Corrigé
Corrected

CR 2013/17

International Court of Justice

LA HAYE

Cour internationale de Justice

THE HAGUE

YEAR 2013

Public sitting

held on Monday 8 July 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 lundi 8 juillet 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))**

COMPTE RENDU

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

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

M. Couvreur, greffier

The Government of Australia is represented by:

The Honourable Mark Dreyfus Q.C., M.P., Attorney-General of Australia,

as Counsel and Advocate;

Mr. Bill Campbell, Q.C., General Counsel (International Law), Attorney-General's Department,

as Agent, Counsel and Advocate;

H.E. Mr. Neil Mules, A.O., Ambassador of Australia to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Justin Gleeson, S.C., Solicitor-General of Australia,

Mr. James Crawford, A.C., S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institut de droit international, Barrister, Matrix Chambers, London,

Mr. Henry Burmester, A.O., Q.C., Special Counsel, Australian Government Solicitor,

Mr. Philippe Sands, Q.C., Professor of Law, University College London, Barrister, Matrix Chambers, London,

Ms Laurence Boisson de Chazournes, Professor of International Law at the University of Geneva,

as Counsel and Advocates;

Ms Kate Cook, Barrister, Matrix Chambers, London,

Dr. Makane Mbengue, Associate Professor, University of Geneva,

as Counsel;

Ms Anne Sheehan, Acting Assistant-Secretary, Attorney-General's Department,

Mr. Michael Johnson, Principal Legal Officer, Attorney-General's Department,

Ms Danielle Forrester, Principal Legal Officer, Attorney-General's Department,

Ms Stephanie Ierino, Acting Principal Legal Officer, Attorney-General's Department,

Ms Clare Gregory, Senior Legal Officer, Attorney-General's Department,

Ms Nicole Lyas, Acting Senior Legal Officer, Attorney-General's Department,

Ms Erin Maher, Legal Officer, Attorney-General's Department,

Mr. Richard Rowe, Senior Legal Adviser, Department of Foreign Affairs and Trade,

Dr. Greg French, Assistant Secretary, Department of Foreign Affairs and Trade,

Le Gouvernement de l'Australie est représenté par :

L'honorable Mark Dreyfus, Q.C., M.P., *Attorney-General* d'Australie,

comme conseil et avocat ;

M. Bill Campbell Q.C., General Counsel (droit international), services de l'*Attorney-General* d'Australie,

comme agent, conseil et avocat ;

S. Exc. M. Neil Mules, A.O., ambassadeur d'Australie auprès du Royaume des Pays-Bas,

comme coagent ;

M. Justin Gleeson, S.C., *Solicitor-General* d'Australie,

M. James Crawford, A.C., S.C., F.B.A., professeur de droit international à l'Université de Cambridge, titulaire de la chaire Whewell, membre de l'Institut de droit international, avocat, Matrix Chambers (Londres),

M. Henry Burmester, A.O., Q.C., *Special Counsel*, *Solicitor* du Gouvernement australien,

M. Philippe Sands, Q.C., professeur de droit au University College de Londres, avocat, Matrix Chambers (Londres),

Mme Laurence Boisson de Chazournes, professeur de droit international à l'Université de Genève,

comme conseils et avocats ;

Mme Kate Cook, avocat, Matrix Chambers (Londres),

M. Makane Mbengue, professeur associé à l'Université de Genève,

comme conseils ;

Mme Anne Sheehan, secrétaire adjoint par intérim, services de l'*Attorney-General*,

M. Michael Johnson, juriste principal, services de l'*Attorney-General*,

Mme Danielle Forrester, juriste principal, services de l'*Attorney-General*,

Mme Stephanie Ierino, juriste principal par intérim, services de l'*Attorney-General*,

Mme Clare Gregory, juriste hors classe, services de l'*Attorney-General*,

Mme Nicole Lyas, juriste hors classe par intérim, services de l'*Attorney-General*,

Mme Erin Maher, juriste, services de l'*Attorney-General*,

M. Richard Rowe, juriste hors classe, ministère des affaires étrangères et du commerce,

M. Greg French, secrétaire adjoint, ministère des affaires étrangères et du commerce,

Mr. Jamie Cooper, Legal Officer, Department of Foreign Affairs and Trade,

Ms Donna Petrachenko, First Assistant Secretary, Department of Sustainability, Environment, Water, Population and Communities,

Mr. Peter Komidar, Director, Department of Sustainability, Environment, Water, Population and Communities,

Dr. Bill de la Mare, Scientist, Australian Antarctic Division, Department of Sustainability, Environment, Water, Population and Communities,

Dr. David Blumenthal, Senior Adviser, Office of the Attorney-General,

Ms. Giulia Baggio, First Secretary, Senior Adviser, Office of the Attorney-General,

Mr. Todd Quinn, First Secretary, Embassy of Australia in the Kingdom of the Netherlands,

as Advisers;

Ms Mandy Williams, Administration Officer, Attorney-General's Department,

as Assistant.

