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Cour internationale de Justice

THE HAGUE

YEAR 2013

Public sitting

held on Friday 28 June 2013, at 10 a.m., at the Peace Palace,

President Tomka presiding,

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

VERBATIM RECORD

ANNÉE 2013

Audience publique

tenue le vendredi 28 juin 2013, à 10 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

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

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	Vice-President	Sepúlveda-Amor
	Judges	Owada
		Keith
		Bennouna
		Cançado Trindade
		Yusuf
		Greenwood
		Xue
		Donoghue
		Gaja
		Sebutinde
		Bhandari
	Judge *ad hoc*	Charlesworth
	Registrar	Couvreur

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M. Sepúlveda-Amor, vice-président
MM. Owada
Keith
Bennouna
Cançado Trindade
Yusuf
Greenwood
Mmes Xue
Donoghue
M. Gaja
Mme Sebutinde
M. Bhandari, juges
Mme Charlesworth, juge *ad hoc*

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The PRESIDENT: Good morning, Please be seated. This sitting is now open. Judges Abraham and Skotnikov, for reasons duly explained to me, are unable to take their seat on the Bench today. The Court will hear this morning the conclusion of Australia's first round of oral argument. I give the floor to Professor Crawford to continue his pleading. You have the floor, Sir.

Mr. CRAWFORD: Thank you, Mr. President. Yesterday I demonstrated that JARPA II meets none of the requirements for a program of scientific research within the meaning of Article VIII of the 1946 Convention. There are two points which are supplementary to that, which I should make or, rather, three.

First, even if some initial lethal research might have been justified, it could not possibly have taken 18 years to formulate a hypothesis that would be testable at the expense of 7000 whales. This in response to the question asked by Judge Bennouna yesterday.

Secondly, in response to the question asked by Judge Cançado Trinidade, as pointed out by our experts, non-lethal methods are now generally available. Of course they are not cost-free, but Antarctica is not cost-free. Any State which has the capacity to engage and sustain a mission in Antarctica has access to the relevant technology. It is fatal to the Japanese case, fatal, that after 18 years of JARPA, there was no pause, no stock-taking, no analysis, no response to criticism, no peer review, no consideration of alternatives, no hypothesis; just lethal business as usual, times two, with extra species, times three.

And it is fatal again that what then happened bears no relationship to the special permit which was the alleged trigger and alleged justification for all of this. If I built a house with M. Poincaré's stones, which bore no relationship to the blueprint, it would be a pretty rough house, I can tell you. If I carried out a scientific program that bore no relationship to the permission to engage in the science, it could not be considered science.

2. JARPA II is commercial whaling

45. Mr. President, Members of the Court, that might be thought sufficient to establish Australia's case under the Convention. But there is more. Not merely is JARPA II not justified

under Article VIII, it is an outright case of commercial whaling prohibited by the Moratorium. Let me establish this in three propositions:

— First, the Convention contemplates three types of whaling. The only one that fits JARPA II is commercial whaling.

— Secondly, JARPA II, and its predecessor, JARPA I, continue Japan's commercial whaling practices in the Southern Ocean, albeit on a smaller scale.

— Thirdly, the commercial character and purpose of JARPA II are clear from its design and implementation.

(a) ***The classification of whaling under the Convention***

46. First of all, the Convention establishes a comprehensive régime for the regulation of the conservation and management of whales. In doing so, it contemplates three and only three types of whaling:

(1) whaling under special permit;

(2) aboriginal subsistence whaling; and

(3) commercial whaling.

There is no fourth type, for example, there is no recreational whaling.

47. For the reasons I have explained, JARPA II is not a program of whaling for purposes of scientific research. It is self-evident that it is not aboriginal subsistence whaling. It falls within the remaining category of commercial whaling. And that's not just an accident of classification: it corresponds to the reality.

(b) ***JARPA & JARPA II continue Japan's commercial whaling practices***

48. In its Counter-Memorial, Japan asserts that seven characteristics of a program of whaling are relevant in determining whether that program is conducted for commercial or scientific purposes[1]. We do not endorse these in all respects, but it is useful to see what happens when you apply them.

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[1] CMJ paras. 5.127 – 5.138.

49. The first characteristic Japan identifies is the area of operation and trackline. On the question of the area of operation, JARPA and JARPA II have largely been conducted in the same productive whaling grounds where Japan conducted its commercial whaling before 1988.

50. In its JARPA proposal, Japan claimed that it was "more efficient" to undertake JARPA in these productive whaling grounds[2]. JARPA II is likewise largely conducted in those areas. In fact, Japan narrowed its area of operation for JARPA II even further on the basis that there was a lower density of minkes in the abandoned area[3]. Now this may be "more efficient", but only from the perspective, only if you are measuring efficiency in terms of the number of whales killed per unit of effort, CPUE. It doesn't hold if you are measuring efficiency in terms of acquiring new scientific knowledge, when you need to survey less populated areas, as well as more populated ones[4].

51. The second distinguishing characteristic identified by Japan is target species and number of whales taken. The species that was the sole target of JARPA, and which has represented 99.5 per cent of Japan's take under JARPA II — the Antarctic minke whale — was the primary focus of commercial whaling operations in the decade before 1988.

52. The third characteristic is the selection of individual whales killed. Japan contends that in research whaling operations, "individual animals taken are based on random sampling procedures"[5]. There are several problems here. First of all, as to fin whales, it only targets the smaller fin whales, because it can't take the larger ones. As to minkes, the position is somewhat the reverse, there is an underrepresentation of the smaller minkes. One wonders why. These facts raise serious questions about Japan's purportedly random sampling procedures in the conduct of JARPA II.

53. The fourth and fifth distinguishing characteristics cited by Japan are the information or data obtained and the tissue samples collected by the whaling operation. Scientific whaling can be distinguished, it is said, from commercial whaling on the basis that scientific whaling programs

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[2] *JARPA Proposal 1987*, 8 [MA, Ann. 156].

[3] CMJ, para. 5.38.

[4] Mangel, *Original Expert Opinion*, paras. 5.47-48 [MA, App. 2].

[5] CMJ, para. 5.134.

collect more data, information and tissue samples than commercial whaling operations[6]. Now, if that's right, one can justify whaling for the purposes of restaurant menus, by taking earplugs on the way.

54. The collection of additional data does not signify that the whaling operation has a scientific purpose[7], unless the data is actually used, used to confirm or deny a hypothesis[8]. Japan equates the conduct of scientific research with the accumulation of data. But science is not stamp collecting: JARPA II is an activity which collects data on whales in the Southern Ocean without end or object[9].

55. In terms of the sixth distinguishing characteristic identified by Japan — the personnel involved — the mere fact a whaling vessel has designated scientists or researchers on board does not serve as a criterion for the scientific character of the operation. Otherwise the presence of eminent scientists in this room would be sufficient grounds to classify my presentation as an activity conducted for purposes of scientific research, which I can assure you it is not!

56. Finally, for its seventh distinguishing characteristic, Japan cites the Article VIII (2) requirement that proceeds from the sale of whale meat be dealt with in accordance with directions of the sponsoring Government. Commercial whaling has a scale and scope indicative of an intention to provide whale meat for commercial purposes.

57. But the fact that proceeds are dealt with in accordance with directions of the relevant Government will not deprive a whaling operation of its commercial character. I cite my restaurant example. The IWC noted in 2003, this is in tab 106 of your folder:

> "Article VIII of the Convention is not intended to be exploited in order to provide whale meat for commercial purposes and shall not be so used."[10]

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[6]CMJ, paras. 5.135 and 5.136.

[7]Mangel, *Original Expert Opinion*, para. 6.1 [MA, App. 2].

[8]Mangel, *Supplementary Expert Opinion*, para. 3.3.

[9]Mangel, *Original Expert Opinion*, paras. 6.1 and 6.19 [MA, Appendix 2]; Mangel, *Supplementary Expert Opinion*, paras. 3.10 and 7.1-7.5.

[10]Whaling under Special Permit, Resolution 2003-2, Ann. F, Chair's Report of the Fifty-Fifth Meeting, *Annual Report of the International Whaling Commission 2003*, 102 (Resolution 2003-2) [MA, Ann. 38].

(c) ***JARPA & JARPA II: four indicia of commercial purpose***

58. Mr. President, Members of the Court, the design and manner of implementation of JARPA II indicate the true commercial character of this whaling program. Continuing to whale for the purposes of the provision of whale meat accounts for JARPA II in a way that science does not. Consistent with the interpretation of the term "commercial" or "for commercial purposes" adopted in other international environmental treaties, such as CITES[11], let me identify four indicia of the commercial purposes of JARPA II.

59. First, JARPA II is directed towards production, sale and distribution of whale meat. (Tab 107) [Screen on] Japan's "scientific" whaling business model, implemented in 1988, is a commercial scheme whereby the cost of continued whaling has been mainly covered by income generated from the sale of that meat. You can see the "by-products" sale and distribution chain for whale meat on the screen. It is considerably more complex than the unseen scientific distribution scheme emerging from JARPA II. In addition to wholesale markets, some whale meat is distributed to fishery co-operatives and other processing operators. It is distributed for public use, including for school meals, but we understand it is not very popular in school meals. [Screen off]

60. As recently as October 2012, the Director of the JFA openly admitted to a Japanese Parliamentary Subcommittee that maintaining its purportedly "scientific" whaling program in the Southern Ocean was necessary to perpetuate the market in minke whale meat. (Tab 108):

> "Minke whale meat is prized because it is said to have a very good flavour and aroma when eaten as sashimi and the like . . .
>
> . . . . . .
>
> [T]he scientific whaling program in the Southern Ocean was necessary to achieve a stable supply of minke whale meat."[12]

61. In fact sales of whale meat are declining. Whale meat consumption in Japan peaked in 1962 at about 400,000 tonnes. It has dropped to about 4,000 tonnes in recent years[13]. As of January 2013, there were 4,355 tonnes of refrigerated whale meat in the market's distribution

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[11]CITES Resolution Conf. 5.10 (Rev. CoP15), *Definition of "primarily commercial purposes"*, adopted at the Fifth Meeting of the Conference of the Parties, Buenos Aires, Argentina, 22 April–3 May 1985.

[12]Government of Japan, Minutes of Meeting of the Subcommittee of the House of Representatives Committee on Audit and Oversight of Administration, 23 Oct. 2012, Statement by Kazuyoshi Honkawa, Director, Japan Fisheries Agency.

