The Court's views, as expressed for example in *Kasikili/Sedudu*, hold true *mutatis mutandis* in the present case:

> "From all of the foregoing, the Court concludes that the abovementioned events, which occurred between 1947 and 1951, demonstrate the absence of agreement between South Africa and Bechuanaland with regard to the location of the boundary around Kasikili/Sedudu Island and the status of the Island. Those events cannot therefore constitute 'subsequent practice in the application of the treaty [of 1890] which establishes the agreement of the parties regarding its interpretation' (1969 Vienna Convention on the Law of Treaties, Art. 31, para. 3 (b)). *A fortiori*, they cannot have given rise to an 'agreement between the parties regarding the interpretation of the treaty or the application of its provisions' (*ibid.*, Art. 31, para. 3 (a))."[15]

14. Second, and contrary to New Zealand's presumption that such is the case, the resolutions of the organs established by the ICRW do not qualify *ipso facto* as subsequent practice. New Zealand refers to advisory opinions where the Court admitted that such may be the case (*Certain Expenses, Constitution of the Maritime Safety Committee*, *Legal Consequences of the Construction of a Wall*[16]). However, these references are misleading: in each of these cases the Court was called upon to define the competences of the conventional organs under the founding treaty, their practice being, *in the particular circumstances of those cases*, relevant for that purpose. This is not so in the present case, where it is not the powers of the IWC as such that are questioned before the Court, but rather the obligations of the Contracting Governments under the ICRW, and especially under its

[15] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1087, para. 63.
[16] NZWO, para. 11, fn.15.

Article VIII. Only the practice of the States themselves in regard to Article VIII of the Convention is relevant in this context.

B. On the scope of "restrictive interpretation"

15. New Zealand's misapprehension of the rights and obligations of the States under the ICRW is apparent when it argues "for a restrictive rather than an expansive interpretation" of Article VIII. [17] Japan's case rests primarily on the explicit provisions of the ICRW; and in Japan's submission the arguments advanced both by New Zealand and Australia seek to displace, rather than to interpret, the express terms of the Convention. That said, Japan makes the following points concerning New Zealand's arguments on "restrictive interpretation".

16. *First*, it is apparent that New Zealand's conception of the "restrictive interpretation" is quite contrary to that evident in the case-law. When the Court resorts to a restrictive interpretation of a treaty, it is always with a view to protecting the sovereignty and freedom of action of the State. Thus, in the case concerning the *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne* the PCIJ noted:

> "[I]f the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted."[18]

---

[17] NZWO, para. 46.

[18] *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925, P.C.I.J., Series B, No. 12*, p. 25; *see* also: *S.S. Wimbledon, Judgment, 1923, P.C.I.J., Series A, No. 1*, p. 24; *Access to, or Anchorage in, the port of Danzig, of Polish War Vessels, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 43*, p. 142; *Interpretation of the Statute of Memel Territory, Judgment, 1932, P.C.I.J., Series A/B, No. 49*, pp. 313–314; *Interpretation of the Peace Treaties, second phase, Advisory Opinion, I.C.J. Reports 1950*, p. 227; *Continental Shelf (Libyan Arab Jamahiria/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984*, p. 22, para. 35; *see* also *Interpretation of the Peace Treaty*

Rather than invoking this principle of restrictive interpretation in favour of States' sovereign rights, New Zealand invokes the principle with a view to obliterating rights expressly preserved for States under Article VIII of the ICRW.

17. *Second*, in reality, as has been noted:

> "The doctrine of restrictive interpretation never had a hierarchical supremacy, but was a technique to ensure a proper balance of the distribution of rights within a treaty system. The principle of restrictive interpretation (...) is not in fact mentioned in the provisions of the Vienna Convention."[19]

The truth is that, as this Court wrote,

> "A treaty provision which has the purpose of limiting the sovereign powers of a State must be interpreted like any other provision of a treaty, i.e. in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation."[20]

And certainly no principle of interpretation can be invoked in order to make an interpretation of a text that contradicts its explicit terms.[21]

18. *Third,* and in any case, the proper rule is that of ensuring the *effet utile* of the provision to be interpreted:

1946 (No. 196) (France v. Italy), United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol.XIII, 1955, p. 431.

[19] Arbitral Award, 24 May 2005, *Iron Rhine ("Ijzeren Rijn") Railway (Belgium/Netherlands)*, *RIAA*, Vol. XXVII, pp. 64-65, para. 53; *see* also paras. 24 and 53–55.

[20] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 237, para. 48.

[21] *S.S.Wimbledon, Judgment, 1923, P.C.I.J., Series A, No. 1*, pp. 24-25; *See* also: ICJ, Judgment of 16 April 2013, *Frontier Dispute (Burkina Faso/Niger)*, para. 85.

> "Of particular importance is the principle of effectiveness: *ut res magis valeant quam pereat*. The relevance of effectiveness is in relation to the object and purpose of a treaty."[22]

In other words, the prevailing interpretation must be the one closest to the object and purpose of a treaty (properly interpreted).

C. That the object and purpose cannot be silently rewritten

19. New Zealand's description of the object and purpose of the Convention as the framework for "the proper conservation and management of whales" is incomplete. While it is true that conservation *and* management are among the components of the object and purpose of the Convention, this formulation is a partial paraphrase of the stated object and purpose of the ICRW. It ignores the Convention's goal of "[making] possible the orderly development of the whaling industry", which is expressly stated in the ICRW Preamble.

20. The Preamble states that 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." While New Zealand is correct in identifying proper conservation of whale stocks as one object and purpose of the ICRW, it is inaccurate and misleading (and in a respect that is crucial in this case) to ignore the concern with the development of the whaling industry, which was a purpose for which the ICRW was

---

[22] Arbitral Award, 24 May 2005, *Iron Rhine ("Ijzeren Rijn") Railway (Belgium/Netherlands)*, *RIAA*, Vol. XXVII, at para. 49. *See* also ICJ, Judgment of 1 April 2011, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections*, para. 133 and the authorities quoted therein.

drafted, adopted, and in due course acceded to by the Contracting Governments.

21. New Zealand's position eliminates this most important objective from the Convention. It postulates that the increase of membership of non-whaling States brought about a change in the object and purpose of the Convention:

> "Their interest (...) lies in the proper conservation and management of whales themselves, not in the preservation of the whaling industry."[23]

22. Whatever the individual intentions of the States parties when adhering to the Convention, no legal principle allows for a change of the object and purpose of a convention – especially a change in a direction that is antagonistic to that established by the text of the convention, and to the will of the authors of that convention. In particular, the fact that States accede to a convention that was negotiated without their participation cannot change the object and purpose of that convention. They accept the Convention as it stands: to pretend otherwise would encourage an unprecedented form of hijacking of existing conventions.

23. Moreover, while the ICRW can be (and has been[24]) modified, there has been no modification of any provisions that are material in this case. The object and purpose of the ICRW have not been amended openly and explicitly, and they cannot be changed silently on the basis of tenuous inferences unsupported by evidence.

---

[23] NZWO, para. 32.
[24] *See* the Protocol to the ICRW.

24. Japan's Counter-Memorial has recalled several instances in which anti-whaling States, and in particular Australia, unsuccessfully attempted to revise the Convention, in particular its Article VIII.[25] In the same vein, in 2005, New Zealand introduced a document with a view to adopting a Protocol modifying several provisions of the Convention. The document presenting this proposal specified that such modification could only be envisaged by means of an instrument having the same legal value as the Convention itself, *i.e.* by means of a Protocol:

> "A number of delegations have stated that a Revised Management Scheme is not acceptable without the removal of special permit whaling. As this cannot be achieved through an amendment to the Schedule, the suggestion has been made that a voluntary code of conduct would be a suitable solution. A legally effective and robust solution, however, is the amendment or removal of Article VIII."[26]

Article VIII of the Convention was the first target. New Zealand proposed either purely and simply to suppress Article VIII,[27] or to submit special permit whaling to rules to be decided upon by the IWC.[28]

25. All of these attempts have proved unsuccessful, because the anti-whaling States were unable to impose their views on the States parties to the Convention.

---

[25] Counter-Memorial of Japan (JCM), paras. 8.33-8.36. For other attempts to restrict the rights enjoyed by Contracting Governments under Article VIII, *see* also Circular Communication, 29 August 1986, RG/VJH/16202 [Annex 2]; Circular Communication to Commissioners and Contracting Governments, 5 January 1987, RG/VJH/16365 [Annex 3].

[26] Document Prepared by New Zealand entitled "Protocol Amending the International Convention for the Regulation of Whaling", Proposed Cover Page, 24 March 2005. [Annex 4].

[27] New Zealand, Discussion Document, Protocol Amending the International Convention for the Regulation of Whaling, 24 March 2005 [Annex 5].

[28] *Ibid.*

III. NEW ZEALAND'S INCORRECT UNDERSTANDING OF THE TREATY REGIME UNDER THE ICRW

A. Discretionary power preserved by Article VIII

26. New Zealand asserts that the ICRW has as its object and purpose the replacement of 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.[29] That is inaccurate in several respects.

27. First, the ICRW is not a complete regime that regulates all activities in respect of whaling and entirely displaces all other rights and duties. The States parties to the ICRW are bound by its express provisions: no more and no less.

28. It is true that the ICRW constrains "unilateral whaling". The ICRW is a treaty superimposed upon a pre-existent freedom of whaling – whaling as an aspect of the freedom of fishing, which is one of the long-established freedoms of the high seas. The ICRW did not create or crystallize the right to engage in whaling. Nor did it set out an exhaustive code governing all activities that affect whales. It consists in a set of rules that regulate certain aspects of whaling activity, in accordance with the express terms of the Convention.

29. In this context New Zealand's attempt to surmount the discretion expressly recognized as belonging to the Contracting Governments under

[29] NZWO, para. 25.

Article VIII, by advocating an illusionary transition to a system of "collective regulation", goes against the plain meaning of Article VIII.

30. In the present case, New Zealand's interpretation of Article VIII subjects the discretion that a Contracting Government retains under Article VIII to a requirement that its exercise be validated by the other parties to the ICRW and by the organs established under the Convention.[30] This deprives the express words of Article VIII of any real meaning.

31. The words of Article VIII indicate that the Contracting Government granting a special permit is the Government – the *only* Government – called upon to determine whether the granting of a special permit is appropriate and to establish the conditions under which special permit activities may take place.

32. Article VIII, paragraph 1, provides that

> "*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."[31]

[30] NZWO, paras. 45, 68.
[31] Article VIII (1) of the ICRW.

33. The words "Notwithstanding anything contained in this Convention" and "shall be exempt from the operation of this Convention" indicate explicitly that the system established by the ICRW, upon which New Zealand puts great emphasis[32], does not apply to whaling for purposes of scientific research.

34. That is perhaps the most crucial fact – and it is an historical fact, not a matter of interpretation – that is obscured in the New Zealand analysis, as it is in the Memorial of Australia. The question before the Court is whether or not Japan has acted contrary to any of the specific undertakings that it made when it became a party to the ICRW.

35. Furthermore, the "system of collective regulation" to which New Zealand refers repeatedly[33] is a question-begging label. The fact that the ICRW provides for binding decisions on *some* matters to be taken by organs of the IWC, with legal consequences for the ICRW Contracting Governments, does not mean that the ICRW has established a "regime" in which *all* whaling-related matters are subject to control by the IWC. Article VIII of the ICRW does not establish a "system of collective regulation" in the sense that, for example, the EU treaties establish such a system in certain fields, ousting the competence of national authorities. This contrasts with the strict regulation established by the ICRW for the establishment of quotas for commercial whaling (Article V of the Convention and Paragraph 10(e) of the Schedule) and for aboriginal subsistence whaling (Article V of the Convention and Paragraph 13 (a) of the Schedule).