The Government of Japan is represented by:

Mr. Koji Tsuruoka, Deputy Minister for Foreign Affairs,

as Agent;

H.E. Mr. Yasumasa Nagamine, Ambassador Extraordinary and Plenipotentiary of Japan to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, President of the Société française pour le droit international, associate member of the Institut de droit international,

Mr. Vaughan Lowe, Q.C., member of the English Bar, Emeritus Professor of International Law, Oxford University, associate member of the Institut de droit international,

Mr. Alan Boyle, Professor of International Law at the University of Edinburgh, member of the English Bar,

Mr. Yuji Iwasawa, Professor of International Law at the University of Tokyo, member and former Chairperson of the Human Rights Committee,

Mr. Payam Akhavan, LL.M., S.J.D. (Harvard), Professor of International Law, McGill University, member of the Bar of New York and the Law Society of Upper Canada,

Mr. Shotaro Hamamoto, Professor of International Law, Kyoto University,

Ms Yukiko Takashiba, Deputy Director, ICJ Whaling Case Division, Ministry of Foreign Affairs,

as Counsel and Advocates;

M. Jamie Cooper, juriste, ministère des affaires étrangères et du commerce,

Mme Donna Petrachenko, premier secrétaire adjoint, ministère du développement durable, de l'environnement, de l'eau, des populations et des communautés,

M. Peter Komidar, directeur, ministère du développement durable, de l'environnement, de l'eau, des populations et des communautés,

M. Bill de la Mare, scientifique, division de l'Antarctique australien, ministère du développement durable, de l'environnement, de l'eau, des populations et des communautés,

M. David Blumenthal, conseiller principal, services de l'*Attorney-General*,

Mme Giulia Baggio, conseiller principal, services de l'*Attorney-General*,

M. Todd Quinn, premier secrétaire, ambassade d'Australie au Royaume des Pays-Bas,

comme conseillers ;

Mme Mandy Williams, administrateur, services de l'*Attorney-General*,

comme assistant.

Le Gouvernement du Japon est représenté par :

M. Koji Tsuruoka, ministre adjoint des affaires étrangères,

comme agent ;

S. Exc. M. Yasumasa Nagamine, ambassadeur extraordinaire et plénipotentiaire du Japon auprès du Royaume des Pays-Bas,

comme coagent ;

M. Alain Pellet, professeur à l'Université Paris Ouest, Nanterre-La Défense, président de la Société française pour le droit international, membre associé de l'Institut de droit international,

M. Vaughan Lowe, Q.C., membre du barreau d'Angleterre, professeur émérite de droit international à l'Université d'Oxford, membre associé de l'Institut de droit international,

M. Alan Boyle, professeur de droit international à l'Université d'Edimbourg, membre du barreau d'Angleterre,

M. Yuji Iwasawa, professeur de droit international à l'Université de Tokyo, membre et ancien président du Comité des droits de l'homme,

M. Payam Akhavan, LL.M., S.J.D (Harvard), professeur de droit international à l'Université McGill, membre du barreau de New York et du barreau du Haut-Canada,

M. Shotaro Hamamoto, professeur de droit international à l'Université de Kyoto,

Mme Yukiko Takashiba, directeur adjoint à la division chargée de l'affaire de la chasse à la baleine devant la CIJ, ministère des affaires étrangères,

comme conseils et avocats ;

Mr. Takane Sugihara, Emeritus Professor of International Law, Kyoto University,

Ms Atsuko Kanehara, Professor of International Law, Sophia University (Tokyo),

Mr. Masafumi Ishii, Director-General, International Legal Affairs Bureau, Ministry of Foreign Affairs,

Ms Alina Miron, Researcher, Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

as Counsel;

Mr. Kenji Kagawa, Director-General, Resources Enhancement Promotion Department, Fisheries Agency,

Mr. Noriyuki Shikata, Minister, Embassy of Japan in the United Kingdom of Great Britain and Northern Ireland,

Mr. Kenichi Kobayashi, Director, International Legal Affairs Division, Ministry of Foreign Affairs,

Mr. Joji Morishita, Director-General, National Research Institute of Far Seas Fisheries,

Mr. Akima Umezawa, Ph.D., Director, Fishery Division, Ministry of Foreign Affairs,

Ms Yoko Yanagisawa, Director, ICJ Whaling Case Division, Ministry of Foreign Affairs,