[13]"Antarctic scientific whaling program at a crossroads. Over-supply of whale meat. Ending the program also an option", *Asahi Shimbun,* 19 Feb. 2011, p. 3.

stock[14]. That is a lot of refrigeration. To counter the decline in sales, the ICR has undertaken a number of new sales promotion activities.

62. Secondly, JARPA II is directed towards providing economic use or benefit to the Japanese whaling industry and key stakeholders. So-called "scientific" whaling permits Japan to maintain the institutions and personnel necessary to maintain long-term pelagic whaling operations, with the aim of enabling Japan to transition back into commercial operations if and when the moratorium is lifted. As noted by a former Director-General of the ICR (tab 109): "Scientific whaling is enabling whaling facilities and technical crews to be retained, making it possible to respond quickly to any decision to resume [authorized commercial] whaling."[15]

63. Thirdly, JARPA II is conducted on a commercial scale. The level of operations of JARPA and JARPA II can only be described as consistent with commercial whaling, albeit on a smaller scale than before 1988. The sample sizes are not based on scientific considerations. They were established in the light of industry confirmation that they would enable a self-sustainable whaling industry to continue indefinitely[16].

64. Mr. President, Members of the Court, 935 minke whales, 50 fin whales and 50 humpback whales are more than could reasonably be required for the conduct of legitimate scientific research, even if there was a legitimate scientific research program. These sample sizes have been set with the aim of maximizing revenue from the sale of "by-products" to ensure the possibility to continue whaling on a sustainable basis.

65. The reason Japan's actual annual catch under JARPA II has decreased in recent years is falling consumer demand, it remains far in excess of what would reasonably be required for the purposes of scientific research — if any lethal take was required. But lethal research methods are no longer required to obtain new information relevant to the conservation or management of whales and this is not a development of the last couple of years.

Hyperlink still valid on 30 June: http://ika-net.jp/images/en_pdf_files/profitable_fisheries_e.pdf.

[14]J. Sakuma, "'Profitable Fisheries?' What Comes Next? Bold Predictions on the Future of Research Whaling", Iruka & Kujira (Dolpin & Whale) Action Network website, ~~Error! Hyperlink reference not valid.~~ on 5 June 2013.

[15]SMA, Ann. 78, Ohsumi, *Half a Century in Pursuit of the Whale — Proposals for a New Era in Whaling* (2008, Seizando-Shoten Publishing Co. Ltd), p. 158.

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

66. Fourthly, JARPA II, and in particular the level of take, is driven by market forces. You can see this on the screen. Japan's average catch is less than half its target catch. Its catch of fin whales is one-twentieth of its target. Well you would have seen that on the screen it if had been on the screen — but I ask you to imagine it!

67. Japan cites the fire on board its factory ship during the 2006/2007 season and the actions of the Sea Shepherd Conservation Society as the reasons for its reduced catches, and it accuses Australia of downplaying the seriousness and dangers of violent activities occurring in the Southern Ocean[17]. I should briefly deal with this latter allegation, although it is of no relevance to the present case. Australia is fully alive to the dangers of the Southern Ocean. The Australian Maritime Safety Authority sends annual messages to both the Sea Shepherd and the Japanese whaling fleet warning of the dangers of operation in the Southern Ocean. Australia has repeatedly condemned dangerous, reckless or unlawful behaviour occurring in the Southern Ocean. Australia fully complies with its international obligations arising out of events in the Southern Ocean, including search and rescue.

68. The real reason for the Japanese Government's decision to reduce target catches is as simple as it is commercial — the sharp decrease in domestic demand for whale meat in Japan. The well-known Mr. Komatsu, the former head of the JFA, has confirmed in numerous public statements that Japan's reduction in catches has been a deliberate strategy to keep the price of whale meat high. For example, he said in June 2010 that Japan had deliberately reduced its target catches — this is tab 110: "because of the stagnation of the sales of whale meat. Some government officer tried to think that if . . . the . . . supply would be down that may lead to a bit higher price of . . . the whale meat"[18], which is a fairly good commercial tactic.

69. [Screen on] Japan's stockpile of frozen whale meat is four times greater today than it was 15 years ago[19]. This can be seen — he said with some relief — on the graphic which is now on the screen (tab 111). Japan's capacity to store frozen whale meat is not unlimited. As reported

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[17]CMJ, paras. 5.73-5.74.

[18]MA, Ann. 148, "Former Japanese fisheries boss joins *Lateline*", Australian Broadcasting Network, 17 June 2010.

[19]International Fund for Animal Welfare, "The Economics of Japanese Whaling: A Collapsing Industry Burdens Taxpayers", 2 at IFAW Australia website http://www.ifaw.org/australia/resource-centre/economics-japanese-whaling on 5 June 2013.

by crew members, since Japan expanded its catches at the beginning of JARPA II, large quantities of lesser quality meat are discarded overboard daily[20], notwithstanding Article VIII, paragraph 2, surplus to "research requirements"! [Screen off]

70. Japan has sought to reduce the costs of its special permit operations by other means. For the first four seasons of JARPA II, it sent six vessels to the Southern Ocean. In 2009/2010 it reduced that to five vessels and then to four for the last three seasons.

71. It also reduced the length of its whaling voyages in the past three seasons. In the 2012/2013 season, the fleet did not depart until 20 December, more than a month later than usual. And yet — I repeat myself — the special permit still lists the same sample sizes — 935 minke whales, 50 fin whales and 50 humpback whales. That was a year in which the catch was 103 minke whales — 10 per cent of the stated catch target. The "special permit", requiring individual consideration and exceptional justification, has become a mere matter of administrative procedure, unchanging down the years, unrelated to what actually happens, unrelated to any issue of science.

72. Mr. President, Members of the Court, taken together, the four characteristics I have mentioned convincingly establish that JARPA II is a whaling operation conducted for commercial purposes, or incidental thereto. Australia is not alone in this assessment. Statements to similar effect have been made by, among others, Germany[21], Brazil[22], New Zealand[23], the United Kingdom[24] and the Buenos Aires Group: the latter, for example, noted that JARPA II catch limits "clearly point to an operation of a commercial nature which lacks any scientific justification"[25].

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[20]MA, Ann. 149, A. Ideta, "Feature: The Greenpeace Theft Trial", *Chunichi Shimbun*, 26 August 2010 (morning edition), p. 12; Greenpeace Japan, *Whaling on Trial: Japan's whale meat scandal and the trial of the Tokyo Two*, (March 2011), Greenpeace website, http://www.greenpeace.org/international/en/publications/reports/whaling-on-trial/ on 5 June 2013.

[21]Intervention by Germany, IWC 55, Verbatim Record of Agenda Item 12.2 — Scientific Permits — Commission discussions and action arising [0:00:45].

[22]Intervention by Brazil, IWC 55, Verbatim Record of Agenda Item 12.2 – Scientific Permits — Commission discussions and action arising [0:28:22].

[23]Intervention by New Zealand, IWC58, Verbatim Record of Agenda Item 11.2 — Scientific permits — Commission discussions and action arising [0:04:01].

[24]Intervention by the United Kingdom, IWC60, Verbatim Record of Agenda Item 9 — Scientific Permits [0:24:15].

[25]"Members of the 'Buenos Aires Group' protest against Japan's new whaling campaign in the Southern Ocean Sanctuary and urge the Japanese Government to end the so-called 'scientific whaling'", Press Release No. 022/13, 4 Feb. 2013.

In 2003, the IWC stated: "The current and proposed Special Whaling operations represent an act contrary to the spirit of the moratorium on commercial whaling and to the will of the Commission."[26]

3. The legal consequences: Japan's breaches

73. Mr. President, Members of the Court, I turn to outline Japan's consequent breaches of the Convention. The relevant measures are: the factory ship restriction, the moratorium, and the Sanctuary.

(a) *The factory ship restriction*

74. The factory ship restriction, established in paragraph 10 *(d)* of the Schedule in 1979, prohibits the taking, killing or treating of whales by factory ships or whale catchers attached to factory ships. This moratorium applies to sperm whales, killer whales and to all baleen whales except minke whales.

75. Fin whales are, of course, a species of baleen whale. Since the commencement of the JARPA II program, Japan has taken 18 fin whales.

76. The Japanese "research base vessel" is plainly a factory ship in accordance with the definition in Article II (1) of the Convention. The "sighting and sampling vessels" used in JARPA II are "whale catchers", as defined in Article II, paragraph 3, of the Convention. These whale catchers are "attached" to the factory ship within the meaning of the definition. It follows that there is a breach of the factory ship restriction.

(b) *The moratorium on commercial whaling*

77. I turn to the moratorium on commercial whaling. This was established under paragraph 10 *(e)* of the Schedule in 1982. It entered into effect for Japan on 1 May 1987, and has been binding on it up to this time[27].

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

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

78. Under JARPA II, Japan has killed a reported total of 3,633 minke whales and 18 fin whales in eight whaling seasons. For the reasons I have given, that constitutes whaling "for commercial purposes" and contravenes the Moratorium.

(c) [The Southern Ocean Sanctuary]

79. (Tab 63) [Screen on] Then there is the Southern Ocean Sanctuary, established under paragraph 7 *(b)* of the Schedule in 1994. This prohibits commercial whaling in the waters comprising the Sanctuary, as defined by co-ordinates there laid down. JARPA II operations are entirely conducted within the boundaries of the Sanctuary. [Screen off]

80. Japan has unsuccessfully attempted to repeal or limit the application of paragraph 7 *(b)* on numerous occasions[28]. The Commission has rejected these proposals and the Sanctuary remains in place. Japan has exercised its right under Article V to object to the application of paragraph 7 *(b)*[29]. However, this objection only protects the commercial whaling of minke whales in the Sanctuary, and is independent of the Moratorium. Japan does not dispute that the Sanctuary applies to all other species[30]. Paragraph 7 *(b)* thus applies to the take of fin whales under JARPA II.