[32] NZWO, paras. 6, 7, 14-33, 108, 109, 114.
[33] NZWO, paras. 6, 7, 14-33, 34, 36, 81, 108, 109, 114.

36. Similarly, references to a "collective purpose"[34] and to "collective decision-making"[35] are misleading in so far as they suggest an intention on the part of ICRW States parties to do more than accept the specific obligations that are set out in the ICRW. Article III of the Convention uses the term "decisions" for all acts of the Commission, binding and non-binding alike. It thus refers to Schedule amendments that are in principle binding (Article V) and to recommendations (Article VI) and other type of resolutions which have no binding effect whatever. However, a clear-cut distinction of principle between the two categories must be set out: while compliance with properly-adopted amendments of the ICRW, being binding, is in principle amenable to adjudication and judicial enforcement, such is not the case for purely hortatory instruments, which cannot create binding obligations by themselves. That is why the law distinguishes between binding and non-binding instruments.

B. Limited constraints under Article VIII of the ICRW and Schedule Paragraph 30

37. As far as the restrictions on the exercise of research activities are concerned, it is apparent from the wording of Article VIII that the Contracting Government granting the permit enjoys a large margin of discretion. *Ratione materiae*, Article VIII imposes upon the Contracting Governments only one requirement; that of limiting the number of whales to be taken. However, the establishment of the size of the sample falls under the competence of the Government that issues the permit. As for any other

[34] *E.g.*, NZWO, paras. 23, 60.
[35] *E.g.*, NZWO, para. 28.

conditions attached to the permit, it is up to the Government granting the permit to decide what, if any, limitations are necessary.

38. Aside from the duty to process whales taken under special permits so far as practicable and to deal with the proceeds in accordance with directions issued by the Government under Article VIII(2), the only other express obligations a Contracting Government has towards the Commission under Article VIII of the ICRW are to report the special permits *after* it has granted them and to transmit to such body as may be designated by the Commission scientific information including the results of research conducted thereunder. Paragraph 30 of the Schedule, introduced in 1979, has added an additional requirement to this reporting procedure, which includes an obligation to submit to the IWC Scientific Committee the special permit proposal prior to the issuance of the special permits. It requires that the Contracting Governments specify in their proposal certain details as to the objectives of the research and methods used:

> "A Contracting Government shall provide the Secretary to the International Whaling Commission with proposed scientific permits before they are issued and in sufficient time to allow the Scientific Committee to review and comment on them. The proposed permits should specify:
>
> (a) objectives of the research;
> (b) number, sex, size and stock of the animals to be taken;
> (c) opportunities for participation in the research by scientists of other nations; and
> (d) possible effect on conservation of stock.
>
> Proposed permits shall be reviewed and commented on by the Scientific Committee at Annual Meetings when possible. When permits would be granted prior to the next Annual Meeting, the Secretary shall send the proposed permits to members of the

> Scientific Committee by mail for their comment and review. Preliminary results of any research resulting from the permits should be made available at the next Annual Meeting of the Scientific Committee."[36]

39. This obligation under the Schedule cannot be equated to a right for the other Contracting Governments to veto proposals to grant special permits. When Paragraph 30 of the Schedule was adopted, it was considered to be compatible with Article VIII of the Convention only on the understanding that it could not be construed as limiting the sovereign rights of Contracting Governments. Sir Derek Bowett's legal opinion, requested by the IWC prior to the adoption of Paragraph 30 of the Schedule, clearly states that the amendment to the Schedule cannot purport to restrict Contracting Governments' rights under Article VIII:

> "It is also important to emphasize *what the amendment could not do*. The amendment must be *so drafted as not to derogate from the rights of contracting Governments under the Convention*. Article VIII makes clear that the decision to grant a special permit rests with the contracting Governments. The function of the Scientific Committee must therefore be retained as one of 'review and comment' (Rule F). There can be no question of the Scientific Committee assuming a power to authorise or disallow a permit. Even the fixing of the number of whales to be taken, and any other conditions, rests in the discretion of the contracting Governments ('as the Contracting Government thinks fit'), so that the most the Scientific Committee can do is to comment on these conditions, and this by way of reports and recommendation to the Commission as Rule J .3 recognizes ."[37]

40. Thus, the wording of Article VIII has very little that would constrain the discretion enjoyed by Contracting Governments. Indeed, except

---

[36] Paragraph 30 of the Schedule.

[37] Derek Bowett, "Legal Opinion on Schedule Provision for Prior Review of Scientific Permits and Prohibition of Whaling by Operations Failing to Supply All Data Stipulated", IWC/31/9, p. 4 (emphasis added) [JCM, Annex 78].

for an obligation to report (paragraphs 1 and 3) and to join in the efforts to collect and analyse the data resulting from the research (paragraph 4), no other objective requirements are established. This situation can be contrasted with that existing in the *Constitution of the Maritime Safety Committee* case, where the Court found that:

> "If Article 28 (a) were intended to confer upon the Assembly such an authority, enabling it to choose the eight largest ship-owning nations, *uncontrolled by any objective test of any kind*, whether it be that of tonnage registration or ownership by nationals or any other, the mandatory words 'not less than eight shall be the largest ship-owning nations' would be left without significance. To give to the Article such a construction would mean that the structure built into the Article to ensure the predominance on the Committee of 'the' largest ship-owning nations in the ratio of at least eight to six would be undermined and would collapse. The Court is unable to accept an interpretation which would have such a result."[38]

41. New Zealand refers to the *Pulp Mills* case[39], but fails to notice the important point that the Court, while recognizing a failure on the part of Uruguay to comply with *procedural* obligations, did not consider that this failure amounted to a breach of the related *substantive* obligations:

> "The Court notes that the 1975 Statute created CARU and established procedures in connection with that institution, so as to enable the 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.*

---

[38] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, p. 166 (emphasis added).
[39] NZWO, para. 86.

> Likewise, the fact that the parties have complied with their substantive obligations does not mean that they are deemed to have complied *ipso facto* with their procedural obligations, or are excused from doing so. Moreover, the link between these two categories of obligations can also be broken, in fact, when a party which has not complied with its procedural obligations subsequently abandons the implementation of its planned activity."[40]

C. "Duty to co-operate"?

42. With regard to the duty of cooperation, Japan does not take issue with the general proposition that there is a duty of cooperation under the ICRW. Japan, however, disagrees with New Zealand's proposition that this duty of cooperation goes so far as to impose upon a State granting special permits the burden of demonstrating its "readiness to modify its Special Permit proposal to take account"[41] of the views of the States disagreeing with it. That is an unwarranted reversal of the burden of proof, which has no legal basis. Moreover, if "taking into account" must be equated to accepting those other States' views, as New Zealand seems to imply, that would give each ICRW State (or the majority, or some group of, ICRW States) the right to impose changes on the conditions of special permits granted by other ICRW States. Nothing in the ICRW suggests that any such power exists.

---

[40] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010,* p. 49, para. 78 (emphasis added).
[41] NZWO, para. 106. In the same vein, para. 107.

IV. NO REVERSAL OF BURDEN OF PROOF

43. At a number of points the Written Observations of New Zealand appear to reverse the burden of proof under international law. One example has just been given.[42] Another clear example appears in paragraph 74 of the Written Observations, where New Zealand refers to the "precautionary approach". It quotes a reference by a Chamber of the ITLOS to the "trend towards making this approach part of customary international law."[43] New Zealand appears subsequently to treat the "precautionary approach" as if it were already established as a part of customary international law, though without giving authority for that view or explaining what in its view is the content of that "approach". It then baldly asserts that the "precautionary approach" carries with it the requirement "a State interested in undertaking or continuing an activity has to prove that such activities will not result in any harm", citing one of the fourteen Separate Opinions and declarations appended to the ITLOS decision of 3 December 2001 on a provisional measures application in the *MOX* case.[44]

---

[42] *See* para. 42.

[43] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Advisory Opinion, 2011*, para. 135; ILM, Vol. 50 (2011), p. 458; <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/Adv_Op_010211_eng.pdf>. The full quotation is somewhat more cautious, referring to the *initiation* of a trend: "The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law."

[44] ITLOS, *the Mox Plant Case (Ireland v. United Kingdom), provisional Measures, Order, 2001*, Separate Opinion of Judge Wolfrum, *See* <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/sep.op.Wolfrum.E.orig.pdf>. Judge Wolfrum, quoted by New Zealand, also said in that Separate Opinion "It is still a matter of discussion whether the precautionary principle or the precautionary approach in international environmental law has become part of customary international law."

44. The "activity" in the *MOX* case was the shipment and reprocessing of nuclear materials. Whatever may be the position in relation to activities involving nuclear materials, Japan does not consider that the statement quoted by New Zealand can possibly be understood literally. There is no evidence that customary international law requires a State that undertakes, for example, an exercise of its right of navigation or fishing on the high seas "to prove that such activities will not result in any harm"[45]. New Zealand cites no support for this general reversal of the burden of proof under international law; and Japan does not consider that any such support exists. Japan agrees with the statement of the Court in the *Pulp Mills* case that "while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute [in that case, the 1975 Statute of the River Uruguay], it does not follow that it operates as a reversal of the burden of proof."[46]

45. Another example appears in paragraphs 107 and 113-114 of the Written Observations, where New Zealand asserts that a Contracting Government that issues a special permit must demonstrate that it has complied with the procedural obligations of cooperation that New Zealand finds in the ICRW, including: the obligations to allow consultation procedures to run their full course[47], to take account of the views of others[48], to take account of the gravity of the proposed actions for the interests of the other party[49], and to observe due process.[50] New Zealand considers that "due

---

[45] NZWO, para. 74.
[46] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010,* p. 71, para. 164.
[47] NZWO, para. 101.
[48] NZWO, para. 102.
[49] NZWO, para. 104.

process" requires that the Contracting Government demonstrate that it is ready to modify its approach to special permit whaling. In paragraph 106, New Zealand says that such readiness must be "demonstrable", which suggests that the demonstration is due only when another Contracting Government calls for it; but in paragraphs 113 and 114 New Zealand asserts that the Contracting Government must "demonstrate" compliance with the procedural obligations, indicating that New Zealand considers that the onus lies upon the Contracting Government issuing the special permit to present the demonstration. In so doing, New Zealand in effect creates a presumption that a State granting a special permit is acting in bad faith. But "there is a general and well-established principle of law according to which bad faith is not presumed." [51]

46. Here again Japan sees no reason or support in legal authority for this reversal of the burden of proof.

> "As a general rule, it is for the party which alleges a fact in support of its claims to prove the existence of that fact."[52]

According to New Zealand's view, it would apparently be for the State issuing a special permit to prove the "accuracy" of its appreciation, and not

---

[50] NZWO, para. 103.

[51] *Lake Lanoux Arbitration (France v. Spain), Arbitral Award of 16 November 1957, ILR,* Vol. 24, p. 126. *See* also *Tacna-Arica (Chile v. Peru), Arbitral Award of 4 March 1925, RIAA*, Vol. II, pp. 929-930 and *Mavrommatis Jerusalem Concessions, Judgment, 1925, P.C.I.J., Series A, No. 5*, p. 43; *Certain German Interests in Polish Upper Silesia, Merits, Judgment, 1926, P.C.I.J., Series A, No. 7*, p. 30.

[52] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 660, para. 54; *see* also *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 86, para. 68; *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 253, para. 101; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), I.C.J. Reports 2008*, p. 31, para. 45; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 128, para. 204, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101.

for other States or the Scientific Committee to disprove it. This cannot be the law; and this is not what Article VIII or Paragraph 30 of the Schedule say.