Mr. Naohisa Shibuya, Deputy Director, ICJ Whaling Case Division, Ministry of Foreign Affairs,

Mr. Ken Sakaguchi, ICJ Whaling Case Division, Ministry of Foreign Affairs,

Ms Akiko Muramoto, ICJ Whaling Case Division, Ministry of Foreign Affairs,

Mr. Masahiro Kato, ICJ Whaling Case Division, Ministry of Foreign Affairs,

Mr. Takaaki Sakamoto, Assistant Director, International Affairs Division, Fisheries Agency,

Mr. Shigeki Takaya, Assistant Director, Fisheries Management Improvement Division, Fisheries Agency,

Mr. Toshinori Uoya, Assistant Director, Fisheries Management Division, Fisheries Agency,

Mr. Shinji Hiruma, Assistant Director, International Management Division, Fisheries Agency,

Mr. Sadaharu Kodama, Legal Adviser, Embassy of Japan in the Kingdom of the Netherlands,

Mr. Nobuyuki Murai, LL.D., First Secretary, Embassy of Japan in the Kingdom of the Netherlands,

M. Takane Sugihara, professeur émérite de droit international de l'Université de Kyoto,

Mme Atsuko Kanehara, professeur de droit international à l'Université Sophia (Tokyo),

M. Masafumi Ishii, directeur général du bureau des affaires juridiques internationales, ministère des affaires étrangères,

Mme Alina Miron, chercheur, Centre de droit international de Nanterre (CEDIN), Université Paris Ouest, Nanterre-La Défense,

comme conseils ;

M. Kenji Kagawa, directeur général du département de la promotion de la valorisation des ressources, agence des pêcheries,

M. Noriyuki Shikata, ministre à l'ambassade du Japon au Royaume-Uni de Grande-Bretagne et d'Irlande du Nord,

M. Kenichi Kobayashi, directeur à la division des affaires juridiques internationales, ministère des affaires étrangères,

M. Joji Morishita, directeur général de l'Institut national de recherche sur les pêcheries en eaux lointaines,

M. Akima Umezawa, Ph.D., directeur à la division des pêcheries, ministère des affaires étrangères,

Mme Yoko Yanagisawa, directeur à la division chargée de l'affaire de la chasse à la baleine devant la CIJ, ministère des affaires étrangères,

M. Naohisa Shibuya, directeur adjoint à la division chargée de l'affaire de la chasse à la baleine devant la CIJ, ministère des affaires étrangères,

M. Ken Sakaguchi, division chargée de l'affaire de la chasse à la baleine devant la CIJ, ministère des affaires étrangères,

Mme Akiko Muramoto, division chargée de l'affaire de la chasse à la baleine devant la CIJ, ministère des affaires étrangères,

M. Masahiro Kato, division chargée de l'affaire de la chasse à la baleine devant la CIJ, ministère des affaires étrangères,

M. Takaaki Sakamoto, sous-directeur à la division des affaires internationales, agence des pêcheries,

M. Shigeki Takaya, sous-directeur à la division de l'amélioration de la gestion des pêcheries, agence des pêcheries,

M. Toshinori Uoya, sous-directeur à la division de la gestion des pêcheries, agence des pêcheries,

M. Shinji Hiruma, sous-directeur à la division de la gestion internationale, agence des pêcheries,

M. Sadaharu Kodama, conseiller juridique à l'ambassade du Japon au Royaume des Pays-Bas,

M. Nobuyuki Murai, LL.D., premier secrétaire de l'ambassade du Japon au Royaume des Pays-Bas,

Ms Risa Saijo, LL.M., Researcher, Embassy of Japan in the Kingdom of the Netherlands,

Ms Héloïse Bajer-Pellet, member of the Paris Bar,

as Advisers;

Mr. Douglas Butterworth, Emeritus Professor, University of Cape Town,

Ms Judith E. Zeh, Ph.D., Researcher Professor Emeritus, University of Washington,

Mr. Dan Goodman, National Research Institute of Far Seas Fisheries,

Mr. Luis Alberto Pastene Perez, Ph.D., Director, Survey and Research Division, Institute of Cetacean Research,

as Scientific Advisers and Experts;

Mr. Martin Pratt, Professor, Department of Geography, Durham University,

as Expert Adviser;

Mr. James Harrison, Ph.D., Lecturer in International Law, University of Edinburgh,

Ms Amy Sander, member of the English Bar,

Mr. Jay Butler, Visiting Associate Professor of Law, George Washington University Law School, member of the New York Bar,

as Legal Advisers.