4. Conclusions

81. Mr. President, Members of the Court, JARPA II is not a program for purposes of scientific research in the context of the conservation and management of whales, or any other context. JARPA II does not possess even one of the four essential characteristics of such a program. Under the two programs, Japan has killed more than 10,000 whales, purportedly in

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[28]Chairman's Report of the Fifty-First Annual Meeting, *Annual Report of the International Whaling Commission 1999*, p. 10; Chairman's Report of the Fifty-Second Annual Meeting, *Annual Report of the International Whaling Commission 2000*, p. 14; Chair's Report of the Fifty-Third Annual Meeting, *Annual Report of the International Whaling Commission 2001*, p. 13; Chair's Report of the Fifty-Fourth Annual Meeting, *Annual Report of the International Whaling Commission 2002*, pp. 28-30, 35; Chair's Report of the Fifty-Fifth Annual Meeting, *Annual Report of the International Whaling Commission 2003*, p. 24; Chair's Report of the Fifty-Sixth Annual Meeting, *Annual Report of the International Whaling Commission 2004*, p. 33; Chair's Report of the Fifty-Seventh Annual Meeting, *Annual Report of the International Whaling Commission 2005*, p. 34; Chair's Report of the Fifty-Eighth Annual Meeting, *Annual Report of the International Whaling Commission 2006*, p. 27.

[29]IWC Circular Communication RG/VJH/25435, "Japanese Objection to Southern Ocean Sanctuary", 15 August 1994, enclosing Note from the Embassy of Japan to the Secretary of the International Whaling Commission, 12 August 1994 [MA, Ann. 55].

[30]IWC Circular Communication RG/VJH/25479, "Objection by Japan to new Schedule sub-paragraph 7 *(b)*", 12 Sept. 1994 with enclosure [MA, Ann. 56].

pursuit of information that is not required for the proper and effective conservation and management of whale stocks in the Southern Ocean or for any other identified scientific purpose.

82. The design and implementation of JARPA II confirm that Japan's true purpose in the continuation of whaling in "some form or another", that is maintaining its whaling industry on a self-sustaining basis through the sale of whale meat "by-product", while it waits for the resumption of commercial whaling, that that is its true purpose. That accounts for JARPA II in a way that science does not. Japan's "scientific" whaling business model is driven by economic considerations, not by scientific ones. Japan has not suggested, not even a trace of a suggestion, how its reduction in annual catches affects its purported research. What it has done is to continue its efforts to strengthen and promote whale meat consumption. The predominant influence of commercial considerations in the conduct of JARPA II is manifest. For all these reasons, JARPA II is not protected by Article VIII.

Mr. President, Members of the Court, thank you for your attention.

The PRESIDENT: Thank you, Professor Crawford. Now I invite Solicitor-General Mr. Gleeson to continue. You have the floor, Sir.

Mr. GLEESON:

JAPAN HAS ACTED WITH A LACK OF GOOD FAITH AND IN ABUSE OF RIGHT IN ITS DEALINGS WITH THE IWC AND IN ITS ISSUE OF SPECIAL PERMITS

I. Introduction

1. Mr. President, Members of the Court, my presentation complements that which you have just heard from Professor Crawford. My two topics are Japan's failure to act with good faith and Japan's conduct in abuse of right. This part of Australia's case has two core but related components. The first follows inescapably from what you have heard from our previous counsel. Once one understands the true object and purpose of the Convention, the proper role and limits on Article VIII within it and the true character of JARPA — just exposed by Professor Crawford — it follows inescapably that Japan's purpose in issuing the permits lies outside that permitted by Article VIII. As the factual premises of that part of the case have been developed, I say nothing further on them.

2. The second component of this part of our case — which I will seek to develop — is this: the obligation of good faith required Japan to give a degree of consideration to the Guidelines and Resolutions of the IWC, and to the reports of its Scientific Committee, which unfortunately Japan has not shown. To develop this component of the case, I will seek to take you to a chronological review of the events as they unfolded. I will give you references to the tab numbers of the documents and I will emphasize perhaps seven documents, which I would invite you particularly to read on this part of the case.

3. At the conclusion of this speech, I will draw together our legal arguments on lack of good faith and abuse of right.

II. Japan and the IWC — the JARPA period (1987-2005)

4. *Japan should never have started as and when it did:* The starting-point which both sides recognize lies in the original JARPA proposal. While this case concerns specifically JARPA II, Japan's relationship with the IWC and the Scientific Committee from the very outset of JARPA is critical to understand what has occurred. The key documents which commence this part of the case at the outset I will simply reference for you, you find them in Volume 1, at tabs 5, 6 and 7. And they are the earliest pronouncements of the IWC: 1985 Annex L, and Resolutions 1986-2 and 1987-1[31]. Those documents are important because they set out at the very outset what the IWC considered to be "the minimum criteria that should be met before whales are killed for research"[32].

5. With those minimum criteria having been laid down by the Commission, a number of members of the Scientific Committee, a significant number, from the very outset in 1987, identified serious reservations with the methodology proposed in JARPA (tab 114)[33].

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[31]Proposed Guidelines for Review of Scientific Permits, Ann. L, Report of the Scientific Committee, *Rep. Int. Whal. Commn* 36, 1986, p. 133 (1985 Ann. L) [MA, Ann. 42]; Resolution on Special Permits for Scientific Research, App. 2, Chairman's Report of the Thirty-Eight Annual Meeting, *Rep. Int. Whal. Commn* 37, 1987, p. 25 (Resolution 1986-2) [MA, Ann. 43]; Resolution on Scientific Research Programmes, App. 1, Chairman's Report of the Thirty-Ninth Annual Meeting, Rep. Int. Whal. Commn 38, 1988, pp. 27-28 (Resolution 1987-1) [MA, Ann. 44]. See also MA, paras. 4.25-4.27.

[32]IWC39, Verbatim Record of Opening Plenary Session, 22 June 1987, IWC/39/VR, 16-17.

[33]Report of the Scientific Committee, *Rep. Int. Whal. Commn 38*, 1988, 57 (partially extracted at CMJ, Annex 82). The complete section of the report addressing the Japanese permits (pp. 55-58) is reproduced in the Judges' folders at (tab 114).

6. What was Japan's response to that reservation from within the Scientific Committee? Japan's response was to say that this should be simply termed a "division of opinion" and the solution to the problem was that JARPA should simply go ahead and the differences could be sorted out[34]. Indeed, Japan asked the Commission to defer its consideration of JARPA until the 1988 meeting. The Commission in turn, rather understandably, asked whether Japan would defer issuing permits for JARPA until that consideration could occur, but Japan's response was what you now see on the screen, also at tab 115. The reason Japan did not accede to the response to defer the commencement of JARPA was [Screen on]:

> "We have got allocation of funds from our Finance Ministry of over $4 million. Once we do not use that it will not come back forever and we cannot get it again. So we should proceed and I think that, even with a division of opinion between distinguished scientists I think we have a right to proceed."[35] [Screen off]

7. That, Mr. President, Members of the Court, was Japan's attitude at the outset, and it has remained the attitude until today. Now that sets the background for the first document, which I would invite you to read, which you should find at tab 116. At tab 116 you will find the first Resolution of the Commission, expressing its views on JARPA[36]. And I would invite you particularly to consider the paragraph in which the Commission adopts the view that JARPA does not satisfy the criteria, which had been set out in the 1986 Resolution, in that the proposed research does not appear, on present information, to be structured as to contribute information essential for the rational management of stock, and the proposed take will not, at this stage, materially facilitate the Comprehensive Assessment, that is, the assessment which was referred to in paragraph 10 *(e)* of the Schedule. And you then see the recommendation that Japan refrain from issuing the special permits until the Scientific Committee could resolve the serious uncertainties and that it could be established that the research methods would contribute sufficiently reliable results needed for the Comprehensive Assessment or for other critically important research needs.

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[34]Intervention of Japan, IWC39, Verbatim Record of Fourth Plenary Session, 26 June 1987, IWC/39/VR, 142.

[35]Intervention of Japan, IWC39, Verbatim Record of Fourth Plenary Session, 26 June 1987, IWC/39/VR, 145.

[36]Resolution on Japanese Proposal for Special Permits, App. 4, Chairman's Report of the Thirty- Ninth Annual Meeting, *Rep. Int. Whal. Commn* 38, 1988, 29 (Resolution 1987-4) [MA, Ann. 10].

8. That Resolution was passed by an overwhelming majority of the Commission, in accordance with the majority decision-making processes established under the Convention and accepted by Japan[37].

9. Australia submits that the obligation of good faith required Japan, at the very outset, to address four key questions in the light of this Resolution. Let me identify those matters which Japan should have addressed in good faith. The first is:

— how might the objectives of JARPA be revised so that they align with critical research needs, identified by the IWC and the Scientific Committee?

— the second is how might the methods of JARPA be adjusted to have a real likelihood of achieving objectives so tailored?

— the third is, rather than start with a pre-determined view that a certain number of whales had to be killed each year, how might non-lethal means — existing or reasonably capable of development — provide a partial or complete alternative?

— and the fourth is should JARPA be suspended or deferred until those questions could be answered?

10. Australia's case is that you will not find anywhere, in the subsequent 28-year history, Japan giving real consideration to those questions. Japan made some minor changes to the proposal and commenced a "feasibility study", but never addressed the substance of the Resolution from the IWC[38].

11. The IWC, in subsequent years, by clear majorities, expressed similar resolutions[39] and the response from Japan was the same.

12. Mr. President, Members of the Court, you will not find in the Counter-Memorial a substantive explanation for why Japan, in good faith, ignored the Resolution I've taken you to and like resolutions. [Next slide] Instead of that what you will find from Japan, and you should now see

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[37]See the table referred to by Professor Crawford, reproduced at tab 57, for the voting record for each resolution.

[38]Report of the Special Meeting to Consider the Japanese Research Permit (Feasibility Study), 15-17 December 1987, *Rep. Int. Whal. Commn 39*, 1989, 159, 162 (partially extracted at CMJ, Ann. 83).

[39]Resolution on the Proposed Take by Japan of Whales in the Southern Hemisphere under Special Permit, Appendix 3, Chairman's Report of the Forty-First Annual Meeting, *Rep. Int. Whal. Commn* 40, 1990, 36 (Resolution 1989-3) [MA, Ann. 16].

summarized on your screen and at tab 119, is that Japan has made an unfortunate attack upon the IWC itself. Japan's approach to the collective organ, under the treaty, is that its resolutions:

— often "were adopted without supportive advice from the Committee";

that its resolutions

— "appear . . . as political decisions, driven by the convictions and the preservationist attitude of anti-whaling States . . . rather than by scientific knowledge"

and, embarking upon rhetoric, Japan declaims that the IWC

— represents the "tyranny of the majority" against which de Tocqueville warned us[40].