47. Yet another example appears in paragraph 54 of the Written Observations, where New Zealand asserts that it would be inconsistent with the objective of the ICRW "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". If that implies that the burden lies on Japan to present on each occasion an objective proof that whaling covered by each proposed special permit qualifies as whaling for purposes of scientific research, the proposition cannot be correct. If a State party to a treaty considers that another State party is acting contrary to its treaty obligations, the burden lies upon the complaining State to say so and to explain why.

> "To begin with, the Court considers that, in accordance with the well-established principle of *onus probandi incumbit actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts. (...) It is of course to be expected that the Applicant should, in the first instance, submit the relevant evidence to substantiate its claims."[53]

[53] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010,* p. 71, paras. 162-163.

V. *"FOR PURPOSES OF SCIENTIFIC RESEARCH"*

A. That there is no single definition of "for purposes of scientific research" and it is up to the Contracting Government

48. New Zealand appears to base its observations on the assumption that there is one, uniquely correct, view of what constitutes the "purposes of scientific research".[54] That view seems, moreover, to be equated with the view discerned by New Zealand in "guidance" that is provided by a majority of the members of the IWC.[55]

49. However, in reality, the "guidance" of the Scientific Committee is just that: guidance. While it must be taken into account as part of the good faith implementation of obligations under the ICRW, Contracting Governments are not legally bound to follow such guidance, and it does not add to or modify a Contracting Government's obligations under the Convention. There is room for Contracting Governments to differ in their views of the purposes of scientific research.

50. That point was made clear at an early stage in the work of the IWC Scientific Committee. As the minutes of a meeting in 1957 record:

> "The Committee also considered the question whether any practical definition could be made of 'scientific research' in this context, and, for instance, whether research on such things as technical methods of the industry could be included. They felt that it would be very difficult to make any such definition or to draw a line between one branch of science or another and that the interpretation and decision

[54] NZWO, paras. 48-54.
[55] NZWO, paras. 55-60.

in any particular case should be left to the Contracting Government which issues the permit."[56]

B. Standard of review

51. Japan also disagrees with New Zealand's approach concerning the right to authorize whaling for purposes of scientific research. Article VIII of the ICRW reaffirms the existence of the right of Contracting Governments to authorize whaling "for purposes of scientific research", which right was firmly established *prior* to the ICRW as an aspect of the freedom of the seas. Article VIII does not *confer* that right: it affirms its continuing existence "notwithstanding anything contained in [the ICRW]", and states that the killing, taking and treating of whales in accordance with Article VIII is "exempt from the operation of this Convention".

52. Further, New Zealand asserts that the question whether whaling is conducted "for purposes of scientific research" is to be determined "objectively" by the Court.[57] That assertion conflates a number of distinct issues and fails to address some crucial questions, and it does so without argument or reference to legal authority.

53. Japan accepts that a determination by a Contracting Government that whaling is "for purposes of scientific research" is not entirely beyond question. It can be reviewed by the Court.

---

[56] Report of the Scientific Committee, 1957, International Whaling Commission, ninth meeting: Document XIII, p. 4 [Annex 1].
[57] NZWO, paras 51-54.

54. However, the Court cannot substitute its own appreciation of the desirability or utility of a research programme for that of the Contracting Government. It might decide to strike down the Government's decision on the basis that it is proven to have been taken in bad faith, for example. But the Court cannot take the additional step of substituting its own determination. And, in practice, the Court shows deference to the State's appreciation of the factual and legal conditions in cases such as the present one, where the State enjoys a large margin of discretion.

> "The Parties have provided the Court with information about measures Nicaragua has undertaken, and to this day continues to undertake, in regulating the use of the river. Costa Rica contends that the information shows that Nicaragua is acting unlawfully, not for legitimate purposes but for reasons of harassment, and unreasonably and in a discriminatory way. Nicaragua submits the opposite.
>
> The Court notes that Costa Rica, in support of its claim of unlawful action, advances points of fact about unreasonableness by referring to the allegedly disproportionate impact of the regulations. The Court recalls that in terms of well established general principle it is for Costa Rica to establish those points (cf. *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 86, para. 68, and cases cited there). Further, a *court examining the reasonableness of a regulation must recognize that the regulator, in this case the State with sovereignty over the river, has the primary responsibility for assessing the need for regulation and for choosing, on the basis of its knowledge of the situation, the measure that it deems most appropriate to meet that need.* It will not be enough in a challenge to a regulation simply to assert in a general way that it is unreasonable. Concrete and specific facts will be required to persuade a court to come to that conclusion."[58]

[58] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 253, paras. 100-101 (emphasis added).

55. Like Australia, New Zealand does not address the standard of review that is applicable by the Court. To take only two possible approaches to this question, does New Zealand consider that the Court should ask (i) if Japan's view that JARPA II is scientific research is a view that no reasonable Government could reach or was adopted in bad faith, or should it ask (ii) if Japan's view was "correct" and substitute its own (the Court's) assessment for that of the Contracting Government? Those are very different questions; and there are many more formulations of the criterion that might be adopted. Even at this late stage in the proceedings, Japan does not know what standard of review Australia and New Zealand say the Court should apply.

56. Answering the first of those questions implies that a high threshold of discretion is recognized to Contracting Government in accordance with the clear text of Article VIII. By contrast, answering the question whether or not Japan's view that JARPA II is scientific research is "correct" does not square with the text. It implies that the Court (or other States) could substitute its (their) appreciation for that of Japan, which is not what the Convention says.

57. Then there is the separate question of the intensity of review. Whichever standard is adopted, it is necessary to explain how the Court should go about applying it. It is doubtful that the Court can make its own enquiry into the facts. As in most cases where both Parties appear before the Court, the Court makes its own appreciation on the basis of facts submitted by the Parties:

> "The Court has in this case been presented with a vast amount of materials proffered by the Parties in support of their versions of the facts. The Court has not only the task of deciding which of those materials must be considered relevant, but also the duty to determine

> which of them have probative value with regard to the alleged facts. The greater part of these evidentiary materials appear in the annexes of the Parties to their written pleadings. (...)
>
> As it has done in the past, the Court will examine the facts relevant to each of the component elements of the claims advanced by the Parties. In so doing, it will identify the documents relied on and make its own clear assessment of their weight, reliability and value."[59]

The same is true for expert documentation or testimonies:

> "[T]he Court does not find it necessary in order to adjudicate the present case to enter into a general discussion on the relative merits, reliability and authority of the documents and studies prepared by the experts and consultants of the Parties. It needs only to be mindful of the fact that, despite the volume and complexity of the factual information submitted to it, it is the responsibility of the Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate. Thus, in keeping with its practice, the Court will make its own determination of the facts, on the basis of the evidence presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed."[60]

58. The facts are not the only issue. When the facts have been gathered, how is the Court, as a non-technical body, to appraise them? This is not a case of the kind that may arise in the WTO, where the issue takes the form of the technical question whether there are any "less restrictive" measures that may achieve the chosen aim. That may be a technical question to which there is a clear technical answer. In the present case, however, the question is one of the propriety of the research aims themselves, which is a matter of science policy, and science *policy* is neither a technical nor a legal question.

---

[59] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005,* p. 200, paras. 58-59.

[60] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010,* pp. 72-73, para. 168.

59. In its Written Observations, New Zealand has side-stepped these problems. Its version of "objectivity" is to say that it disagrees with Japan's appraisal and to invite the Court to agree with New Zealand, without explaining how the Court can reason its way to that conclusion.

VI. LETHAL RESEARCH AND SAMPLE SIZE

60. It is clear that there is a duty not to threaten the existence of whale stocks by whaling conducted for purposes of scientific research. That is not controversial. But it is also clear that a certain number of whales can be caught without any significant risk whatever to the health of a whale stock. The two points which arise in this context on which Japan and New Zealand have different views are (i) whether lethal whaling must be the scientific methods of last resort in the collection of data, used only where there is no practical alternative and (ii) how the limit on the number of whales is to be determined.

61. As to the first, there is no basis whatever in the ICRW for an absolute ban on lethal whaling for scientific purposes: and New Zealand does not go so far as to assert that there is such a ban. On the contrary, the possibility of lethal whaling for scientific purposes clearly follows from Article VIII, which states that "the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention."[61]

62. It is, however, equally clear that nothing in the ICRW establishes any presumption against the use of lethal methods for the collection of data. Nor can such a presumption be found in other fisheries conventions.

[61] Article VIII (1) of the ICRW.

63. Moreover, non-lethal methods cannot entirely replace lethal methods for two reasons. First, certain essential data can only be obtained by lethal means. Second, while certain data may be obtainable by non-lethal means it would not be of the same quality and reliability, and in some circumstances it would take an unrealistic amount of time and expense to collect a sufficient number of samples to meet the research objectives.

64. The important question is whether or not the use of lethal methods can enable a better understanding (and consequently, better management) of the whale population dynamics – though Japan of course accepts that the number of whales caught must be such as will not threaten the existence of the stock. Japan does not in fact use lethal means more than it considers necessary; but that restraint flows not from any specific prohibition under the ICRW but from reasons of scientific policy in the implementation of its rights and duties under the Convention.

65. As to the second point, New Zealand says that the numbers of whales taken must be necessary and proportionate to the objectives of the research and have no adverse effect on the stock.[62] It appears to infer the requirements of "necessity" and "proportionality" from the uncontroversial proposition (which Japan accepts) that the discretion that a Contracting Government has to determine the number of whales to be taken under a special permit is not wholly unlimited – it is not a blank cheque. No explanation is given to justify these inferences, and Japan does not consider that there is any warrant for making them. As regards the numbers taken,

[62] NZWO, paras. 65-80.

they should be sufficient to meet the research objectives and to ensure that the data collected is accurate – without, of course, endangering the stock.

66. Nor does New Zealand explain how "proportionality" [63] with "research objectives" is to be determined. Sample sizes are calculated by standard algorithms. Differences of opinion over the justification for the sample size flow primarily from disagreements over the need to collect the data, the level of precision in the data that is sought, the level of statistical confidence in the analysis of the data that is sought, and the probability and scale of the impact upon the stock. Such determinations are not supposed to be made by the Court, which cannot substitute its own appreciation for that of the State party. Only if the determination made by a Contracting Government were, for example, clearly arbitrary could it criticize the State decision to grant special permits.

67. While Japan understands and respects the fact that some other States – including New Zealand – are opposed to whaling of any kind and in any circumstances, that is not the question before the Court. The question is whether there is such an absolute prohibition already in existence as a matter of international law under the ICRW, and binding upon Japan. There is not.

68. Although more nuanced and considered than the Australian Memorial, New Zealand's interpretation of the Whaling Convention relies on similar misleading postulates and leads to the same erroneous conclusions.

[63] NZWO, paras. 76-79.

VII. CONCLUSION

69. Despite a considerable degree of concurrence between New Zealand and Japan, Japan sees differences of particular significance in certain areas, as has been explained above. Starting from the perspective that there was a transition to a "system of collective regulation" with the adoption of the ICRW, and disregarding one of the stated goals of the Convention (namely, "mak(ing) possible the orderly development of the whaling industry"), New Zealand reaches erroneous conclusions on a number of points that are pertinent to the present case. New Zealand elevates the views of an articulate and expressive group of ICRW parties into a definitive interpretation of the Convention, and consequently misstates the scope of the discretion expressly reserved to the Contracting Governments by Article VIII of the ICRW, particularly in relation to research methods and sample sizes as well as to the duty of cooperation. New Zealand also attempts to reverse the burden of proof with regard to the precautionary approach, to the procedural duties incumbent upon Contracting Governments issuing special permits, and to the determination of what constitutes "scientific purposes" under Article VIII of the ICRW. Japan submits that New Zealand's characterization of each of these points is incorrect.