The Government of New Zealand is represented by:

The Honourable Christopher Finlayson Q.C., M.P., Attorney-General of New Zealand,

as Counsel and Advocate;

Dr. Penelope Ridings, International Legal Adviser, Ministry of Foreign Affairs and Trade,

as Agent, Counsel and Advocate;

H.E. Mr. George Troup, Ambassador of New Zealand to the Kingdom of the Netherlands,

as Co-Agent;

Ms Cheryl Gwyn, Deputy Solicitor-General, Crown Law Office,

Ms Elana Geddis, Barrister, Harbour Chambers, Wellington,

as Counsel;

Mr. Andrew Williams, Legal Adviser, Ministry of Foreign Affairs and Trade,

Mme Risa Saijo, LL.M., chercheur à l'ambassade du Japon au Royaume des Pays-Bas,

Mme Héloïse Bajer-Pellet, membre du barreau de Paris,

comme conseillers ;

M. Douglas Butterworth, professeur émérite de l'Université de Cape Town,

Mme Judith E. Zeh, Ph.D., chercheur, professeur émérite de l'Université de Washington,

M. Dan Goodman, Institut national de recherche sur les pêcheries en eaux lointaines,

M. Luis Alberto Pastene Perez, Ph.D., directeur à la division des enquêtes et de la recherche, Institut de recherche sur les cétacés,

comme conseillers et experts scientifiques ;

M. Martin Pratt, professeur au département de géographie de l'Université de Durham,

comme conseiller expert ;

M. James Harrison, Ph.D., chargé de cours en droit international à l'Université d'Edimbourg,

Mme Amy Sander, membre du barreau d'Angleterre,

M. Jay Butler, professeur associé invité de droit à la faculté de droit de l'Université George Washington, membre du barreau de New York,

comme conseillers juridiques.

Le Gouvernement de la Nouvelle-Zélande est représenté par :

L'honorable Christopher Finlayson, Q.C., M.P., *Attorney-General* de Nouvelle-Zélande,

comme conseil et avocat ;

Mme Penelope Ridings, conseiller juridique pour le droit international, ministère des affaires étrangères et du commerce,

comme agent, conseil et avocat ;

S. Exc. M. George Troup, ambassadeur de Nouvelle-Zélande auprès du Royaume des Pays-Bas,

comme coagent ;

Mme Cheryl Gwyn, *Solicitor-General* adjoint, Crown Law Office,

Mme Elana Geddis, avocat, Harbour Chambers (Wellington),

comme conseils ;

M. Andrew Williams, conseiller juridique, ministère des affaires étrangères et du commerce,

Mr. James Christmas, Private Secretary, Attorney-General's Office,

Mr. James Walker, Deputy Head of Mission, Embassy of New Zealand in the Kingdom of the Netherlands,

Mr. Paul Vinkenvleugel, Policy Adviser, Embassy of New Zealand in the Kingdom of the Netherlands,

as Advisers.

M. James Christmas, chef de cabinet, services de l'*Attorney-General*,

M. James Walker, chef de mission adjoint, ambassade de Nouvelle-Zélande au Royaume des Pays-Bas,

M. Paul Vinkenvleugel, conseiller politique, ambassade de Nouvelle-Zélande au Royaume des Pays-Bas,

comme conseillers.

The PRESIDENT: Please be seated. Good morning. The sitting is open. The Court meets this morning to hear New Zealand give its oral observations on the subject-matter of its intervention. Thus I shall now give the floor to Dr. Ridings, the Agent. You have the floor, Madam.

Ms RIDINGS:

[Slide 1: logo]

1. Mr. President, Members of the Court, it is a great honour and privilege for me to appear before this Court on behalf of my country.

2. Mr. President, New Zealand appears here today because of our systemic interest in ensuring that the Convention at issue in this dispute is properly interpreted and applied.

3. New Zealand was a founding member of the International Whaling Commission and participates actively in its work. We recognize that this Court's decision will have significant implications for all members of the IWC. As a party to the Convention we wish to place before the Court what we believe to be the correct interpretation of the obligations under the Convention. In doing so, we acknowledge that the points we make may differ in substance or in emphasis from those of the Parties — that is entirely to be expected.

4. At the same time, we accept that we will be bound by the construction of the Convention that the Court determines in this case. But we are confident that the Court will be mindful of the need for the members of the IWC to work together constructively in the future — and, to that end, that its decision will assist in bringing about a meaningful and effective settlement to this long-standing issue.