13. Now, in short, Japan ignores any IWC Resolutions it does not like and it derides, and that is not too strong a word, those supportive of the resolution as engaged in mere "politics". It also dismisses any reasoned opinion expressed within the Scientific Committee that its proposals require modification or withdrawal, as being no more than the opinion of a body that can't reach consensus. [Screen off]

14. Mr. President, Members of the Court, I have spent a little time dwelling on what happened at the outset, in 1987 to 1989, because it illustrates, in a microcosm, where, Australia submits, Japan's conduct fell short of the standard of good faith. Before I move beyond the first JARPA proposal, could I mention more briefly five other aspects, which emerge between 1987 and 2005?

15. *Japan ignores the Commission's restated position:* The first, which you have heard, is that repeatedly, in the years from 1990 onwards, the Commission adopted resolutions reaffirming that JARPA was not required for the management of whale populations and did not satisfy the

[40]CMJ [8.80], [8.87] and [8.101].

original 1986 and 1987 Resolutions[41]. Some of these Resolutions were passed by consensus, others by large majorities[42]. The difference matters not for this part of the case.

16. *Japan ignores IWC Resolution 1995-9:* The second additional matter I would mention is that Professor Sands showed you late yesterday, and Dr. Gales gave some evidence about, IWC Resolution 1995-9, an important resolution, as it set out the criteria subsequently relevant at the time JARPA II was adopted.

17. It is also important because on the occasion that the Commission had the first opportunity to compare JARPA I with Resolution 1995-9, the Commission confirmed that JARPA failed to satisfy the criteria. That is Resolution 1996-7 and in Japan's Counter-Memorial it again gives you no substantive argument as to why it was entitled to ignore that Resolution. Indeed, the approach which Japan took to this important Resolution 1996-7, which you will see on the screen and at tab 120, can be expressed in the graphic words of disregard "we do not intend to respect this Resolution"[43].

18. The third additional point from JARPA is that in the mid-term review in 1997, the Scientific Committee looked at JARPA, some ten years in, and concluded — and the reference is tab 123 — that the results of JARPA while not required for management under the RMP had, at best, a potential to improve management in various ways. So after ten years, JARPA had not produced any output which was required for management and, at best, was in the area of potentiality. That is the context for the second document, which I would invite you to read[44], which you will find at tab 124, Resolution 1997-5.

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[41]Resolution on Special Permit Catches by Japan in the Southern Hemisphere, Appendix 2, Chairman's Report of the Forty-Second Meeting, *Rep. Int. Whal. Commn* 41, 1991, 47-48 (Resolution 1990-2) [MA, Annex 18]; Resolution on Special Permit Catches by Japan in the Southern Hemisphere, Appendix 2, Chairman's Report of the Forty-Third Meeting, *Rep. Int. Whal. Commn* 42, 1992, 46 (Resolution 1991-2) [MA, Annex 19]; Resolution on Special Permit Catches by Japan in the Southern Hemisphere, Appendix 5, Chairman's Report of the Forty-Fourth Meeting, *Rep Int. Whal. Commn* 43, 1993, 71 (Resolution 1992-5) (Tab 118); Resolution on Special Permit Catches by Japan in the Southern Hemisphere, Appendix 7, Chairman's Report of the Forty-Fifth Annual Meeting, *Rep. Int. Whal. Commn* 44, 1994, 33 (Resolution 1993-7) [MA, Annex 21]; Resolution on Special Permit Catches by Japan in the Southern Hemisphere, Resolution 1994-10, Appendix 15, Chairman's Report of the Forty-Sixth Annual Meeting, *Rep. Int. Whal. Commn* 45, 1995, 47 (Resolution 1994-10) [MA, Annex 25].

[42]See the table referred to by Professor Crawford, reproduced at tab 57, for the voting record for each resolution.

[43]Intervention of Japan, IWC48 (1996), Verbatim Record of Fifth Plenary Session, 28 June 1996, p. 176.

[44]Resolution on Special Permit Catches in the Southern Ocean by Japan, Resolution 1997-5, App. 5, Chairman's Report of the Forth-Ninth Annual Meeting, *Rep. int. Whal. Commn* 48, 1998, p. 47 (Resolution 1997-5) [MA, Ann. 29].

19. You will see in that document a number of recitals, all of which are accurate and the last two recitals accurately record the position which the Scientific Committee had reached and you will then see some resolutions. Firstly, an affirmation that JARPA does not address critically important research needs; secondly, a reaffirmation that Contracting Governments should refrain from issuing special permits involving killing; thirdly, a reiteration of deep concern at Japan's continuing program of killing; fourthly, a strong urging to the Government of Japan in the exercise of sovereign rights to refrain from issuing further permits; and, fifthly, important to the scientific case, an instruction to the Scientific Committee not to consider Southern Hemisphere minke whales in the context of the RMP unless advised to do so. In other words, any data JARPA might be collecting lethally was determined by the Commission not to be necessary or appropriate in implementing the RMP.

20. Now I have asked you to look at that as a second key document because it crystalizes ten years into JARPA exactly the position the Commission had reached. It required Japan to open its mind to the four questions I mentioned at the outset and, unfortunately, you will not find from Japan any consideration of these resolutions or questions.

21. *1998-2003: any justification for JARPA becomes even weaker:* The third additional matter I mention about JARPA is that, in the following five years, that is 1998 to 2003, any slender thread of justification in science which JARPA may have had, viewed within a good faith framework, slipped away. This is apparent from a series of resolutions, including Resolution 1998-4 and Resolutions from 1999 onwards. And I would like to particularly draw your attention to Resolution 2003-2[45], of which an extract should appear on the screen and the full document, which I would invite you to read, is at tab 106. [Screen on] 2003 was a very important year in the life of the Convention with the Berlin Initiative and the document at tab 106, which Professor Crawford addressed you on this morning, contains really in one page a series of recitals which accurately record the position after 15 years of JARPA and then came to a series of recommendations, which really reflect the reason we are here today in this case. The Commission expressed deep concern that the Article VIII provision enabled countries to conduct whaling for

[45]Resolution on Whaling under Special Permit, Resolution 2003-2, Ann. F, Chair's Report of the Fifty-Fifth Annual Meeting, Annual Report of the International Whaling Commission 2003, p. 102 (Resolution 2003-2) [MA, Ann. 38].

commercial purposes in the face of the moratorium; it considered that the current and proposed permits were an act contrary to the spirit of the moratorium and to the will of the Commission; it stated that Article VIII was not intended to be exploited in order to provide whale meat for commercial purposes and shall not be so used — the very matter Professor Crawford has addressed you on; it reaffirmed that non-lethal techniques *available today* "will usually provide better data at less cost to [both] animals and budget": the matter that Professor Mangel and Dr. Gales gave evidence on and urged all countries to limit scientific research to non-lethal methods.

22. Now, as Professor Crawford said this morning, coming to the end of a 15- or 18-year project, at the very least good faith required a considered pause. A consideration of whether the collection of data had proved so useless and so contrary to the views of the common organ of the Convention that there needed to be a fundamental rethink.

23. However, Japan's response, as you will see on the screen and at tab 126, [next screen] is that its Commissioner to the IWC, Mr. Komatsu, put it as simply as this: "As far as legal aspect is concerned . . . this is Article VIII operations. It is none of your business."[46] [Screen off]

III. Japan should never have proposed or adopted JARPA II in 2005

24. Let me turn then to the adoption of JARPA II in 2005. Australia's case is that good faith required Japan not to have proposed or adopted JARPA II as and when it did. As you know, the Commission in 2003 adopted a precautionary Resolution recommending that no additional JARPA program be considered until the Scientific Committee had conducted its in-depth review of JARPA[47]. And as you know, in the face of that request, Japan submitted the research plan for JARPA II to the Scientific Committee in June 2005, 18 months before the JARPA review would be conducted in 2006. On Japan's timetable, JARPA II would already have been in operation for two

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[46]Intervention of Japan, IWC55 (2003), Verbatim Record of Agenda item 10.2 — Scientific Permits — Commissions discussions and action arising — Draft Resolution on Southern Hemisphere minke whales and special permit whaling [0:10:30].

[47]Resolution on Southern Hemisphere Minke Whales and Special Permit Whaling, Resolution 2003-3, Annex G, Chair's Report of the Fifty-Fifth Annual Meeting, *Annual Report of the InternationalWhaling Commission 2003*, 103 (Resolution 2003-3) [MA, Ann. 39].

years — potentially taking up to 2,000 whales — before the final JARPA I review could be conducted.

25. Mr. President, Members of the Court, setting that timetable was conduct inconsistent with good faith. You have also heard that, when Japan presented the proposal to the Scientific Committee in June 2005 — 18 months before the proposed review of JARPA — 63 Scientific Committee members submitted a paper recording their view that it was "scientifically invalid to review the JARPA II proposal before the Commission could conduct the full review of the results of the original 18-year programme"[48].

26. Those 63 scientists felt compelled to submit brief comments on matters of serious concern, but quite properly refused to participate in any full "review" of the JARPA II proposal[49]. The result was that it was only a portion of the Scientific Committee that ever considered the JARPA II proposal, and even then their comments were necessarily "limited"[50].

27. I dwell on that because in the Counter-Memorial Japan makes the bold assertion that the Scientific Committee in 2005 "reviewed . . . JARPA II . . . in accordance with the relevant guidelines"[51]. But when scientists representing more than half of the national delegations to the Scientific Committee were unable to participate in the purported "review", and the remaining scientists expressed only "limited" opinions, the correct conclusion — and this is critical to the establishment of JARPA II — is that it was commenced by Japan first, without backing from the Scientific Committee and second, without an identified relationship to any critical research needs identified by the Committee.

28. That brings me to the fourth document I would invite you to read, which is at tab 127. What you have at tab 127 is the Commission Resolution 2005-1, and that is the first formal response by the Commission to Japan's plan to embark upon JARPA II. And you will note the concerns expressed by the Commission: particularly at the foot of the first column, the concern in

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[48]S. Childerhouse *et al.*, App. 2, "Comments on the Government of Japan's Proposals for a Second Phase of Special Permit Whaling in Antarctica (JARPA II)", Ann. O1, Report of the Standing Working Group on Scientific Permits, Report of the Scientific Committee, *J. Cetacean Res. Manage. 8 (Suppl.), 2006*, pp. 260-261 (JARPA II Proposal Comments) [MA, Ann. 52, pp. 173, 179].