70. New Zealand implicitly requests the Court to substitute its own judgment for that of the Government of Japan as to the character of the special permits granted by Japan. It is respectfully submitted that the Court does not have such a power and cannot substitute its own appreciation for that of a Contracting Government granting a special permit.

鶴岡公二

Koji TSURUOKA

Agent of Japan

31 May 2013

LIST OF ANNEXES

1. Report of the Scientific Committee, 1957, International Whaling Commission, ninth meeting: Document XIII.

2. International Whaling Commission, *Circular Communication to Commissioners and Contracting Governments*, 29 August 1986, RG/VJH/16202.

3. International Whaling Commission, *Circular Communication to Commissioners and Contracting Governments*, 5 January 1987, RG/VJH/16365.

4. Document Prepared by New Zealand entitled "Protocol Amending the International Convention for the Regulation of Whaling", Proposed Cover Page, 24 March 2005.

5. New Zealand, Discussion Document, Protocol Amending the International Convention for the Regulation of Whaling, 24 March 2005.

6. Statement of 16 April 2013 by Mr. McCully, the Foreign Minister of New Zealand.

ANNEX1: Report of the Scientific Committee, 1957, International Whaling Commission, ninth meeting, Document XIII

NINTH MEETING:
DOCUMENT XIII

INTERNATIONAL WHALING COMMISSION

NINTH MEETING

Report of the Scientific Committee

1. The Scientific Committee was appointed by the Commission at its opening Plenary Session on the 24th June and met on June 24, 25, and 26.

2. The Committee consisted of:

Australia	Mr. Anderson
Brazil	Mr. Menezes
France	Professor Budker
Japan	Dr. Omura
Netherlands	Professor Slijper
Norway	Professor Ruud
South Africa	Mr. Andrews
U.K.	Dr. Mackintosh
U.S.A.	Dr. Kellogg
U.S.S.R.	Dr. Sleptsov
New Zealand	Mr. Francis (designated at the plenary session as an observer to the Committee)

Other experts, advisers, and observers also attended.

3. Election of Chairman. Dr. Mackintosh was elected Chairman of the Committee.

4. The following Agenda was approved:-

3. Any questions arising from Catch Figures 1956/57

4. Consideration of Sub-Committee's report (Document II) under the following heads.

(a) Catching Days for humpbacks in the Antarctic
(b) Blue Whales in the North Atlantic
(c) Whales in the North Pacific
(d) Antarctic Whaling and condition of the Stock
(e) Matters arising from Current Research
(f) Whale Marking
(g) Whales taken for Scientific Purposes

5. Amendments to the Schedule (Item 18 of the Agenda) including further opening of Antarctic sanctuary and opening date of Antarctic season.

6. Progress reports on research

7. Other business.

5. Catch Statistics for 1956/57. (Item 3, I.W.C. agenda item 9). The Committee briefly discussed the catch statistics which had been submitted by the Committee for whaling statistics. They noted that the greater part of the catch had been taken in Areas II and I and very small numbers in the Areas IV and V. They understood that in Area II a large proportion had been taken between 50° and 60° South. Almost the entire catch of humpbacks had been taken in Area I. The catch of sperm whales amounted to over 4,000 but was a little less than in the last 2 years. The average size and percentage immature of fin whales showed no decisive trend but the average size at least of females of blue whales was still declining. It was also noted that the percentage of blue whales in the catch of blue and fin combined was still falling.

1.

6. Consideration of Sub-Committee's Report (Item 4, I.W.C. 8). On the first day the Committee received a new paper on humpback whales by Dr. Chittleborough and in order to give time to study it item 4(a) was postponed until the next day.

7. Blue Whales in the North Atlantic (Item 4 (b), I.W.C. 11). The Committee unanimously endorsed the Sub-Committee's expression of regret that the protection of blue whales in the North Atlantic recommended in 1955 had still not been completely implemented.

8. Whaling in the North Pacific (Item 4(c), I.W.C. 12). The Committee took note of the Sub-Committee's observations on this subject. They were shown particulars of some specially interesting recoveries of Japanese marks which appeared to connect the stock of whales on the east and west side of the North Pacific Ocean. These whales had been marked in the vicinity of the east part of the Aleutian chain and recovered not far from Kamchatka. Whale marking is being conducted by both the Japanese and the U.S.S.R. authorities in this region. It was thought that further research was needed before any recommendation should be made for the conservation of whales in the North Pacific.

9. Whale Marking (Item 4(f)) The Committee were informed that at least 56 marks had been recovered from whales in the Antarctic season of 1956/57. One of these had been carried for 22 years in a whale. Another mark showed that a humpback marked in the Tonga Islands was recovered in the eastern part of the Pacific sector of the Antarctic; a blue whale had moved 1,900 miles from Area II to Area VI in not more than 47 days. A humpback marked off the East Australian coast had been recovered in New Zealand. This is of some importance as it shows a link between the Australian and New Zealand stocks.

Approximately 225 whales were marked in the Antarctic in 1956/57 before the opening date (and marks from 22 of these have been recovered). It is understood that in addition 50 baleen whales have been marked by the U.S.S.R. authorities. About 500 whales were marked in Australia and New Zealand in 1956.

The Committee felt that everything possible should be done to stimulate the recovery of marks from carcases brought into factory ships and land stations. They recommend that inspectors should be asked to encourage the search for marks both by consultation with the whaling companies in whose factories they are working and by direct contact with the men working in the factories.

The question was raised whether ships sailing in the Antarctic waters in connection with the work of the International Geophysical Year could take any opportunities to mark whales. It was thought however that it might be difficult for such ships to do very much.

The Committee agreed that as much as possible should be done to continue the marking programme and that special efforts should be made to mark young whales provided precautions were taken against injuring them.

The Committee also endorsed the Sub-Committee's recommendation that further financial support should be given to marking from the Commission's funds.

10. Catching days for humpbacks in the Antarctic (Item 4(a), I.W.C. 18(e) and (f)). The Committee next considered the Sub-Committee's Item 2 dealing with the taking of humpbacks in the Antarctic. Mr. Anderson explained the Australian view in support of Dr. Chittleborough's paper. This did not dispute the Sub-Committee's view that the humpback stock had been relatively less taxed in the Antarctic but argued that there could not have been any absolute increase in the stock in recent years. Mr. Anderson also put the view that doubling of the permitted catching days for humpbacks might more than double the catch. Professor Ruud said that the Australian view did not affect the main argument that humpbacks have had a measure of protection for many years and are taken to be in a relatively better condition than that of the blue and fin whales. The Sub-Committee had it in mind that an increased catch of humpbacks would result in fewer fin and blue whales being taken. Some other views were expressed on both sides of the question but it was pointed out that the Sub-Committee had

taken into consideration nearly all the points which were now raised. It was noted that the opening of the former sanctuary (where nearly all the humpbacks had been taken in 1956/7) would at least to some extent relieve the pressure on humpbacks in Areas IV and V.

The following proposal was put to the vote: That the Committee recommends (a) that the Commission should take steps to increase the Antarctic catch of humpbacks to double the average number legally taken there annually since 1949-50 and at the same time to close Area III for one season in the first instance to the taking of humpback whales and (b) that the subject should be reconsidered by the Commission next year in the light of the catches of humpbacks in 1957/8. The result of the voting on (a) was as follows:-

For the motion: Japan, Netherlands, Norway, U.K.

Against: Australia, Brazil, South Africa.

Abstained: France, U.S.A., U.S.S.R. (France however was in favour of the closure of Area III)

Not Voting: New Zealand

The question was raised whether Mr. Francis, appointed to the Committee by the Commission as an observer for New Zealand, was entitled to vote. He expressed his opinion against the motion.

Proposal (b) was unanimously agreed.

11. Antarctic Whaling and condition of the Stock and Matters arising from Current Research. (Items 4 (d) and (e), I.W.C. 13 and 18(e)). The Committee took note of the part of the Sub-Committee's report dealing with the condition of the Antarctic stock and matters arising from current research. The Chairman pointed out that although the Sub-Committee's discussion had been reported in some detail the views expressed were very similar to those of the Sub-Committee and Committee last year. A little more evidence had been put forward, for example that the stock of fin whales in the older grounds had been affected by whaling in such a way as to show an important difference in their constitution when compared with the stock in the newly opened Pacific sector. Some discussion followed in which Professor Slijper explained the Netherlands memorandum, which had been considered by the Sub-Committee, and a new short paper (by Dr. Drion) which had been passed round the Committee on this day. He reiterated his view that without more conclusive evidence no recommendation should be made to reduce the Antarctic pelagic catch. Dr. Slijper gave his opinion, on the basis of the new paper, that small reductions in the catch would not have any appreciable effect and that only a large reduction would be effective if the stock was really diminishing.

It was realised that this complicated question could not be fully discussed at this meeting and that a very thorough discussion had taken place at the Sub-Committee meeting. The Sub-Committee had given their view (Dr. Slijper dissenting) that although there is not conclusive proof of a heavy decline of the stocks of fin whales, they considered that the balance of evidence is sufficient to justify warning again that the present number of whales taken annually in the Antarctic is dangerously high. On a proposal that this view should be endorsed the following countries agreed that it should be endorsed: Australia, France, Japan, Norway, South Africa, U.K., U.S.A., and U.S.S.R. The Netherlands disagreed. New Zealand, as before, did not vote but intimated assent.

12. Whales taken for purposes of scientific research (Item 4(g), I.W.C. 25) The Committee agrees with the Sub-Committee that it should seldom be necessary for scientific purposes to take whales outside the open season. They recommend the Commission to recommend Contracting Governments not to permit the taking of

such whales outside the open season unless the applicants concerned can give cogent reasons for doing so.

They would draw special attention to Article VIII (3) which provides that permits for the taking of whales for scientific research are conditional upon reports on results of research being submitted to the Commission. They would further propose that the Secretary be designated by the Commission as the recipient of all such reports.

It appears that the Sub-Committee's recommendation that there should be a stipulation that such whales (if taken in the Antarctic) should be included in the Antarctic catch limit and be the subject of a recommendation by the Commission, would not be in accordance with Article VIII (1) of the Convention.

The Committee also considered the question whether any practical definition could be made of "scientific research" in this context, and, for instance, whether research on such things as technical methods of the industry could be included. They felt that it would be very difficult to make any such definition or to draw a line between one branch of science or another and that the interpretation and decision in any particular case should be left to the Contracting Government which issues the permit.

13. Opening Date of the Season. (Item 5, I.W.C. 14). The proposal that the opening date of the Antarctic season should be advanced was briefly considered by the Committee. They had nothing new to say on this point but would recall the reasons which had been given in favour of a late opening date, namely that the later the whaling in the Antarctic season the better the production obtained from any given number of whales and the lower the precentage of pregnant whales in the catch. In any case the Committee recommend no change in the opening date for taking blue whales.

14. Further Opening of the Antarctic Sanctuary. (Item 5, I.W.C.18(d)). The Committee recognise that the closure of the sanctuary has no merit so long as the catch limit is enough to prevent disastrous depletion of the stocks. They would recommend that the former sanctuary be kept open beyond 1958, but would prefer that the Commission should not be committed to keeping it open for so long as 3 years beyond 1958 (i.e. 4 seasons from now). For one reason or another the closure of the sanctuary might be desirable as a measure of conservation and the Committee would much prefer that the period for which the sanctuary is inoperative should at this stage be limited to one season after 1957-58. It is recommended that the question be reconsidered every year.