Historical context

5. Mr. President, this case takes place within its distinct historical context. An understanding of this context is key to the interpretation of the Convention. Whaling in the Antarctic has had a chequered and controversial past. Rampant over-exploitation, particularly prior to World War II, led to significant declines in whale stocks. Calls to take international action to address this came in

the early 1930s. [Slide 2: quote] Let me recall the words spoken by the British Minister at the opening of the International Conference on Whaling in 1937, which is on the screen in front of you:

> "The path of conservation is beset by many difficulties, but as we are all gathered to pursue a common object, I hope that your united efforts will find a way through or over these difficulties, and that we may reach an agreement which will be beneficial for us all, and which because of its reasonableness and its practical character, may induce those who are not with us today to work with us in the near future."[1]

6. Those words are as true today as when they were spoken in 1937. [Slide 3: logo] While an Agreement was reached at the 1937 Conference, the Final Act foreshadowed that the purpose of the agreement could be defeated by unregulated whaling by other countries[2]. And it was. It was not until the post-World War II era that the time was ripe for countries involved in whaling to come together — in the words of its US sponsor — to advance the "international cooperative effort in whale conservation"[3]. The result of their common endeavour was the conclusion of the Convention and the establishment of the International Whaling Commission.

7. During the initial years of the IWC, the action taken to protect whale stocks may be characterized as too little, too late. Professor Iwasawa characterized the 1960s as the "*heyday* of commercial whaling"[4], but it was this insensitivity to conservation that was one of the principal reasons for New Zealand's decision to leave the IWC in 1968[5]. The failure to conserve whales led to strong international concern, not only for whale stocks, but for the conservation and management of shared resources. The IWC responded positively to these concerns in recognition of the fact that natural resources are not unlimited. It was this responsiveness, and the confidence that the IWC could fulfil its objective of collective regulation, that led New Zealand to re-join in 1976[6]. However the collective sense of optimism that followed the 1982 commercial moratorium, and the

---

[1]Minister's Speech at the Opening of the Conference, International Conference on Whaling I.C.W./1937/3; CMJ, Vol II, Ann. 7, p. 101.

[2]*Final Act of the Agreement for the Regulation of Whaling, 1937*, (1940) 34 *AJIL*, p.112; CMJ, Vol. II, Ann. 13, p. 119.

[3]International Whaling Conference, Washington DC, 1946, Minutes of the Opening Session, IWC/11; 20 Nov. 1946; CMJ, Vol. II, Ann. 16, p. 129.

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

[5]International Whaling Commission, Verbatim Records, IWC 28 21-25 June 1976, pp. 10-14, at http://download.iwc.int/verbatim/pdf/VR_1976_28th.pdf (accessed 29 June 2013).

[6]*Ibid.*

Japanese withdrawal of its objection to the moratorium in 1986, was soon dispelled by the decision of Japan to initiate the JARPA programme in 1987.

8. Japanese special permit whaling continues to be controversial within the IWC, not least because of the decision to proceed ahead with JARPA II, without a proper review of JARPA. The common purpose of those parties, which came together in 1946 to conclude the Convention, has been overshadowed by this controversy. And it is inhibiting the effective operation of the IWC.

9. Mr. President, this historical context informs the understanding of the object and purpose of the Convention, and is central to this case. The drafters of the Convention intended to replace unilateral whaling with a system of collective regulation. This object and purpose will be expanded upon by the Attorney-General. He will also address the role of Article VIII within this system of collective regulation, and the central requirement that Article VIII permits whaling only "for purposes of scientific research".

10. I will then address two further requirements placed on Contracting Governments which issue special permits under the Convention. These are that the number of whales to be killed under special permit must be necessary and proportionate, and that the Convention imposes a duty of meaningful co-operation upon those Governments.

11. Mr. President, Members of the Court, I thank you for your attention. I now request that you give the floor to the Attorney-General, the Honourable Christopher Finlayson.

The PRESIDENT: Thank you very much, Madam. Now I call on the Honourable Christopher Finlayson, Attorney-General of New Zealand. You have the floor, Sir.

Mr. FINLAYSON:

THE OBJECT AND PURPOSE OF THE CONVENTION AND THE ROLE OF ARTICLE VIII FOR SCIENTIFIC RESEARCH

1. Mr. President, Members of this Court, this is the first time I have had the honour to appear before this Court, and I have the particular privilege to do so as counsel on behalf of my country.

2. Mr. President, Article VIII, and particularly the first paragraph of that Article, is at the heart of the legal dispute in this case. My task today is to address the role of that provision within

the Convention as a whole. That is, a provision that was created exclusively for, and limited to, the purposes of genuine scientific research, that forms an integral part of the Convention, and that must necessarily be interpreted and applied in a manner consistent with the Convention as a whole.

3. I will address three points:

(a) First, the object and purpose of the Convention, which is to establish a system of collective regulation for the conservation and management of whales;

(b) Second, the role of Article VIII as an integral part of that system of collective regulation; and

(c) Third, the requirement that whaling under Article VIII be conducted exclusively "for purposes of scientific research".