[49]Report of the Scientific Committee, *J. Cetacean Res. Manage 8 (Suppl.),* 2006, 49 [MA, Ann. 52].

[50]See especially MA, Ann. 52 pp. 174-175.

[51]CMJ, p. 427, para. 9.37.

the second column about the doubling of the take, the concerns on the effect on the endangered fin population, concerns about the targeting of humpback whales in small vulnerable breeding populations around some small island states in the South Pacific. And you then see the Resolution, the request that the Scientific Committee review the outcome of JARPA as soon as possible, and the *strong urging to Japan* to withdraw JARPA II or revise it, so that the information needed to meet the stated objectives is obtained "using non-lethal means"[52].

29. What one cannot find in the JARPA II proposal[53], or in Japan's Counter-Memorial, is any engagement with this Resolution.

IV. Japan continues to ignore the IWC in carrying on JARPA II

30. JARPA II commences in the face of this Resolution and the inevitable, and somewhat sorry end to this chronological tale, is found at the next tab 128, which is that in Resolution 2007-1 — this is now after the Scientific Committee has looked at JARPA — the Commission, in the first column near the end, noted that the Scientific Committee workshop had agreed that none of the goals of JARPA I had been reached and the results of the JARPA I program were not required for management under the RMP, expressed certain further matters and then, in the second column just before the Resolutions, expressed a conviction that the aims of JARPA II did not address critically important research needs and then called upon Japan to address 31 recommendations from the Scientific Committee and to indefinitely suspend the lethal aspects of JARPA II within the Southern Ocean Whale Sanctuary. So what you have before you is a Resolution of the IWC based upon the work of the Scientific Committee[53bis] and good faith, expressed simply, required Japan to give real and meaningful consideration to the Resolution, and it did not.

V. Japan's grant of special permits under JARPA II does not comply with paragraph 30

31. Let me then turn to a related factual aspect of Japan's dealings with the Commission, which is the question whether its permits comply with paragraph 30 of the Schedule.

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[52]Resolution on JARPA II, Resolution 2005-1, Ann. C, Chair's Report of the Fifty-Seventh Annual Meeting, *Annual Report of the International Whaling Commission 2005*, p. 1 (Resolution 2005-1) [MA, Ann. 40].

[53]Government of Japan, "Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) — Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources", 2005, SC/57/O1 (JARPA II Plan) [MA, Ann. 105, especially p. 20].

53bis "Report of the Intersessional Workshop to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic", Tokyo, 4-8 December 2006, J. Cetacean Res. Manage 10 (Suppl.), 2008, 411, especially pp. 433-434 (JARPA Final Review).

32. Professor Crawford explained to you earlier in the week the operation of paragraph 30, which requires Contracting Governments to provide the special permits to the IWC before they are issued, in sufficient time for the Scientific Committee to comment on them. The permits must contain certain criteria.

33. *Failure to submit in advance:* There are two aspects to Japan's conduct that we draw attention to. The first is that for the eight whaling seasons of JARPA II, Japan submitted the permits to the IWC after they had been issued[54], and not in advance. Clearly the Scientific Committee could not play its role in those circumstances.

34. *Failure to state required information in permits:* The second aspect is that the Japan permits do not contain the information required by paragraph 30. You might recall that on Wednesday, I showed you on the screen an example of the form of permit issued for the first six or so years of JARPA. Those permits do not provide the information required by paragraph 30 — and paragraph 30, for these purposes, has been flushed out by the Commission in a document I would invite you to read — which is found at tabs 131 and 132[55]. If you might perhaps, if it was convenient, go to 132, document Annex O in the reports of the Scientific Committee, you will see a series of material which *pro forma* proposals should incorporate, and on a quick scan you will see a close connection to the material in the Schedule P document we looked at yesterday. Now that is the type of material which the Commission and the Scientific Committee was requiring all proponents to provide, in order to enable a proper assessment of the proposals. And the short fact is, Japan did not do so.

35. The last document I propose to invite you to read this morning would be at tabs 134 to 135, which are the modified permits. So, for the last two years, perhaps in the light of this case, in order to offer something more than what we saw on Wednesday was the research defined by grenade harpoon, the permit now in paragraph 1 has copied over the four JARPA II

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[54]Special Permit No. 17-SUIKAN-2389 of 1 Nov. 2005 [MA, Ann. 82]; Special Permit No. 18-SUIKAN-2610 of 13 Nov. 2006 [MA, Ann. 83]; Special Permit No. 19-SUIKAN-1911 of 7 Nov. 2007 [MA, Ann. 84]; Special Permit No. 20-SUIKAN-1727 of 5 Nov. 2008 [MA, Ann. 85]; Special Permit No. 21-SUIKAN-1605 of 12 Nov. 2009 [MA, Ann. 86]; Special Permit No. 22-SUIKAN-1577 of 29 Nov. 2010 [MA, Ann. 87] (tab 133); Special Permit No. 23-SUIKAN-1874 of 1 Dec. 2011 (tab 134); Special Permit No. 24-SUIKAN-1893 of 20 Dec. 2012 (tab 135) (JARPA II permits).

[55]Scientific Committee Report, *J. Cetacean Res. Manage.* 9 *(Suppl.)*, 2007, pp. 57-58; "Report of the Standing Working Group on Scientific Permits", Ann. O, Report of the Scientific Committee, *J. Cetacean Res. Manage. 9 (suppl.)*, 2007, pp. 346-348.

objectives. That is a manifest attempt to remedy the deficiency of the earlier permits, but clearly remains insufficient for the Scientific Committee to assess properly the proposed research. One only need look again at the first objective monitoring the Antarctic ecosystem to wonder how members of the Scientific Committee can usefully review such a proposal.

VI. Conclusions on lack of good faith case

36. Could I then conclude on the lack of good faith case, and step back for a moment from that chronology I have shown you. There were 18 seasons of JARPA, and now eight seasons of JARPA II. JARPA II has no end date; it is proposed to be reviewed next year, but Japan's public position is it continues indefinitely — as I showed you on Wednesday. Five conclusions follow about Japan's lack of good faith:

— the first is a legal proposition that the IWC has a treaty role under Article VI to make recommendations, and those recommendations are intended at a minimum to guide the exercise of the power under Article VIII, consistent with the object and purpose of the Convention and to develop a common understanding among Contracting Governments as to the proper scope of Article VIII; that is a legal proposition[56];

— the second is a factual proposition. The IWC, in proper reliance on the work of the Scientific Committee, has provided recommendations in the strongest, clearest and most consistent terms that Japan's special permit whaling should cease or be modified;

— the third proposition, which is also factual, is that in making those recommendations, the IWC has identified problems with Japan's whaling when set against the object and text of the Convention; problems which have a sound evidentiary base. The problems are in the three main areas identified by Professor Crawford: Japan's whaling undermines the conservation measures adopted by the Commission, in particular the Southern Ocean Sanctuary and the

[56]Intervention of the United States, IWC39, Verbatim Record of Second Plenary Session, 24 June 1987, IWC/39/VR, pp. 40-41.

moratorium[57]; it assumes the characteristics of commercial whaling[58]; and it overlooks non-lethal techniques where those methods are reasonably available[59];

— the fourth proposition is a factual one, concerning Japan's response to those evidence-based recommendations. The proposition is that Japan has never opened its mind to a consideration of making the slightest change to the core aspects of its lethal methodology; scale, continuity and indefinite period, have never been the subject of reconsideration by Japan; and,

— the fifth proposition, which has elements of both law and fact combined, is that this Court should not reject the Resolutions of the IWC as merely the work of de Tocqueville's "tyrannous majority".

37. Mr. President, Members of the Court, with that background laid, what I need to say about the law is brief, because the law on good faith is both well established in this Court and even better known to you. Could I permitted to say this, as was stated by the Court, in *Gabčíkovo*[60]:

> "Article 26 [of the Vienna Convention on the Law of Treaties] combines two elements, which are of equal importance . . . 'Every treaty . . . is binding upon the parties . . . and must be performed . . . in good faith.' Th[e] latter element, in the Court's view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal [interpretation]. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be [achieved]."

38. As stated by Judge Keith in *France* v. *Djibouti* in the context of the principles of "good faith, abuse of rights and *détournement de pouvoir*", those principles require a State agency in question to exercise the power for the purposes for which it was conferred and without regard to improper purposes or irrelevant factors[61].

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[57]Resolution 1995-9, MA, Ann. 46; Resolution 1985-2, Resolution on Scientific Permits, App. 2, Chairman's Report of the Thirty-Seventh Annual Meeting, *Rep. int. Whal. Commn* 36, 1986, p. 26, MA, Ann. 7; Resolution 2003-2, Whaling under Special Permit, Resolution 2003-2, Ann. F, Chair's Report of the Fifty-Fifth Meeting, *Annual Report of the International Whaling Commission 2003*, p. 102, MA, Ann. 38; *Berlin Initiative*, Ann. II, IWC Conservation Work (An Annotated Compilation, 1976-2001), p. 28, MA, Ann. 37; Resolution 1995-8, Resolutions on the Southern Ocean Sanctuary: Resolution on Whaling under Special Permit in Sanctuaries, Chairman's Report of the Forty-Seventh Annual Meeting, *Rep. int. Whal. Commn* 46, 1996, p. 46, MA, Ann. 27; Resolution 1996-7, MA, Ann. 28; Resolution 1997-5, MA, Ann. 29; Resolution 1998-4, MA, Ann. 31; Resolution 1999-3, MA, Ann. 32; Resolution 2000-4, MA, Ann. 33; Resolution 2001-7, MA, Ann. 35; Resolution 2003-3, MA, Ann. 39; Resolution 2007-1, MA, Ann. 41.

[58]For example, Resolution 1985-2, MA, Ann. 7; Resolution 2003-2, MA, Ann. 38.

[59]For example, Resolution 1995-9, MA, Ann. 46; Resolution 2003-2, MA, Ann. 38,.

[60]*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 78-79, para. 142. See also *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 268, para. 46.

[61]*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 279, para. 6.