The Committee therefore recommend that the words in square brackets in Para. 5 of the Schedule be amended to read as follows:-

> "[This article, as the result of the seventh meeting in Moscow, was rendered inoperative for a period of three years from 8th November, 1955, and as the result of the Ninth Meeting at London, was rendered inoperative for a further year from 8th November, 1958, after which it will automatically become operative again on the 8th November, 1959.]

15. Progress Reports on Research. (Item 6). The Committee took note of reports on research which had been rendered by the Netherlands, Norway, U.K. and Japan and expressed their thanks to these countries for the interesting information they submitted. The Committee hope that more Governments will submit such reports next year, if possible before the meeting of the Sub-Committee.

Dr. Kellogg said that observations had been made on the numbers and breeding of gray whales off the coast of California. More had been seen than in recent years. Some studies on the brains of whales were also in progress in the U.S.A.

Dr. Sleptsov intimated that he hoped to have further information shortly on gray whales.

Dr. Finn was kind enough to distribute copies of "A Synopsis of Data on Whales" prepared by the Fisheries Division of F.A.O. and invited additions and corrections, further information or material which might usefully be added to it.

16. Other Business. (Item 7). Under this heading reference was made to the numbering of whaling areas. Scientists have recently been accustomed to using the following:-

Area I	120°W to 60°W
II	60°W to 0°
III	0° to 70°E
IV	70°E to 130°E
V	130°E to 170°W
VI	170°W to 120°W

The areas so defined have been used in a number of scientific publications and the Committee feel that it would be best if the Commission would request the Committee for Whaling Statistics to adopt them, and also ask that the material from the two last seasons be re-arranged accordingly. They realise there have been practical reasons for using slightly different limits to the areas for recent statistics.

Approved on behalf of the Committee

N.A. MACKINTOSH (Chairman)
26 June, 1957.

ANNEX2: International Whaling Commission, *Circular Communication to Commissioners and Contracting Governments*, 29 August 1986, RG/VJH/16202

International Whaling Commission

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

The Red House,
Station Road, Histon,
Cambridge CB4 4NP
Telephone: Histon (022023) 3971
Telex: 817960

Your Ref.

Our Ref. RG/VJH/16202

29 August 1986

CIRCULAR COMMUNICATION TO COMMISSIONERS AND CONTRACTING GOVERNMENTS

Special Permits for Scientific Research

The Commissioner for the USA has asked for the enclosed letter on whaling under special scientific permits to be circulated to all Commissioners and Contracting Governments.

Dr Calio suggests that any comments which Commissioners may make in response should be sent to the IWC Secretariat by 31 October 1986 for circulation to the other members.

Ray Gambell

Dr R. Gambell
Secretary to the Commission

Enc.

EMBASSY OF THE
UNITED STATES OF AMERICA
24 Grosvenor Square
London W.1.

August 26, 1986.

Dr. Ray Gambell,
Secretary,
International Whaling Commission,
The Red House,
Station Road,
Histon,
Cambridge,
CB4 4NP.

Dear Dr. Gambell:

I would appreciate it if you would send out this letter as a circular communication to all commissioners and contracting governments as soon as possible and would facilitate our communication in the manner suggested in the concluding paragraph.

Recently, I have been engaged in an effort to interpret and apply the provisions of the resolution adopted by the 38th Annual Meeting concerning whaling under special scientific permits. In my view, the long and difficult process leading to the consensus resolution in Malmo was motivated out of a unanimous view that whaling should not continue that would otherwise cease by terms of schedule paragraph 10(E) simply because it occurs under special scientific permits. I am writing now out of a concern that the resolution does not fully meet the intent that gave rise to it.

At the 38th Annual Meeting, we recognized both the rights of contracting governments secured by article VIII of the convention and the commercial whaling moratorium set forth in schedule paragraph 10(E). We also recognized that the Commission has accorded high priority to undertaking by 1990 the comprehensive assessment. It is my understanding, therefore, that the 38th Annual Meeting was striving to find words for the thought that any whale killing under special scientific permits be limited to that found to be consistent with the comprehensive assessment and that it be unquestionably noncommercial.

In contrast, the implications of the present resolution are that a country can allow the taking of an unlimited number of whales under special scientific permits so long as the whale meat as well as other products are used primarily for local, i.e., domestic, consumption and other provisions of the resolution are accounted for. Our results did not meet our intent. Not only does the ambiguous word 'primarily' fail to make clear what proportion in excess of 50 percent of the two categories of products should be used domestically, but, whatever the proper proportion, this provision fails to provide a limiting factor on catches. The forms that local consumption can and will take include use as human food and animal fodder.

Dr. Ray Gambell August 26, 1986.

I am not satisfied with that aspect of the IWC conservation program that deals with whaling under special scientific permits while schedule paragraph 10(E) is in effect, both with respect to the zero catch limits the latter establishes and the comprehensive assessment it mandates. As the needs and conduct of this assessment are further defined, any whaling under special scientific permits should be evaluated in light of those needs. The IWC should make its position clear.

I would like to suggest that interested commissioners work cooperatively prior to the 39th Annual Meeting in three areas to propose that the IWC:

(1) Define and articulate a linkage between the needs and conduct of the comprehensive assessment called for in schedule paragraphs 10(E) and 13(A) and the issuance of special scientific permits;

(2) further define the nature of the scientific committee's role and responsibilities for review and comment with respect to proposed and existing scientific permits; and

(3) articulate guidelines for the scientific community to assist in planning and carrying out international whale research involving these permits that addresses the needs of the commission as a high priority, particularly in respect of the comprehensive assessment.

I suggest that commissioners who have concerns or views in this matter share them in correspondence through the secretary's circular communication facility by the end of October 1986. I would be pleased to communicate again with you soon thereafter on the basis of the comments received.

Sincerely,

Anthony J. Calio
United States Commissioner
to the International
Whaling Commission

ANNEX3: International Whaling Commission, *Circular Communication to Commissioners and Contracting Governments*, 5 January 1987, RG/VJH/16365

International Whaling Commission

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

The Red House,
Station Road, Histon,
Cambridge CB4 4NP
Telephone: Histon (022023) 3971
Telex: 817960

Your Ref.

Our Ref. RG/VJH/16365

5 January 1987

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.

Ray Gambell

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 Whales	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 SC1 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 Balcienidae	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 SC1 doc 138
1958	USA	Any	4	"	"	Renewal of above permit	

Year	Country	Species of Whale	No. of Whales	Area	Purpose	Result	Reference
							- 3 -
1958	Australia	Sperm adult female Sperm juvenile female	6 6				
1958	Netherlands	Baleen	9				Report May 1959 filed SC1
1959	USA	Any	4	Pacific off California	Specific Research	2 gray whales taken	Report Dec. 1959
1959/60	USSR - Slava Ukraine	Any Any	2 pre-season 2 after season 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/14/8
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 Whales	Area	Purpose	Result	Reference
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 IWC/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	No. 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, 3 pygmy blues and 51 sperm whales taken	Report filed SC2 doc140 and IWC/19/9
		Blue	3	S. of 40°S Lat.			
		Sperm	100	S. of 30°S Lat.			
		Fin	1 female + calf	S. of 40°S Lat.			
1966/67	USSR	Bryde	3		"	3 Bryde and 1 Blue taken	IWC/20/10
		Sei	3				
		Pygmy blue	1				
		Fin	2				
1967	USA	Gray	100		"	99 taken	IWC/19/10
1967	USA	Minke	2		For live public display, renewal of 1966 permit	None taken	Sightings report filed SC2 doc169
1967	USA	Sperm	50				
1967/68	Canada	Fin	5 under 40ft.		Scientific Research	1 taken	IWC/20/10 and report filed SC2 doc145
		Sei	5 under 33ft.			1 taken	
		Sperm	5 under 32ft.		"	5 taken	
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
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.	"	2 taken	Report filed SC3 doc54 and SC/22/4

Year	Country	Species of Whale	No. of Whales	Area	Purpose	Result	Reference
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	No. of Whales	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				

AUSTRALIAN NATIONAL PARKS AND WILDLIFE SERVICE

HEAD OFFICE
G P O. Box 636
Canberra, A.C.T. 2601
Construction House
217 Northbourne Avenue
Turner A.C.T. 2601
Phone (062) 46 6211
Telex AA62971

DARWIN OFFICE
P.O. Box 1260
Darwin, N. T. 5794
Ground Floor, Commercial Union Building
Smith Street, Darwin, N T 5794
Phone (089) 81 5299
Telex AA85130

Our ref
Your ref 610/1/31

24 October 1986

Dr R. Gambell
Secretary
International Whaling Commission
The Red House
Station Road, Histon
CAMBRIDGE ENGLAND CB4 4NP

Dear Dr Gambell,

I refer to Dr Calio's letter to you of 26 August 1986 seeking the views of Commissioners on the subject of special permits for scientific research.

I fully support the statements made by the US Commissioner and in particular I share his concern that the resolution on special permits drafted at Malmo has failed to provide unambiguous guidance for countries intending to pursue whaling for scientific purposes during the period of the moratorium. Recent events have demonstrated that although very considerable effort was expended to develop a resolution which could be adopted by consensus, the differences in its interpretation are, as indicated by the US Commissioner, sufficient to subvert the intent of the resolution. I am deeply concerned that unless some procedure is established to regulate the killing of whales under national scientific permits the effectiveness of the IWC will be further undermined to the extent that it may lose international control over whaling.

For these reasons I would welcome co-operative efforts by interested Commissioners in the three areas Dr Calio has identified as priorities, in the period leading up to the 39th Annual Meeting. He has proposed that interested Commissioners work to: establish a clearer link between the comprehensive assessment and further research catches; build on the existing Scientific Committee Guidelines for Assessment of Scientific Permits (Annex L) in further defining the role of the Scientific Committee in the review of such permits; and facilitate international co-operation on research under scientific permits in line with the objectives of the Commission.

The Republic of Korea and Iceland have argued that their research will contribute to the work of the Comprehensive Assessment. I believe that member governments undertaking research under national scientific permits should have as a major goal the development of experimental design which will provide maximal information of relevance to the long term objectives of the

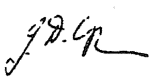
Commission through the Comprehensive Assessment. It would be appropriate for the Scientific Committee, as the body planning and co ordinating the Comprehensive Assessment, to be involved in all stages of experimental design, methodology and analysis of results.

In addition to those tasks already detailed, I feel that th Commissioners could supplement the existing Schedule definition of "small type whaling" through consideration of the characteristics of commercial whaling operations, with the final aim being the development of an unambiguous definition for inclusion in the Schedule.

It should then be possible to consider the elements which together constitute the taking of whales for scientific purposes and then reach agreement on a definition embodying those elements. An agreed interpretation of the phrase "primarily for local consumption" for inclusion in the Schedule definition of "whaling under scientific permit" would be an essential component of the definition. The next step would be to determine the extent to which whaling for scientific purposes that took place outside the agreed Schedule definition should be treated as infractions by the Commission.

I would suggest that discussions on these issues could most successfully be conducted through correspondence over the next seven months and by holding a meeting of interested Commissioners immediately prior to the next Annual Meeting in Bournemouth. I also believe it would be beneficial for Dr Calio to consider bringing this matter to the attention of the Scientific Committee for their consideration and comment at the next Annual Meeting.