The object and purpose of the Convention

4. I turn first to the object and purpose of the Convention.

5. Mr. President, the Agent has outlined the historical context to the development of the Convention. The Convention arose from the recognition by its negotiating parties that they had a shared interest in the long-term future of whale stocks. That shared interest could never be secured by individual States acting alone. As the nineteenth and early twentieth centuries show, the unrestricted freedoms of the high seas descended into the tragedy of the commons. The negotiating States recognized that the only way to achieve the long-term future of whale stocks was to work together. Putting aside their individual interests, the negotiators of the Convention decided to replace unilateral whaling with a system of collective regulation. They agreed to constrain their traditional high seas freedoms through a system of joint co-operation, so as to provide for the proper long-term conservation and management of whales.

The object and purpose recorded in the Preamble to the Convention

6. The object and purpose is clearly recorded in the Preamble to the Convention. [Slide 4: Preamble]

7. Paragraph 1 begins by recognizing "the interest of the nations of the world in safeguarding for future generations the great natural resources represented by whale stocks".

8. The Preamble then records that: "it is essential to protect all species of whales from further over-fishing"; that whale stocks may be restored "if whaling is properly regulated"; that

there is a "common interest" in the revitalization of whale stocks; and, therefore, that "whaling operations should be confined".

9. The objective of the negotiating parties in light of those considerations was clear. As stated in paragraph 6, they desired "to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks".

10. To that end, the Preamble concludes, the parties "decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry".

11. Mr. President, Japan has tried to make much of that final preambular paragraph. In their submission everything turns on the final clause and the words "and thus". Under Japan's interpretation, the object and purpose of the Convention is contained in those ten words, so that the Convention is solely a vehicle for the "optimum utilization" of whales through commercial whaling[7] — nothing more than an industry "cartel"[8].

12. To adopt that reading would be to distort the sense of the Preamble as a whole. It extracts those few words from the Preamble at the expense of everything that comes before — not least the preceding paragraph, which is clear that the objective of the parties was to "establish a system of international regulation of the whale fisheries to ensure proper and effective conservation and development of whale stocks". "Whale stocks", that is, not "the whaling industry". [Slide 5: logo]

13. The object and purpose of the Convention thus cannot be reduced to the protection of commercial whaling. States may have, and do have, differing individual interests with respect to whales and whaling. The purpose of the Convention was to provide a system through which those individual interests could be managed and resolved in the light of the greater shared interest of the parties in the long-term future of whale stocks. That shared interest would be achieved not through unilateral action, but by a comprehensive system of collective regulation.

---

[7]CMJ, para. 6.11; WOJ, para. 19; CR 2013/13, p. 59, para. 63 (Boyle).

[8]CR 2013/12, p. 44, para. 19 (Akhavan).

14. That system is not "super-imposed on a pre-existent freedom of whaling" as Japan seeks to persuade you[9]. It represents a conscious and deliberate decision on the part of its parties to *constrain* that freedom, so as to secure their shared interest in the long-term future of whale stocks.

The object and purpose reflected in the scheme and structure of the Convention

15. That object and purpose is also reflected in the scheme and structure of the Convention as a whole.

16. The Convention covers all whaling by its parties, whether it is industrial commercial whaling, aboriginal subsistence whaling, or whaling for the purposes of scientific research[10]. A collective organization is established to set the rules under which whaling may be conducted: the International Whaling Commission[11]. Membership of the Commission is universal. It is open for all countries to join, whether they have a whaling industry or not[12]. The Commission is empowered to adopt regulations to control whaling activities[13] and to make recommendations "on any matters which relate to whales or whaling"[14]. In so doing , the Commission must consider a wide range of factors[15]. All decisions of the Commission are taken collectively by a vote of its members[16]. And the regulations so adopted are binding on members of the Commission[17]. This is far from a "tyranny of the majority" as Japan has repeatedly alleged[18]. To the contrary, a specific reservation mechanism has been included in the Convention so that a member may opt out of a decision where it feels that its individual interests have not been sufficiently protected[19]. That is the proper mechanism for a State to use where it disagrees with a decision of the Commission.

---

[9]WOJ, para. 28.

[10]Art. I (2) of the Convention and the Schedule to the Convention.

[11]Arts. III and V of the Convention.

[12]Arts. III and X (2) of the Convention.

[13]Art. V (1) of the Convention.

[14]Art. VI of the Convention.

[15]Art. V (2) of the Convention.

[16]Art. V and VI of the Convention.

[17]Arts. V (3) and Art. IX of the Convention.