39. Applying those principles to this treaty, the paramount consideration of Contracting Governments, including Japan, must be to co-operate in good faith to further the IWC's primary object and purpose, as has been outlined[62].

40. By persistently putting its determination to continue whaling on a commercial scale ahead of its duty of co-operation with the IWC, Japan has — to adopt the language of Judge Lauterpacht in the *Voting Procedure Advisory Opinion* — set itself above the expressed judgment of the Commission, and failed to show loyalty to the object and purpose of the Convention[63].

VII. Abuse of Right

41. *The existence of the principle and its contours:* Mr. President, Members of the Court, the final topic for this presentation is to consider whether Japan's conduct amounts to an abuse of right. Australia recognizes that it has not been necessary for the Court in previous cases to decide the case on the basis of this principle. But that does not deny the existence of the principle, about which I wish to say a little, nor that it is attracted in this case. Japan does not present to you a full-blooded argument that the Court should *reject* the existence of the principle as a matter of law, and Japan is correct in that stance. The principle must have a role to play in international law with its emphasis on *pacta sunt servanda*, as much as it does in most domestic systems with which we are familiar. The real area for debate perhaps lies in the contours of the principle.

42. What Australia would offer to the Court on this question of contour are four core propositions and I will direct these propositions to a context where the issue arises directly between States. The propositions may be stated a little differently in other contexts of international law. The first proposition we ask you to find it that the doctrine is a general principle of law, which may be applied by the Court, with support in relevant judicial decisions and academic commentary within Article 38 (1) *(c)* and *(d)* of the Court's Statute. Secondly, the doctrine is a

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[62] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J Reports 1980*, p. 95, para. 48.

[63] *Voting Procedure on Questions Relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, separate opinion of Judge Lauterpacht, p. 120.

particular application of the principle of good faith to the exercise of rights by States[64]. Thirdly, it is important as the judicial decisions and academic commentary have pointed out, not to allow the question of abuse to rest in the ether. It is important to identify the context in which the alleged abuse arises, to understand the limits of the principle. In some cases — not the present — the abuse arises in the context of the exercise of an apparently general sovereign right of one State, which is being exercised in a manner which might circumvent or cut across an identified right or interest of another State[65]. In those contexts the doctrine allows the apparently general right of one State to be appropriately qualified to recognize the interests or rights of another. The fourth proposition is that, in the present case, the question of abuse arises in a narrower context of a treaty and the question is whether the exercise of a right conferred under the treaty, or more particularly an exception, such as Article VIII, can be seen to abuse a right also reflected under that treaty, particularly a treaty directed to safeguarding an identified common interest. I take the opportunity to remind the Court of our earlier presentation on the importance of the need for all Contracting Governments to respect the integrity of this Convention in the furtherance of their common interest.

43. Could I then offer you our ultimate proposition, which is that abuse, in the present context, is measured by whether the right holder — Japan — has so departed from standards of reasonableness and *bona fides* in the exercise of the right, or from the proper purposes for which the right is accorded under the treaty, that the right holder has reduced its treaty obligations to mere facultative ones and, in so doing, has dissolved their juridical character and negated the treaty rights of other members.

44. The sources that we offer to the Court for the doctrine are found in our Memorial and we have reproduced the relevant sources at tab 136 for you. Of the sources, there are three I would mention this morning.

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[64] *United States — Import Prohibition of Certain Shrimp Products*, Report of the Appellate Body, (1999) 38 *ILM* 119, p. 61 para. 158, citing B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd, 1953), 125.

[65] See, for example, the separate opinion of Judge Alvarez in the *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland* v. *Albania), I.C.J Reports 1949*, pp. 47-48 and his dissenting opinion in the *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J Reports 1950*, p. 14. See also Judge Ammoun in *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), I.C.J Reports 1970*, p. 324, citing his earlier judgment in *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, p. 35.

45. The first, for which an extract should be on the screen shortly, or at tab 137, is the proposition as expressed by the WTO Appellate Body in the *Shrimp* case, the case particularly close to the present in terms of the context[66]. [Screen on]

46. The second source I would offer this morning is Sir Gerald Fitzmaurice's commentary on the *Law and Procedure of the Court*. Sir Gerald correctly noted, as I did at the outset, that the Court has not yet had to decide a case on the basis of the doctrine, nevertheless, his statement of the doctrine we would respectfully adopt:

> "[A]lthough a State may have a strict right to act in a particular way, it must not exercise this right in such as a manner as to constitute an abuse of it; it must exercise its rights in good faith and with a sense of responsibility; it must have *bona fide* reasons for what it does, and not act arbitrarily or capriciously."[67]

47. The final source we would offer is the definition now on the screen, proffered by the dictionary[68]. (tab 138) [next slide]

48. *Application of the principle:* Mr. President, Members of the Court, with that being the legal framework, once Australia's factual case is accepted, it is difficult to think of a scenario which would more squarely attract the doctrine.

49. Let me state Australia's case on the existence of the abuse in these terms. The right in question is the right to issue special permits under Article VIII. The relevant obligations of Japan are those under paragraph 7 *(b)*, 10 *(d)* and 10 *(e)* of the Schedule, of which you have heard. Japan has exercised that right in a manner which involves five elements working together to create the abuse. Based on everything you have heard, those five elements are: firstly, the scale of the exercise of the right; the indefinite period; the admitted commercial drivers; the absence of demonstrated scientific need; and, fifthly, as I have mentioned today, the disregard of repeated IWC Resolutions. Those five matters together demonstrate an absence of good faith and reasonableness, they demonstrate the intrusion of an impermissible purpose, to such an extent that

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[66] *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, (1999) 38 *ILM* 119 at [156].

[67] G Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law", 27 *BYIL* (1950), 1, 12-13.

[68] "The exercise by a State of a right in such a manner or in such circumstances as indicated that it was for that State an indirect means of avoiding an international obligation imposed upon that State, or was carried out with a purpose not corresponding to the purpose for which that right was recognised in favour of that State." (J. Basdevant (dir.), *Dictionnaire de la terminologie du droit international*, Paris, Sirey, 1960.)

Japan has sought to render its obligations merely facultative and has deprived them of their juridical character. It has thereby negated the treaty rights of other members.

50. *Japan's case:* As I have mentioned, Japan does not offer you directly a formulation of a doctrine of abuse of rights, nor does it reject the existence of the doctrine. If you piece together different parts of the Memorial, that is the Counter-Memorial, Japan does accept some constraint upon its Article VIII right. In one place it says it must be exercised in furtherance of the Convention's object and purpose, taking into account the Commission's views[69], and in another place it says that the right must not be exercised arbitrarily or capriciously[70]. We would ask the Court to find that Japan's formulation of the constraint on the Article VIII right is too weak in law and it rapidly leads into erroneous arguments that this Court has little role in assessing breach. The "margin of appreciation" which Japan argues the right-holder retains becomes so large as to swallow any constraint on the exercise of right.

51. However, and may I conclude on this, even if you were to accept only the weaker constraint offered by Japan, you would find breach. For all the reasons advanced thus far, Japan has:

— pursued a purpose extraneous to the Convention;

— failed ever to give real consideration to the ICW's views that it defer, suspend or modify its operation; and

— been arbitrary or capricious, in the sense that the compelling need to kill so many of the object of study, supposedly to learn more about it, has never been shown.

52. Mr. President, that concludes my presentation. I thank you for your attention.

The PRESIDENT: Thank you very much, Mr. Solicitor-General. The hearing is now suspended for 15 minutes and then I will call on Mr. Burmester.

The Court adjourned from 11.30 a.m. to 11.45 a.m.

The PRESIDENT: Please be seated. The hearing is resumed and I give the floor to Mr. Henry Burmester to address the Court on the issue of its jurisdiction. You have the floor.

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[69]CMJ, para. 8.13.

[70]CMJ, para. 7.16.

Mr. BURMESTER:

The Court has jurisdiction

1. Thank you. Mr. President, Members of the Court, the last matter Australia wishes to address in this first round of our presentations is the question of jurisdiction.

2. While jurisdiction is normally a matter to be determined first, we have deliberately left the issue of jurisdiction to the end of the presentations. Australia treats seriously the duty of this Court to satisfy itself that it has jurisdiction. If the Court clearly understands what the dispute before the Court is about this will assist it in understanding why Japan's argument on jurisdiction is without foundation.

3. This is why it is important that the Court has first heard detailed submissions from Australia about the substance of the dispute. The Court, having now heard these submissions, is — in our view — much better placed to understand why Japan's argument on jurisdiction depends on a completely wrong characterization of the dispute and consequently fails.

4. First, I will briefly outline the basis on which Australia relies to found the Court's jurisdiction and the Japanese argument as to why there is no such basis. I shall then turn to the proper interpretation of the particular optional clause reservation that Japan relies upon to seek to deny the Court's jurisdiction and I will show as a matter of law why the Japanese interpretation should be rejected.

The basis of jurisdiction

5. The basis of jurisdiction relied upon by Australia is that derived from the respective optional clause declarations made by Australia and Japan under Article 36 (2) of the Court's Statute[71]. Australia's Declaration was made on 22 March 2002 and that of Japan on 9 July 2007.

6. Both Declarations apply to a "dispute" under Article 36 (2) on condition of reciprocity. As the Court knows, this allows Japan to invoke any relevant reservation contained in Australia's Declaration in an attempt to avoid jurisdiction. There is, however, no relevant reservation that applies in this case. Nonetheless, Japan has sought to invoke one of Australia's reservations.

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[71]Declaration of Australia dated 22 March 2002, signed by the Hon. A.J.G. Downer, Minister for Foreign Affairs; Declaration of Japan dated 9 July 2007, signed by the Hon. Kenzo Oshima, Permanent Representative of Japan to the United Nations.

7. Japan alleges that the dispute before this Court falls within reservation *(b)*. I need to read out that reservation as its wording is critical. It can be found in the your folders, at tab 140, and is on your screen. [Screen on]

8. It reads as follows:

> "*(b)* any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation."