Yours sincerely



Professor J.D. Ovington
Director

Australian Commissioner to the IWC

An Roinn Turasóireachta, Iascaigh agus Foraoiseachta
Lána Chill Mochargán
Baile Átha Cliath 2
Teileafón 01-600444
Teileacs 90253 FFWS
Macasamhail 01-789527

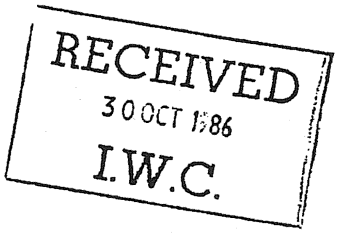
Department of Tourism, Fisheries and Forestry
Leeson Lane
Dublin 2
Telephone 01-600444
Telex 90253 FFWS
Facsimile 01-789527

Tagairt

Our Reference K7/9/18

24 October, 1986

The Secretary
The International Whaling Commission
The Red House
Station Road
Histon
Cambridge
CB4 4NP
England



Special Permits for Scientific Research

Dear Sir

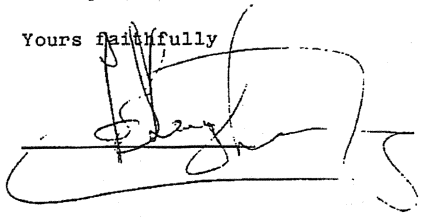
I wish to refer to your letter of 29 August in connection with correspondence from the U.S. Commissioner concerning the resolution dealing with special permits for scientific research adopted by the 38th Annual meeting.

We feel that the U.S. Commission has a valid point when he states that the scientific permits could allow for unlimited taking of whales. This situation could perhaps be rectified by the addition, at the 39th meeting, of a fourth recommendation along the following lines:

"Recommends that the number of animals which may be taken under any such permit issued by the Contracting Governments should be strictly limited to the need for completion of the proposed research".

Regarding Commissioner Calio's concern about the subsequent utilisation of whale products, we are of the opinion that once the research is essential (as it should be in view of indent (2) on page 2 of the Recommendation), the subsequent utilisation is not as crucial as might first appear.

Yours faithfully



Fisheries Service
Forest and Wildlife Service

POD

GM7412 2

THE VIEW OF JAPANESE COMMISSIONER ON THE PROPOSAL BY THE COMMISSIONER OF THE UNITED STATES

1. We consider that whales are a renewable marine resource which should be rationally utilized through application of conservation measures based on the results of continued scientific research so that this valuable resource could be passed onto future generations.

Japan is proud of her record of having made significant contributions to various scientific research on the status of whale stocks by providing monetary funds and human resources, which she regards as a duty given to her as a member of the IWC.

We regard it as extremely unreasonable that some member nations indulge themselves only in criticizing the results of research conducted by other nations, without offering to undertake any field research which obviously would cost them substantial sums of money.

Since there are divergent views among the member nations of the IWC at the present time on the question of the moratorium on all commercial whaling, the Commission should strengthen its policy to encourage scientific research on the status of whale stocks, rather than restrain such research.

2. Japan considers that it is a prerogative accorded to each Contracting Government under Article 8 of the Convention that a Contracting Government may issue special permits for scientific research and that nothing should restrict such a prerogative of a member nation. It is obvious that the Commission has no authority to restrict the right of a Contracting Government to issue such permits, by introducing its own criteria to evaluate whether or not such research is scientific.

Japan believes that there exist adequate opportunities to reflect in scientific research programs a broader range of views of the scientific community, through the procedures adopted by the IWC Scientific Committee in 1985.

3. Japan firmly believes that the resolution on special permits adopted at the Annual Meeting this year is a product of all possible compromises that could be reached among the Contracting Governments, within the limit that the right of the member nation as provided for in Article 8 remains unviolated.

If the proposal by the U.S. Commissioner is to modify this resolution in an attempt to impose additional restrictions on special permits, it obviously runs counter to Article 8 of the Convention and such proposal would, therefore, be unacceptable to Japan.

GM7412 4

4. The U.S. Commissioner's comment emphasizes that scientiric research must be limited to that which contributes to the comprehensive assessment. It is without doubt that we must by all means actively undertake a comprehensive assessment in order to resolve problems facing the IWC which generate confrontation among the member nations due to the divergent views on the moratorium.

Any nation that proposes research under Article 8 of the Convention during this time period should consider ways by which it contributes to the comprehensive assesment. This does not mean, however, that the Commission may set up criteria to evaluate the value of such research solely on the basis of its usefulness to the comprehensive assessment, because it introduces restrictions upon the member nations' prerogative in making its own decisions with regard to the issue of special permits.

(3)

NATIONAL FISHERIES RESEARCH AND DEVELOPMENT AGENCY
2-16. NAMHANG-DONG. YEONGDO-GU.
PUSAN 606. REPUBLIC OF KOREA TEL. 0021~26

Dr. Ray Gambell
Secretary
International Whaling Commission
The Red House, Station Road, Histon
Cambridge CB4 4NP

October 21, 1986

Dear Dr. Gambell

I am pleased to refer to your letter of 26 August, 1986 regarding special permits for scientific research suggested by Dr. Calio, the USA Commissioner.

I think it is quite desirable to consult about the matter for clarification of the extent of scientific research at the 39th Annual Meeting.

However, I believe, in such consultations it should be taken into account that any Contracting Government may grant special permits under Article VIII of the International Convention for the Regulation of Whaling, and that there are differences in research functions of Contracting Governments which wish to conduct scientific research, the sea conditions by area, and the whale species to be researched.

Sincerely yours,

Kim, Kyun Hyun
Korean Commissioner to IWC
Director General
National Fisheries Research and
Development Agency
16,2-Ga,Namhang-dong Youngdo-Ku
Pusan 606, Republic of Korea

Fisheries Research and Development Agency
This agency with a historic
tradition of service to the Nation

RETYPED COPY OF TELEX RECEIVED ON 19 NOVEMBER 1986 FROM

F.C.M. VAN RIJCKEVORSEL, NETHERLANDS COMMISSIONER TO THE IWC

WITH REFERENCE TO THE LETTER OF THE COMMISSIONER OF THE UNITED STATES OF AMERICA DATED 26 AUGUST 1986 I WISH TO INFORM YOU OF THE FOLLOWING.

THE NETHERLANDS GOVERNMENT IS CONCERNED ABOUT THE TENSION BETWEEN THE ACCEPTED GENERAL IWC POLICY, FOUNDED ON THE PROVISIONS OF THE SCHEDULE, IN PARTICULAR PARAGRAPH 10(E), AND THE POSSIBILITY THAT CONTRACTING GOVERNMENTS, USING THEIR RIGHTS LAID DOWN IN ARTICLE VIII OF THE CONVENTION TO ISSUE SPECIAL PERMITS FOR SCIENTIFIC RESEARCH, ACT IN A WAY THAT IS NOT CONSISTENT WITH THAT GENERAL POLICY.

I SHARE THE CONCERN OF THE US COMMISSIONER THAT THE WORDING OF THE PRESENT RESOLUTION ON SPECIAL PERMITS DOES NOT FULLY MEET THE INTENT THAT GAVE RISE TO IT.

THEREFORE I WELCOME THE SUGGESTION THAT PRIOR TO THE 39TH ANNUAL MEETING INTERESTED COMMISSIONERS WORK COOPERATIVELY IN ORDER TO FURTHER DEFINE THE CONDITIONS UNDER WHICH SCIENTIFIC PERMITS SHOULD BE GRANTED BY CONTRACTING GOVERNMENTS, INCLUDING THE ROLE OF THE SCIENTIFIC COMMITTEE.

AS TO THE DISCUSSION AREAS PROPOSED BY THE US COMMISSIONER I WOULD LIKE TO SUGGEST THAT COMMISSIONERS CONSIDER THE PROBLEM OF THE SPECIAL PERMITS NOT ONLY IN THE CONTEXT OF THE COMPREHENSIVE ASSESSMENT BUT ALSO IN THE LIGHT OF THE MORATORIUM ON COMMERCIAL WHALING.

Ministère Royal
des
Affaires Etrangères

LE DIRECTEUR DES AFFAIRES JURIDIQUES

Oslo, 10 December 1986

Dear Ray,

Re Special Permits for Scientific Research

This is by way of a comment to your circular communication to Commissioners and Contracting Governments of 29 August 1986 (your ref. RG/VJH/16202).

We had a long, serious and difficult discussion in Malmö of special permits issued under Article VIII of the 1946 Convention. Personally, I am very glad that it was possible to reach a consensus on a resolution on certain procedures and modalities which Contracting Governments will be expected to observe in connection with the future discussion of scientific research projects and the issuance of special permits.

There is a suggestion in Dr. Calio's letter of 26 August 1986, distributed with your circular communication, that there was a unanimous view in the Commission that our discussion - and the resolution on guidelines - was directly linked to the moratorium on commercial whaling set out in paragraph 10 (e) of the Schedule.

I believe I made the point very clear in working groups and in informal contacts that the issuance of special permits under Article VIII of the Convention is not restricted to any particular branch or specialty of science, or to any

./2

Dr. R. Gambell
Secretary
International Whaling Commission
C a m b r i d g e

specific purpose mentioned in the Schedule. There would be no necessary link to the comprehensive assessment, or to investigations otherwise directed toward an evaluation of population developments or stock conditions. I think I stressed that the issuance of special permits would be legitimate for any bona fide scientific purpose, such as medical or veterinary or general biological investigations. In our Plenary discussion, I stressed Norway's concern over the risk that the IWC might set an unhealthy precedent by establishing criteria which could restrict the freedom of scientific research.

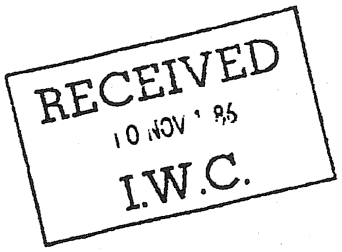
I remain convinced that broader concerns for common policies of scientific freedom continue to support such a latitudinarian view, and I cannot therefore agree with Dr. Calio that it would be helpful to seek to establish any rigid linkages between Article VIII of the Convention and any specific part of the Schedule.

Otherwise, I would welcome further efforts to engage Commissioners in constructive discussion on other aspects of special permits before the next Annual Meeting.

Yours ever,

SWEDISH MINISTRY OF AGRICULTURE

1986-11-03



Dr. Ray Gambell,
Secretary,
International Whaling Commission,
The Red House,
Station Road, Histon,
CAMBRIDGE, CB4 4NP
England

Dear Dr. Gambell,

With reference to the letter of August 26, 1986 by Anthony J. Calio, US Commissioner to the IWC, I would like to make the following comments.

At the 37th Annual Meeting Sweden put forward a draft resolution on scientific permits (IWC/37/27) out of fear that an intensive use of article VIII might circumvent the commercial moratorium set forth in schedule paragraph 10(E).

I am not fully satisfied with the outcome of this issue at the 38th Annual Meeting of the IWC. We are all aware of the laborious and difficult process that led to the resolution adopted unanimously.

It goes without saying that by the very nature of the process of reaching consensus all your original intent will not be met.

During the process we realized the difficulty, or rather impossibility, of reaching a binding resolution. Rather than getting a split decision the commissioners preferred a weaker consensus resolution, even if it might be difficult to interpret.

Sweden thereby declared, after the adoption, that it had, in the spirit of consensus, agreed to accept the recommendation and hoped that all whaling nations will implement it conservatively so as not to make the special permit a cover for continued commercial whaling.

I agree with Mr. Calio about the implications of the present resolution, "primarily" is not an easy word to interpret, but I doubt that "mainly", "chiefly" or "predominantly" might have been any better.

Postal address
S-103 33 STOCKHOLM

Visiting address
Drottninggatan 21

Telephone
08-763 10 00

The comprehensive assessment is one of the most important tasks challenging IWC. A defined and articulated linkage between that assessment and the issuance of special scientific permits might therefore be useful. I think that such a linkage is an important element in keeping the international credibility of IWC. In my opinion difficulty to enforce its own decisious and use of article VIII as a loophole cannot be elements in an organization that has a responsibility to protect the whale stocks. Perhaps, as Mr. Calio suggests, work prior to IWC 39 could find a solution to that linkage as well as to the other two areas mentioned in Mr. Calio's letter. Sweden would like to participate in that work.