[18]CMJ, para. 8.101. See also: CR 2013/12, p. 55, para. 57 (Akhavan); CR 2013/16, p. 61, para. 58 (Pellet).

[19]Art. V (3) of the Convention.

17. Mr. President, those are all of the hallmarks of a collective regulatory régime established to manage the interests of States in relation to common shared stocks. If the goal of the Convention were to protect the whaling industry rather than whale stocks, it would have been structured quite differently. Its membership would be limited to States with an established whaling industry. Decisions under the Convention would be guided solely by industrial considerations. The Commission's functions would centre on economic and financial forecasting and analysis. In short, it would look something like the OPEC Statute[20].

18. But the IWC is not OPEC. It does not look like OPEC and it does not make the same kind of decisions. That is because it is not an industry cartel. To the contrary, the Convention was the first multilateral instrument to have expressly recognized the "interest of the nations of the world" in the proper long-term conservation and management of whale stocks.

19. In light of that interest, whatever their individual interests in whales, parties to the Convention have agreed to work collectively through the Commission and abide by the obligations they have assumed, whether they see whales as an industrial commodity, or as living beings of value in their own right.

Role of Article VIII within the Convention

20. Mr. President, those obligations include those contained in Article VIII, to which I now turn.

21. I will make four points:

(a) First, Article VIII forms an integral part of the system of collective regulation under the Convention, not a free-standing exemption from it.

(b) Second, it provides for Contracting Governments to issue special permits subject to three requirements: they must be issued "for purposes of scientific research"; subject to restrictions as to number; and in accordance with the Convention, including paragraph 30 of the Schedule.

---

[20]Statute of the Organization of the Petroleum Exporting Countries (2006 revision), available at: http://www.opec.org (accessed on 7 July 2013).

(c) Third, the power to issue a special permit must be exercised for the specific purpose for which it is given, in a reasonable way and consistent with the object and purpose of the Convention. It cannot be used to undermine or circumvent the other obligations of the Convention.

(d) Finally, whether those requirements have been met is not subject to any margin of appreciation on the part of the State issuing the special permit, but is a simple question of fact to be determined by the Court in the ordinary way.

Article VIII forms an integral part of the Convention

22. Special permit whaling under Article VIII is part of the fabric of the Convention. It is one of several designated mechanisms for the collection of scientific information relevant to the Commission's work[21]. As such, it does not stand alone as a "free-standing" or "self-contained regime" independent of the Convention as Japan attempts to argue[22].

23. Nor is Article VIII simply an "affirmation" of a right existing under the freedom of the high seas[23]. The freedoms of the high seas are, without question, principles of the greatest pedigree and importance. But they are not the principles in question in this case. The freedoms of the high seas may be exercised only to the extent that they have not been constrained by other, more specific, rules of international law[24]. In this case, those rules are found in the Convention and, specifically, in Article VIII. *That* is the provision which Japan has repeatedly invoked as the legal justification for its whaling activities and *that* is the provision at the centre of this case.

24. As an integral part of the Convention, Article VIII must be interpreted and applied consistently with the Convention's other provisions. It is not a carte blanche allowing a Contracting Government to side-step the rest of the Convention and the other obligations it has

---

[21]See also Arts. IV, VII and VIII (3) & (4).

[22]CMJ, p. 299, para. III.6 and para. 7.8.

[23]WOJ, para. 51; CR 2013/15, p. 15, paras. 7-8 (Lowe).

[24]See, for example, Art. 87 of the *1982* United Nations Convention on the Law of the Sea.

assumed. The parties to the Convention have themselves unanimously confirmed their acceptance of this point[25].

25. This is, and always has been, New Zealand's interpretation of Article VIII[26]. Consistent with that interpretation, New Zealand put forward informal proposals for discussion in 2005 to amend Article VIII[27]. Those proposals sought to constrain more closely the conditions under which special permits could be issued, in the interests of the proper operation of the Convention as a whole.

26. The integral role of Article VIII within the Convention is apparent from the structure of the Article itself. [Slide 6: Art. VIII] Article VIII has four paragraphs. Only the first two relate to special permits. Paragraphs 3 and 4 are broader in scope, relating to scientific information acquired by Contracting Governments more generally. Paragraph 3 includes a specific obligation to report all scientific information to the Commission. On its own terms Article VIII ties directly into the work of the Commission and the system of collective regulation established by the Convention.