9. Japan accepts that the dispute does not fall within the first part of this reservation. It argues, however, that it falls within the second part. It says:

> "it is a dispute 'arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation' . . . because the JARPA II program is taking place in or around maritime areas Australia claims to be part of its exclusive economic zone (EEZ), the rights of which are generated, according to Australia's claims, by its purported sovereignty over a large part of the Antarctic continent.[72]"

10. There is one simple answer to this. The reservation relates to maritime delimitation situations and only those situations. The fact is that all the reservation was designed to cover and all that it does cover is pending maritime delimitation situations. End of story. No such situation arises between Japan and Australia. In particular, the reservation does not cover a dispute concerning the validity, or otherwise, under the 1946 Convention of Japan's JARPA II program, a dispute entirely unconnected with any delimitation situation. [Screen off]

11. Mr. President, I will not stop there, however. I will seek to assist the Court by outlining in greater detail why Japan's attack on jurisdiction is without foundation. As I shall demonstrate, the attempt to invoke the reservation, in the way Japan does, ignores both the actual wording and the context in which the reservation was made. It involves a completely artificial and strained attempt to find a link between the dispute about whaling under the 1946 Convention and the completely separate issue of maritime delimitation. No such link exists. Yet without such a link the Japanese argument must fail.

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[72]CMJ, para. 1.15.

The law concerning declarations

12. The law concerning the interpretation of optional clause declarations is not in dispute — rather, the disagreement between Australia and Japan is over the application of the law to the reservation given the facts of this case. The relevant principles of law are set out in the *Fisheries Jurisdiction* case[73] quoted by Japan in its Counter-Memorial[74].

13. In that case and in other cases this Court has emphasized two things:

(a) all elements in a declaration are to be read as a whole and interpreted as a unity having regard to the words used;

(b) the intention of the depositing State at the time it accepted the compulsory jurisdiction is relevant.

14. As the Court knows, optional clause declarations are *sui generis* — they are unilateral declarations while simultaneously giving rise to consensual relations between States. They are not treaties, so it is not the mutual intention of the parties but that of the depositing State that is relevant.

15. Thus, in the *Anglo-Iranian* case the Court said:

> "The Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention of the Government . . . at the time when it accepted the compulsory jurisdiction of the Court."[75]

16. Hence, the Court must clearly consider the text against the intention that lies behind it. So let me, therefore, first provide this Court with some background on the Australian intent.

The intent of Australia

17. Australia's declaration was made at the same time as it made a reservation under the United Nations Convention on the Law of the Sea, in relation to maritime delimitation[76]. And Japan has set out at Annexes 166 and 167 of the Counter-Memorial, the press release issued by the

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[73] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 452-454.

[74] CMJ, para. 1.16.

[75] *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 104; see also *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 454, para. 49; see also *MV Louisa* case (*St Vincent and Grenadines* v. *Spain)*, ITLOS Case 18, 28 May 2013, para. 82.

[76] United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, 1833 *UNTS* 3 (entered into force 16 November 1994); Declaration of Australia, 22 March 2002.

Australian Government and evidence by Australian Government officials to a parliamentary committee explaining the reason for the declaration. What these documents demonstrate without a doubt is that paragraph *(b)* of the Australian declaration concerned disputes about delimitation of maritime boundaries, including disputes connected to such delimitation.

18. Japan seizes on references in these documents to the Antarctic to conclude that the reservation concerned maritime zones generated by the Australian Antarctic Territory[77]. And so it does, in the sense that the reservation covers all of Australia's potential maritime delimitation situations. That is precisely the point — Australia's reservation concerns disputes about or connected to maritime delimitation.

19. The fundamental policy behind the reservation was Australia's belief that its overlapping maritime claims are best resolved by negotiations. Ministers at the time emphasized this in the press release I have just referred to and Australia had long pursued that policy and had already concluded a number of maritime boundary agreements, including some with innovative solutions which could only be achieved through negotiation.

20. To gain a greater understanding of Australia's intention in making the declaration, it is instructive to consider the maritime boundaries that had yet to be concluded at the time the declaration was made. At that time — in 2002 — Australia was in active negotiations over the maritime boundaries with New Zealand and Timor-Leste. Again, the Australian Government press release made reference to these outstanding boundary delimitations as well as to possible delimitation with claimant States to Antarctic Territory abutting Australia's Antarctic Territory — that is, Norway, France and New Zealand.

21. So the Court should be under no illusion — at the time the reservation was made, the intention of Australia was focused on ensuring maritime delimitation issues were resolved by negotiation. This intent is clear in the statements of Australian Government Ministers and officials.

22. In relation to New Zealand, Australia had been negotiating for a considerable time over continental shelf and exclusive economic zone boundaries. The relevant delimitations involved geographic situations where a simple median line may not have been the only obvious outcome and

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[77]CMJ, para. 1.32.

there had even been speculation about a possible International Court case. In fact, an agreement was concluded with New Zealand in 2004 — and, indeed, it did not involve a simple median line[78] — but in 2002 Australia was obviously conscious of these negotiations when drafting its reservation[79].

23. The intent of the reservation is also evident if one considers the situation Australia faced in its maritime delimitation negotiations with Timor-Leste. Two months after the reservation was made Timor-Leste became independent. Before that it was already clear that Australia was not faced with a simple negotiation with Timor-Leste to draw a delimitation line in the "Timor Gap". This was the area covered by the previous treaty with Indonesia, dealt with by a joint development zone, that was raised in this Court in the *East Timor* case[80].

24. The Court need not be troubled by the detail of the proposed arrangements with Timor-Leste. They were, however, complex. For example, the negotiations with Timor-Leste went far beyond a straightforward delimitation and involved the negotiation of resource sharing arrangements that ultimately took the form of three treaties between Australia and Timor-Leste. There was to be no simple substitution of Timor-Leste for Indonesia in the previous arrangements that Australia had concluded with Indonesia. Rather, at the same time as Australia was amending its optional clause declaration, American oil companies, with interest in exploiting areas off Timor-Leste, were telling anyone who would listen that they had legal advice that Timor-Leste could properly claim not just a share of the resources within the former joint zone but also in areas which lay outside its boundaries, including areas already being exploited by Australia[81]. This put at risk existing resource exploitation by Australia. This situation was clearly in the mind of those drafting the Australian reservation.

25. Given the complexity of the then current negotiations involving delimitations with New Zealand and Timor-Leste, it is not surprising that Australia chose language in its reservation to

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[78]Treaty between the Government of Australia and the Government of New Zealand Establishing Certain Exclusive Economic Zone Boundaries and Continental Shelf Boundaries, ATS 2006, No. 4; 2441 *UNTS* 235 (entered into force 25 January 2006).

[79]Press Release, CMJ, Ann. 166.

[80]*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90.

[81]See Hamish McDonald, "Timor gas billions all at sea" (*Sydney Morning Herald*, 27 March 2002). Available at: http://www.smh.com.au/articles/2002/03/26/1017089535182.html.

cover all the potentially associated disputes that can arise in a delimitation situation as between the parties to the delimitation. It therefore chose comprehensive language, namely disputes "arising out of, concerning or related to the exploitation of any disputed area" or areas adjacent thereto. That language makes perfect sense in the context of delimitation situations with complexities, such as those with New Zealand and Timor-Leste. It makes no sense to try and apply it to a dispute that is not a dispute between the actual parties to a maritime delimitation, let alone a dispute completely unrelated to maritime delimitation. The context I have mentioned also makes clear that the exploitation under contemplation was exploitation of resources covered by a potential delimitation arrangement and not any exploitation unrelated to that delimitation situation that happens to occur in the relevant geographic area.

26. It is true, as Japan mentions, that the revised optional clause reservation is not expressly linked or confined to matters concerning Timor-Leste and New Zealand. Rather, as I have mentioned, Ministers emphasized that Australia was of the strong view that all its maritime boundary issues are best resolved by negotiation rather than litigation. It was in that context that references were made to other outstanding boundary delimitations, including those with other States with claims to parts of the Antarctic continent abutting the Australian Antarctic Territory.

The words themselves

27. Having outlined the intent behind the reservation, I turn now to the reservation "as it stands"[82] in light of that intention and I remind the Court that the words can be found, in your folder, and they are again on your screen.

28. The first word Japan seizes upon is the word "or" where it ~~first~~ second appears in a paragraph[83]. Japan seeks to read this reservation as consisting of two distinct and unrelated parts divided by the word "or". [Screen on — Text of reservation with "or" highlighted]. And the "or" that should be highlighted is the ~~first~~ second "or", not the ~~second~~ third "or" on your screens.

29. The dispute before the Court, as has been outlined, has no element and in no way depends on or involves any delimitation, nor does it require this Court to identify any area to be

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[82] *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 105 and quoted in *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 454.

[83] CMJ, para. 1.18.

delimited. And the second part of the reservation, properly interpreted, is clearly tied to the first part of the reservation. The use of "or" in this context clearly does not require or contemplate an interpretation that treats this reservation as containing two separate and completely unrelated parts. If that were so the second and separate element alleged by Japan would undoubtedly have formed a completely separate paragraph. [Screen off]

30. The second part of the reservation refers also directly back to the first part, in its reference to "*such* maritime zone pending its delimitation". And you can see that on the screen with the word *"such"* highlighted [Screen on — Reservation with *"such"* highlighted]. Those words at the end are clearly connected to the first part of the reservation — the term "such" referring to something previously indicated[84]. And so the purpose of the second part of paragraph *(b)* is clear — it is to make clear the reservation extends beyond disputes over delimitation of maritime zones per se, to associated disputes concerning exploitation of resources that may arise between the States with overlapping maritime claims pending delimitation. [Screen off]

31. The ordinary meaning of the reservation is that it excludes disputes concerning or relating to delimitation and any associated disputes that arise out of, concern or relate in some way to the pending delimitation *as between* the countries concerned.

32. Japan tries another strange interpretive technique. It seeks to divide the second part of the reservation into three separate components[85]. It says that the word "exploitation" only attaches to the last element, namely disputes relating to the exploitation of the disputed area. And again the reservation is on your screen and you can see the word "exploitation" [Screen on — reservation with "exploitation" highlighted]. Japan says that "exploitation" only qualifies the term "relating to" and does not qualify, or have any connection with, the previous words of "arising out of" and "concerning". This interpretation does not read the words "as a unity"[86], and does not accord with Australia's clear intention. In the National Interest Analysis submitted to the Parliamentary Committee on Treaties the expanded part of the reservation was described in shorthand as

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[84] *Macquarie Concise Dictionary* (Sydney, 5th ed., 2009), p. 1260.

[85] CMJ, para. 1.28.