Another task for that work might be to consider some kind of reporting procedure for the countries engaged in "scientific whaling" or how and to what extent they are observing the recommendations and especially the "take account of" of the first, second and fifth operative paragraphs of the resolution.

Sincerely yours

Sture Irberger
Swedish Commissioner to
the International Whaling
Commission

Seychelles High Commission,

BOX No. 4PE, 4th FLOOR,
50 CONDUIT STREET, LONDON W1A 4PE.

Telephone 01-439 0405 Telex 21236 SEYCOM G

Your Ref:

Our Ref: CUL/12

10th November 1986

Dr. Ray Gambell,
Secretary,
International Whaling Commission,
The Red House,
Station Road, Histon,
Cambridge,
CB4 4NP.

Dear Dr. Gambell,

I refer to the letter from the United State Commissioner dated August 26th, which you circulated to other Commissioners.

We find Mr. Calio's suggestions to be an appropriate way for the Commission now to approach a very important problem. If not satisfactorily resolved, and soon, the matter of "Scientific Whaling" on a large scale is in the opinion of the Seychelles Delegation, one which will continue to reduce both the effectiveness, the credibility and ultimately, perhaps the viability of the IWC. In an effort to reduce this trend this delegation is ready to cooperate in the actions proposed by the United State Commissioner.

Yours sincerely,

R.F.Delpech
Ag.Seychelles High Commissioner.

MINISTRY OF AGRICULTURE, FISHERIES AND FOOD
GREAT WESTMINSTER HOUSE
HORSEFERRY ROAD LONDON SW1P 2AE
Direct line 01-216
or Switchboard 01-216 6311

Dr Ray Gambell
International Whaling Commission
The Red House
Station Road
Histon
Cambridge
CB4 4NP

Our ref: MCC 48

11 November 1986

Dear Ray,

SPECIAL PERMITS FOR SCIENTIFIC RESEARCH

I am responding to your circular of 29 August enclosing a letter from the Commissioner for the United States of America.

The United Kingdom Government also attaches importance to the question of whaling under special scientific permits during the period of the moratorium on commerical whaling. We take very much the same view as the US Commissioner on the aim of the resolution adopted on this matter at the 38th Annual Meeting.

It is perhaps not surprising if the provisions of this resolution, which was adopted by consensus, have intially proved somewhat difficult to apply. We would certainly welcome any further attempts to improve its effectiveness and would gladly co-operate in any further work on the matter prior to the 39th Annual Meeting.

Yours sincerely
Martin Haddon

M T HADDON
Commissioner for the United Kingdom

ANNEX4: Document Prepared by New Zealand entitled "Protocol Amending the International Convention for the Regulation of Whaling", Proposed Cover Page, 24 March 2005.

At the December 2004 meeting of the RMS Working Group, New Zealand raised the need for the positions put forward by a number of delegations on various issues under discussion to be given effect through an amendment to the Convention, rather than through Schedule wording.

In the interests of transparency, and with a view to Contracting Governments having had an opportunity to consider the practical means for achieving these amendments, as the Schedule drafting proceeds, New Zealand has produced the attached discussion paper. The paper is not for formal discussion by the RMS Working Group, but New Zealand would welcome any informal comments outside the Working Group process that Contracting Governments may wish to make.

The paper addresses four areas only, as New Zealand outlined during the discussions in Borgholm: (a) Article VIII and scientific whaling; (b) a dispute settlement mechanism; (c) a compliance regime and (d) opting out provisions.

A number of delegations have stated that a Revised Management Scheme is not acceptable without the removal of special permit whaling. As this cannot be achieved through an amendment to the Schedule, the suggestion has been made that a voluntary code of conduct would be a suitable solution. A legally effective and robust solution, however, is the amendment or removal of Article VIII. There are a number of drafting options available to States in pursuing this. New Zealand provides some initial thoughts in the discussion paper in order to promote serious consideration by all members of the IWC of the implications.

Dispute settlement mechanisms are standard in modern treaties. The advantage that New Zealand sees in the IWC pursuing this is that, in the event of a serious dispute, when relations may be strained between two or more parties, there is already a process in place to deal with it. Experience has shown that, once normal diplomatic processes have failed to resolve a dispute, reference to a third party can prevent the dispute spilling over to other areas of the relationship between two or more States. The process that New Zealand suggests, as a starting point for discussion, involves two options: non-compulsory but binding arbitration; or compulsory conciliation with a non-binding outcome.

New Zealand also suggests that the compliance regime under discussion in the RMS Working Group be given a more robust and permanent status by including it in the text of the Convention. New Zealand considers this appropriate given the proposal for the compliance regime to include the possibility of a reduction of catch limits in certain circumstances.

Finally New Zealand recognises that the question of "opting out" is a matter of concern for a number of countries for differing reasons. The current discussions in the RMS Working Group over the adoption of the RMS itself illustrate the shortcomings in the present system. New Zealand considers that the Convention provisions in Article V contain an unacceptable loophole that undermines the credibility of the IWC. A satisfactory resolution of this issue is unlikely to be easy, but we consider it a matter to which Contracting Governments should give serious consideration.

ANNEX5: New Zealand, Discussion Document, Protocol Amending the International Convention for the Regulation of Whaling, 24 March 2005

DISCUSSION DOCUMENT

PROTOCOL AMENDING THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING

The Contracting Governments to the International Convention for the Regulation of Whaling ("the Convention"),

[suitable preambular language to be inserted]

agree as follows:

Article 1 (Special Permits)
Option 1

Article VIII of the Convention shall be deleted.

Comment: The purpose of deleting Article VIII is to treat whaling for scientific purposes in the same way as whaling for all other purposes and to ensure that the provisions in the Schedule apply to all forms of whaling. If this is agreed, then consideration needs to be given also to removing the references in the Schedule to "commercial" whaling, were they occur.

This would entail amendments to Paragraphs 6, 7(a), 7(b), 10(a), 10(b), 10(c) and 10(e). It is proposed that these be incorporated into the Protocol text. Draft text for this purpose is included below.

Aboriginal subsistence whaling would not be affected by these changes. Aboriginal subsistence whaling is treated in the Schedule as commercial whaling, but with special rules applicable to it. Those special rules would not be affected by the removal of the references to "commercial" whaling.

There is no definition of commercial whaling, whaling for scientific purposes, or aboriginal subsistence whaling that would be affected by the changes. Careful consideration should be given, however, to whether it might be necessary to add a specific provision to either the Convention or the Schedule to ensure that the killing of whales for certain humane purposes (eg in the case of beached whales) is not inadvertently prohibited.

Text for Consequential Amendments to the Schedule removing references to "commercial"

To be inserted as Article 1, paragraphs 2 ff:

2 Paragraph 6 of the Schedule is amended to read as follows:
"The killing of whales, except minke whales using the cold grenade harpoon shall be forbidden from the beginning of the 1980/81 pelagic and 1981 coastal seasons. The killing of minke whales using the cold grenade harpoon shall be forbidden from the beginning of the 1982/83 pelagic and the 1983 coastal seasons."

3 Paragraph 7(a) of the Schedule is amended by deleting the word "commercial" from the first sentence.

4 Paragraph 7(b) of the Schedule is amended by deleting the word "commercial" from the first sentence.

5 Paragraph 10(a) of the Schedule is amended by deleting the word "Commercial" from the third sentence.

6 Paragraph 10(b) of the Schedule is amended by deleting the word "Commercial" from the second sentence.

7 Paragraph 10(c) of the Schedule is amended by deleting the word "commercial" from the second sentence.

8 Paragraph 10(e) of the Schedule is amended by deleting the words "for commercial purposes" from the first sentence.

Option 2

An alternative to deleting Article VIII is to amend Article VIII to retain whaling for scientific purposes as a separate "subset" of whaling, but to make it subject to rules to be elaborated by the Contracting Governments. Currently it is unregulated at an international level. This option would require not only the elaboration of new rules, but also amendments to Article VIII to remove references such as "Notwithstanding anything contained in this Convention", and "subject to such other conditions 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."

Option 3

A third alternative is to amend Article VIII to make it clear that special permit whaling for scientific research purposes is only permissible under circumstances agreed by the Scientific Committee. A drafting suggestion for this follows, although further consideration would have to be given to any necessary consequential amendments, for example to Article VIII(2).

Paragraph 1 of Article VIII shall be amended to read:

"The killing of whales for scientific research purposes is prohibited, except when permitted by the Commission, on the basis of advice from the Scientific Committee."

Article 2 (Compliance)

A new article IX bis shall be added to the Convention, to read as follows:

"Article IX bis

1 A Compliance Review Committee is hereby established, to review and report on the compliance of all whaling operations with the provisions of the Schedule and penalties for infractions thereof.

2 The Compliance Review Committee shall have the functions set out in Annex I. Annex I shall be an integral part of the Convention. Additions to the functions in Annex I may be made by a Decision of the Commission in accordance with Article III, paragraph 2 of the Convention.

3 The Compliance Review Committee shall act in accordance with relevant Rules of Procedure established by the Commission. In making any final deliberations and recommendations in relation to any alleged infraction, breach of the Schedule or other relevant requirements of the Commission it shall act in accordance with the principles of fairness, transparency and due process.

4 Representatives from at least two, but no more than two, non-governmental organisations (representing environmental groups and the whaling industry) shall be entitled to attend the Committee as non-voting members, following a selection process agreed by the Commission.

5 In the event of a serious infraction, as determined by the Commission after taking into consideration the advice of the Compliance Committee, the relevant catch limit shall automatically revert to zero unless and until otherwise determined by the Commission on the advice of the Compliance Review Committee.

6 The Commission shall, at its first meeting following the entry into force of this Protocol, decide on a class of infractions to be deemed serious infractions.

Comment: This is the outcome of the EDG report (see IWC/54/RMS 1), with some amendments that are explained below. It is acknowledged that the EDG text contained a number of square brackets. These have been removed in this context on the grounds that all of the proposed wording for the protocol is in square brackets. In paragraph 4, the number "two" has been suggested as a maximum number of NGOs to be represented, as a basis for discussion.

Although it is possible currently for the Commission to establish a Committee without amending the Convention, it is proposed that the Committee be established through the Protocol process in order that the Committee is seen to have a clear and durable mandate. For the purposes of the RMS, a strong

compliance committee is essential. Illegal whaling has been a concern in the IWC since the 1970s. Infractions related to legal whaling have been a concern since the 1980s. A number of Contracting Governments have worked hard to control this, and the proposal above builds on these efforts.

First, the functions of the Committee will not be able to be reduced by future decisions of the Commission. Except as outlined below, any future amendment to the functions would need to occur through an amendment to the Convention. The proposed text above includes in paragraph 2 a simpler process for adding functions, to cover the situation, for example, where it becomes evident that the Committee cannot operate effectively without additional functions.

Second, because the proposed EDG text includes a reference to the reduction of catch limits, it is important that this provision is given the appropriate Convention status, so that it is clear that nothing in the Schedule can override this. Consequential amendments to the Schedule may need to be considered.

Third, the inclusion of this text in the Convention itself will demonstrate to the international community that the International Whaling Commission is serious about monitoring and dealing with infractions.

The original EDG wording has been amended in paragraph 1 to make it clear that there is no further action required on the part of the Commission to establish the Committee. Once the Protocol enters into force, the Committee is automatically established.

A further amendment has been made to specify that the Compliance Review Committee shall act in accordance with relevant Rules of Procedure established by the Commission. If no specific Rules of Procedure were adopted before the Committee met for the first time, there would need to be a common understanding as to what Rules of Procedure already established by the Commission were relevant to the Compliance Review Committee.