[86] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 453.

excluding disputes "concerning the exploitation of an area in dispute or adjacent to an area in dispute". That is, the official document used to explain the Declaration to Australia's Parliament made an express connection between the word "concerning" and the word "exploitation" and indeed used them in a composite phrase "concerning the exploitation of". Yet Japan would have the Court defy the plain reading of the Declaration, the plain reading of which inexorably leads to the word "exploitation" qualifying all the words "arising out of", "concerning" or "relating to".

33. Japan also seeks, in any event rather awkwardly, to fit the present dispute within the word "exploitation". It does so in what can only be described as a bizarre manner in so far as it expressly assumes other parts of its own case are wrong. First, it says that Australia's argument alleges "commercial whaling" which is "exploitation"[87]. Japan says elsewhere that it is not conducting commercial whaling. Secondly, Japan contends that JARPA II as a program of "research", is "an element of the process leading to exploitation" and hence is covered by the reservation[88].

34. Mr. President, scientific research can be of significance for future exploitation of resources, but that does not mean that a dispute over whether an activity amounts to scientific research is a dispute about exploitation. More importantly, as already mentioned, the major flaw in Japan's interpretation is that it seeks to apply the "exploitation" component of the reservation divorced from any delimitation context. And, as I have said repeatedly, this case does not involve a maritime delimitation dispute. Yet that is what the words of the second part of the reservation, read as a whole, clearly indicate must be present, its: "exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation". Japan is a State with no delimitation dispute with Australia. And it is involved in a dispute in this Court that does not depend in any way on the status of the waters where the activity occurs. [Screen off]

35. Japan seeks to suggest that the dispute before this Court is in some way connected or related to Australia's Antarctic Territory and adjacent maritime zones. And in its Counter-Memorial Japan provides a potted history of this issue[89], including domestic Australian

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[87]CMJ, para. 1.22.

[88]CMJ, para. 1.25.

[89]CMJ, paras. 1.3-1.55.

law. This is entirely irrelevant. Japan itself concedes that "Australia's maritime claims are not the subject-matter of the present dispute"[90]. Yet Japan goes on and says that:

> "The legality of Australia's claims to sovereignty in the Antarctic and of its claim to an EEZ off the so-called AAT . . . are not the issues of which the Court is seised. For the purposes of determining its (lack of) jurisdiction, it suffices for the Court to determine that these claims exist, that they have not been resolved, and that their extent covers a geographic area in which or adjacent to which the JARPA II programme is operating."[91]

36. The second sentence I have just quoted concerning the determination of the Court's jurisdiction by reference to the geographic area in which JARPA II operates is an extraordinary statement — it appears that on the Japanese view any dispute Australia may have with a State is excluded by reservation *(b)* if it somehow relates to occurrences in an area with unresolved maritime claims, regardless of whether the status of this area or its pending delimitation is in any way relevant to the dispute and regardless of whether the State in question has any potential involvement in the delimitation.

37. I stress that the Court should firmly resist Japan's invitation to inquire into maritime zone claims that Australia may or may not have made in the Southern Ocean or the way it deals with these issues in domestic law. The HSI case involving Australian domestic law, referred to by Japan[92], is just that — a matter of domestic law unconnected to the treaty law dispute before this Court. And these are all matters entirely irrelevant and provide no support for the attempt by Japan to invoke the reservation.

38. In order to be covered by the reservation, the situations or facts as described in the reservation, and in regard to which a particular dispute is said to have arisen, must be "the real cause" of the dispute before the Court[93]. Or, applying the test noted in the *Fisheries Jurisdiction* case, and quoted by Japan[94], only disputes that would not have come into being in the absence of the measures described in the reservation, are covered by the reservation. As the Law of the Sea Tribunal recently recognized, for a dispute to concern something it must have a bearing on that

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[90]CMJ, para. 1.43.

[91]CMJ, para. 1.45.

[92]CMJ, paras. 1.48-1.53.

[93]*Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77,* p. 82.

[94]CMJ, para. 1.20.

thing or be connected with it[95]. The dispute before the Court concerning compliance of JARPA II with the whaling Convention exists whether or not Australia asserts maritime zones adjacent to Antarctica and irrespective of any delimitation with adjacent claimants.

39. Yet the Japanese interpretation of the reservation would extend it to disputes far, far removed from its clearly intended purpose. In this regard one can think of a hypothetical dispute which, on the Japanese view, would be excluded by Australia's reservation.

40. So let us take an example. Imagine a dispute between Australia and another State over a marine pollution incident in waters south of 60° S. Treaty obligations which bind Australia and the other State prohibit the discharge of noxious liquid substances in the whole of that area; without any distinction as to the status of the waters in question. Australia is in dispute with the other country as to its compliance with this particular treaty obligation as a consequence of the activities of a vessel of the other State discharging noxious liquid substances in the Southern Ocean below 60° S, including in areas within Australia's proclaimed exclusive economic zone.

41. In that hypothetical example, the dispute is clearly over compliance with a pollution convention obligation that applies in all of the relevant Southern Ocean, irrespective of whether the waters are within or beyond national jurisdiction. Yet, on Japan's interpretation of Australia's reservation, the jurisdiction of this Court, assuming it otherwise existed, would be excluded if Australia sought to bring proceedings. Why would this be so? Japan would say that, if part of the passage of a vessel, when it is alleged to have discharged noxious liquid substances, was through an area subject to an exclusive economic zone claim by Australia, that is sufficient for the reservation to operate because there are unresolved maritime claims in the area.

42. In Australia's submission this analysis of the reservation by Japan can only be described as far-fetched. The hypothetical dispute in no way turns on the status of the waters or any claim to those waters. Nor is it in any way connected to or concerned with delimitation of the waters in question. Japan's attempt to invoke the Australian reservation in the case of whaling alleged to be contrary to Article VIII of the 1946 Convention is equally as far removed from both the intent and the words of the reservation as in this hypothetical example.

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[95]The *M/V "Louisa"* case *(Saint Vincent and the Grenadines* v. *Kingdom of Spain)*, International Tribunal for the Law of the Sea, Order of 28 May 2013, para. 83.

43. That this interpretation by Japan is wrong is reinforced by its complete failure to focus on the words "pending its delimitation" at the end of the reservation. [screen on — text of reservation with "pending its delimitation" highlighted] "Delimitation", in a maritime context, has a well understood meaning. It relates to the fixing of boundaries between neighbouring States, whether adjacent or opposite[96]. By contrast, one talks of delineation of seaward limits and determination of baselines[97]. If one reads all the words of the reservation as a unity they confirm that the words in no way apply to a dispute between Australia and a State in relation to a multilateral convention that imposes obligations regardless of the status of the waters in question, particularly a dispute involving a State with whom there is no pending delimitation.

44. In summary, Japan's attempt to invoke Australia's reservation in this case fails because it seeks to apply the reservation in a context completely divorced from its words. The words make clear that delimitation is what the reservation is about. It extends to associated disputes between the States involved in the delimitation, including those concerning exploitation of resources, pending delimitation. It is, however, confined to such situations. The dispute before this Court has nothing to do with delimitation and the reservation is irrelevant. The dispute would be unchanged in all respects even if pending delimitations were resolved. [screen off]

Conclusion

45. Mr. President, the nature of the dispute under the 1946 Convention is clear, as you have now heard in some detail. It is entirely unrelated to maritime delimitation. The reservation sought to be invoked by Japan, having regard to both its intent and the words used, does not apply to this dispute. The Japanese argument on jurisdiction should be rejected.

46. Mr. President, the Solicitor-General would propose to close this first round of presentations with a few brief remarks. If the Court pleases.

The PRESIDENT: Thank you, Mr. Burmester. Certainly, the Court would be pleased to hear *brief* concluding remarks from the first round. You have the floor, Mr. Solicitor-General.

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[96]Johnston and Saunders, *Ocean Boundary Making* (1988), p. 9; S.P. Jagota, *Maritime Boundary*, 1985, p. 3; Prosper Weil, *The Law of Maritime Delimitation* (1989), p. 1, 5.

[97]UNCLOS, Art. 3, 76 (7).

Mr. GLEESON:

CONCLUDING SPEECH — AUSTRALIA'S CASE

1. Mr. President, I have never before succeeded in being brief, but I understand today I must. Thank you to you and the Members of the Court for your kind attention to our presentation of Australia's opening arguments. May I say, it has been a pleasure for all of counsel to appear in the calm and dignity of this great Court and I might say, incidentally, to avoid the tumult and shouting back home in Australia. It remains only for me to mention those few brief remarks. We have attempted in these three days to bring together five strands of argument in order to produce the conclusion that JARPA II is in breach of the Convention.

2. Those strands have first involved an analysis of the Convention itself in establishing the comprehensive regulatory framework based on a collective approach founded on a common interest. Our argument has ranged over the effect of the Schedule, the effect of the Guidelines and an emphasis on object and purpose.

3. Our second key point has concerned that Article VIII itself is not self-judging, nor self-contained and we have offered you the limits which must be placed on that Article.

4. Thirdly, we have presented our argument why, as a matter of law and fact, JARPA II does not satisfy the objective requirements of Article VIII. That has included our expert testimony.

5. Fourthly, as Professor Crawford has elaborated upon this morning, not only does JARPA II lack the essential characteristics of science, it displays the positive characteristics which can be accounted for only as a commercial whaling operation.

6. And finally this morning I have reviewed that same material but, in particular, Japan's dealing with the IWC through the prism of good faith and abuse of right.

7. Finally, Mr. President could I recognize that some of Australia's submissions have involved trenchant criticism of certain aspects of Japan's conduct in JARPA II. We have made those criticisms in the course of presenting our case in a matter of significant importance to both of our countries and, we would suggest, to the international legal framework in environmental and conservation matters generally. The position remains, however, as was stated by Mr. Campbell at the commencement of this case that Australia has an excellent relationship with Japan and, while it

has been necessary to put this case as strongly and clearly as we have, it is the resolution of the dispute by this Court which will enhance that relationship between our countries.

8. Mr. President, I trust I have succeeded in meeting your opening admonition. That is the oral argument for Australia.

The PRESIDENT: Thank you very much, Mr. Solicitor-General. Indeed it brings to an end Australia's first round of oral argument. The Court will meet again on Tuesday 2 July between 15.00 and 18.00 p.m. to hear Japan begin its first round of oral argument. Thank you, the Court is adjourned.

The Court rose at 12.20 p.m.