A reference to "serious" infractions has been included for discussion purposes on the basis of discussion in the RMS Working Group and Small Drafting Group.

Article 3 (Opting Out)

1 Paragraph 3 of Article V shall be amended to read as follows:

"Each of such amendments shall become effective with respect to the Contracting Governments ninety days following notification of the amendment by the Commission to each of the Contracting Governments."

Comment: This simply deletes exceptions (a), (b) and (c) which were the opting out process in the existing Article V(3). The question remains as to what to do in circumstances where a country has already opted out. One option is to draft in a period of grace, whereby a country has, say, two years to bring itself into compliance.

This could be drafted in the following way:

2 Where a Contracting Government has, prior to the entry into force of this Protocol, presented an objection to an amendment, that objection shall be deemed no longer in operation two years after the entry into force of this Protocol.

Article 4 (Dispute Settlement)

A new Article IX bis shall be inserted as follows:

"1. In the event of a dispute between Contracting Governments concerning the interpretation or application of this Convention, the parties concerned shall seek a solution by negotiation.

2. If the parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party.

3. When ratifying or adhering to this Convention, or at any time thereafter, a Contracting Government may declare in writing to the Depositary that for a dispute not resolved in accordance with paragraph 1 or paragraph 2 above, it accepts one or both of the following means of dispute settlement as compulsory:

(a) Arbitration in accordance with the procedure laid down in Annex II;

(b) Submission of the dispute to the [International Court of Justice].

4. If the parties to the dispute have not, in accordance with paragaph 3 above, accepted the same or any procedure, the dispute shall be submitted to conciliation in accordance with Annex III unless the parties otherwise agree.

5. The provisions of this Article shall apply with respect to any protocol except as otherwise provided in the protocol concerned.

6. Annexes II and III shall be an integral part of this Convention."

Comment: This dispute resolution provision is largely based on that in the Convention on Biological Diversity, with certain amendments necessary in the context of the IWC, such as reference to the role of the Chairman of the Commission, rather than the Secretary-General of the United Nations, in appointing arbitrators.

The basic scheme is to provide for (a) binding arbitration, where this is agreed, or has been agreed in advance, by the parties to the dispute or (b) compulsory, but non-binding, conciliation.

Final Clauses

1 This Protocol shall be open for signature and ratification or for adherence on behalf of any Contracting Government to the 1946 Whaling Convention.

2 No reservations may be made to this Protocol.

3 After the adoption of this Protocol, any ratification or adherence to the Convention shall also represent consent to be bound by this Protocol.

4 This Protocol shall enter into force on the date upon which instruments of ratification have been deposited with, or written notifications of adherence have been received by, the Government of the United States of America on behalf of [all of the] Contracting Governments to the 1946 Whaling Convention at the time of the adoption of the Protocol.

5 The Government of the United States of America shall inform all Contracting Governments to the 1946 Whaling Convention of all ratifications deposited and adherences received.

6 This Protocol shall bear the date on which it is opened for signature and shall remain open for signature for a period of [ ] thereafter, following which period it shall be open for adherence.

In witness whereof etc...

Comment: These provisions follow those in the 1946 Protocol, with some changes. A no reservations provision has been included. This is consistent with a number of modern treaties, including the United Nations Convention on the Law of the Sea. This is on the basis that parties will negotiate in good faith to achieve an outcome with which all can agree, recognising that there are always elements in a package that are less desirable to some than others. A "no reservations" provision avoids the situation where different Contracting Governments have different treaty relationships among one another. All Contracting Governments are subject to the same rules.

There are some options for entry into force. One is that the Protocol enters into force only when all current Contracting Governments ratify or adhere to it. Although this is the highest possible threshold, it reflects the fact that the amendments will not enter into force for Contracting Governments that do not ratify them, and it would be undesirable, given the nature of these amendments, for the Commission to be operating under two sets of rules. It does, however, give any Contracting Government a power of veto over entry into force, which is undesirable.

Alternatively, it could be accepted that one or more Contracting Governments may not be able to ratify or adhere to the Protocol within a certain time frame, even if they have no difficulties with the substance of the Protocol. Entry into force on ratification or adherence by a certain number (eg two thirds) of Contracting Governments (at the time of adoption) is common practice.

Annex I

Functions of the Compliance Review Committee

The Compliance Review Committee shall:

(i)	review: (a) infraction reports from Contracting Governments; and (b) the annual report of the functioning of the international observer scheme, including any alleged infractions, for the most recent completed whaling season;
(ii)	review other reports submitted by Contracting Governments on matters relevant to the Committee, including alleged infractions;
(iii)	compare the information in (i) and (ii) above and identify any disagreement in the details of an alleged infraction;
(iv)	report its view as to whether an alleged infraction is a violation(s) of the provisions of the Schedule;
(v)	review action(s) taken by a Contracting Government in response to violation(s) of the provisions of the Schedule identified above;
(vi)	review the actions taken, including progress made, by Contracting Governments in response to previous violations considered by the Commission;
(vii)	recommend to the Commission actions to be taken to improve compliance with the provisions of the Schedule;
(viii)	submit a report to the Commission on its deliberations and recommendations.

Annex II

Arbitration

Article 1

The claimant party shall notify the Secretary that the parties are referring a dispute to arbitration pursuant to Article IX bis. The notification shall state the subject matter of arbitration and include, in particular, the articles of the Convention or the protocol, the interpretation or application of which are at issue. If the parties do not agree on the subject matter of the dispute before the President of the tribunal is designated, the arbitral tribunal shall determine the subject matter. The Secretary shall forward the information thus received to all Contracting Governments to this Convention or to the protocol concerned.

Article 2

1. In disputes between two parties, the arbitral tribunal shall consist of three members. Each of the parties to the dispute shall appoint an arbitrator and the two arbitrators so appointed shall designate by common agreement the third arbitrator who shall be the President of the tribunal. The latter shall not be a national of one of the parties to the dispute, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.

2. In disputes between more than two parties, parties in the same interest shall appoint one arbitrator jointly by agreement.

3. Any vacancy shall be filled in the manner prescribed for the initial appointment.

Article 3

1. If the President of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the Chairman of the Commission shall, at the request of a party, designate the President within a further two-month period.

2. If one of the parties to the dispute does not appoint an arbitrator within two months of receipt of the request, the other party may inform the Chairman of the Commission who shall make the designation within a further two-month period.

3. In the event that the Chairman, but not the Vice-Chairman, is a national of one of the parties to the dispute, or has his or her usual place of residence in the territory of one of these parties, or is employed by any of them, or has dealt with the case in any other capacity, the Vice-Chairman shall make the

designation in accordance with either subparagraph 1 or 2 above, as the case may be.

Article 4

The arbitral tribunal shall render its decisions in accordance with the provisions of the Convention, any protocols concerned, and international law.

Article 5

Unless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own rules of procedure.

Article 6

The arbitral tribunal may, at the request of one of the parties, recommend essential interim measures.

Article 7

The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, using all means at their disposal, shall:

(a) Provide it with all relevant documents, information and facilities; and

(b) Enable it, when necessary, to call witnesses or experts and receive their evidence.

Article 8

The parties and the arbitrators are under an obligation to protect the confidentiality of any information they receive in confidence during the proceedings of the arbitral tribunal.

Article 9

Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the costs of the tribunal shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its costs, and shall furnish a final statement thereof to the parties.

Article 10

Any Contracting Government that has an interest of a legal nature in the subject matter of the dispute which may be affected by the decision in the case, may intervene in the proceedings with the consent of the tribunal.

Article 11

The tribunal may hear and determine counterclaims arising directly out of the subject matter of the dispute.

Article 12

Decisions both on procedure and substance of the arbitral tribunal shall be taken by a majority vote of its members.

Article 13

If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or a failure of a party to defend its case shall not constitute a bar to the proceedings. Before rendering its final decision, the arbitral tribunal must satisfy itself that the claim is well founded in fact and law.

Article 14

The tribunal shall render its final decision within five months of the date on which it is fully constituted unless it finds it necessary to extend the time limit for a period which should not exceed five more months.

Article 15

The final decision of the arbitral tribunal shall be confined to the subject matter of the dispute and shall state the reasons on which it is based. It shall contain the names of the members who have participated and the date of the final decision. Any member of the tribunal may attach a separate or dissenting opinion to the final decision.

Article 16

The award shall be binding on the parties to the dispute. It shall be without appeal unless the parties to the dispute have agreed in advance to an appellate procedure.

Article 17

Any controversy which may arise between the parties to the dispute as regards the interpretation or manner of implementation of the final decision may be submitted by either party for decision to the arbitral tribunal which rendered it.

Annex III

Conciliation

Article 1

A conciliation commission shall be created upon the request of one of the parties to the dispute. The commission shall, unless the parties otherwise agree, be composed of five members, two appointed by each Party concerned and a President chosen jointly by those members.

Article 2

In disputes between more than two parties, parties in the same interest shall appoint their members of the commission jointly by agreement. Where two or more parties have separate interests of there is a disagreement as to whether they are of the same interest, they shall appoint their members separately.

Article 3

1. If any appointments by the parties are not made within two months of the date of the request to create a conciliation commission, the Chairman of the Commission shall, if asked to do so by the party that made the request, make those appointments within a further two-month period.

2. If a President of the conciliation commission has not been chosen within two months of the last of the members of the commission being appointed, the Chairman shall, if asked to do so by a party, designate a President within a further two-month period.

3. In the event that the Chairman, but not the Vice-Chairman, is a national of one of the parties to the dispute, or has his or her usual place of residence in the territory of one of these parties, or is employed by any of them, or has dealt with the case in any other capacity, the Vice-Chairman shall make the designation in accordance with either subparagraph 1 or 2 above, as the case may be.

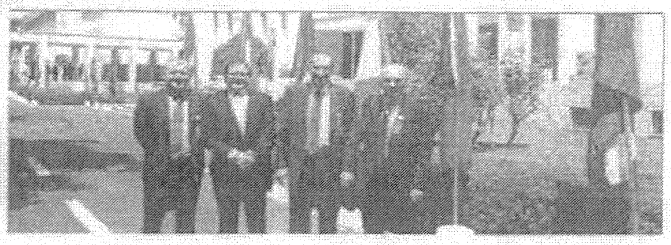
Article 5

The conciliation commission shall take its decisions by majority vote of its members. It shall, unless the parties to the dispute otherwise agree, determine its own procedure. It shall render a proposal for resolution of the dispute, which the parties shall consider in good faith.

Article 6

A disagreement as to whether the conciliation commission has competence shall be decided by the commission.

ANNEX6: Statement of 16 April 2013 by Mr. McCully, the Foreign Minister of New Zealand (http://www.mccully.co.nz/foreign-affairs/press-releases/2012/icj-sets-date-for-whaling-submission, last consulted on 24 May 2013)



Foreign Affairs Press Releases

ICJ sets date for whaling submission

16 April 2013

Foreign Affairs Minister Murray McCully today welcomed the International Court of Justice's announcement that on 8 July it will hear New Zealand's submission on the case brought by Australia against Japanese whaling in the Southern Ocean.

Australia's case questions the validity of Japan's so-called "scientific" whaling programme in the Southern Ocean. New Zealand is intervening in the case, which means it is able to put its views on the proper interpretation of the Whaling Convention before the Court.

"I am pleased New Zealand will have the opportunity to present arguments directly to the Court. New Zealand's Attorney General will lead our presentation at an oral hearing in The Hague," Mr McCully says.

"As a member of the International Whaling Commission, New Zealand has an interest in ensuring that the IWC works effectively and that the Whaling Convention is properly interpreted and applied.

"New Zealand will continue to work to end whaling in the Southern Ocean."