27. The integral role is also apparent from the obligations in the Convention for a Contracting Government to submit any special permit to the Scientific Committee for review and comment before it is issued[28], to notify the Commission once the special permit has been issued[29], and to transmit the results of the research to the Commission once it has been completed[30]. [Slide 7: logo] Far from being a "self-contained regime", special permits under Article VIII are inextricably linked to the role of the Commission and the rest of the Convention. That is further reflected in the Commission's active attention to special permits since the earliest days of its work, monitoring the purpose for which special permits have been issued, the type and the value of the

---

[25]IWC Resolution 1986-2 "Resolution on Special Permits for Scientific Research" at preambular paragraph 5: "WHEREAS the killing, taking and treating of whales for purposes of scientific research should only be undertaken in a manner consistent with the principles and in accordance with the provisions of the Convention."; MA, Ann. 43, Vol. II, p. 148.

[26]Statement by New Zealand, Chairman's Report of the 40th Annual Meeting, *Rep. Int. Whal. Commn. 39*, 1989, p. 11: "It considered that the rights under Article VIII are not unfettered and must be exercised in good faith and in light of other provisions of the Schedule." http://iwc.int/cache/downloads/71ca0bcvz44kocs4wgkskggwo/IWC_1989_Thirty-Ninth%20Report%20of%20the%20Commission.pdf.

[27]WOJ, para. 24 and Ann. 4.

[28]Paragraph 30 of the Schedule to the Convention.

[29]Art. VIII (1) of the Convention.

[30]Art. VIII (3) of the Convention.

research to be conducted, and the number of whales to be killed[31]. That practice provides critical context to, and reinforces the interpretation of Article VIII.

Special permits are not an "exemption" from the Convention

28. Japan has put forward a strained interpretation of Article VIII that highlights snippets of the language of the provision at the expense of the whole. It attempts to sew together three pieces of language from the first sentence of paragraph 1 of the Article to construct a blanket exemption from the rest of the Convention, those being the phrases "notwithstanding anything contained in this Convention", "as the Contracting Government thinks fit", and "shall be exempt from the operation of the Convention"[32].

29. Those three phrases need to be given their ordinary meaning in their context. When the first sentence of paragraph 1 of Article VIII is read in its natural sense, it contains three distinct elements:

(a) [Slide 8: Art. VIII (1)] First, the phrase: "Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research."

Contrary to Professor Pellet's assertion[33], the phrase "notwithstanding anything contained in this Convention" is not an overarching chapeau to the Article as a whole. It clearly attaches only to the words that follow it: "may grant to any of its nationals a special permit". The phrase enables the Contracting Government to issue a special permit for the specific purposes of "scientific research" despite the other rules of the Convention. In that sense it forms a limited exception, as Australia has described to you[34]. But it provides no greater exemption from the obligations of the Convention than that.

(b) [Slide 9: Art. VIII (1)] Next, the paragraph reads "subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit".

---

[31]WON, paras. 90-93.

[32]CMJ, paras. 7.8 and 7.11; WOJ, para. 33; CR 2013/13, pp. 61-62, paras. 4, 10 & 11 (Pellet).

[33]CR 2013/13, p. 62, para. 6 (Pellet).

[34]CR 2013/8 Corr., pp. 42-46, paras. 54-67 (Crawford).

This is the second element, the requirement to impose conditions, including "restrictions as to number", on any special permit that is issued. Again, it is clear that the words "as the Contracting Government thinks fit" attach only to this element. They do not create a general exemption allowing the Contracting Government to do "whatever it thinks fit" under the Article.

(c) [Slide 10: Art. VIII (1)] Finally, the paragraph provides that "the killing, taking and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention".

The text does not say that "*special permit whaling* is 'exempt from the operation of this Convention'", as Japan would read it[35]. To the contrary, only the killing, taking and treating of whales "in accordance with the provisions" of Article VIII is exempt from the ordinary rules of the Convention. Far from creating a blanket exemption, the words create an obligation on the Contracting Government to act "in accordance with the provisions" of Article VIII when issuing a special permit. [Slide 11: logo]

Requirements on special permits under Article VIII

30. Article VIII contains three narrowly framed obligations on a Contracting Government seeking to issue a special permit:

(a) First, it must do so for the specified and articulated "purposes of scientific research".

(b) Second, it must set restrictions on the number of whales to be taken or killed under that special permit.

(c) Third, it must issue a special permit only "in accordance with the provisions of [Article VIII]", including, as the Agent will outline to you shortly, the provisions of paragraph 30 of the Schedule to the Convention and the duty of meaningful co-operation they entail.

31. Whether a Contracting Government has met those obligations is a simple question of compliance with its treaty obligations. As such, it is a question that must be determined by this Court. The Court made that principle clear in the *La Grand* case[36], among others[37].

---

[35]CMJ, para. 7.8.

[36]*La Grand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, pp. 485-486, para. 52.

No margin of appreciation

32. Japan has rightly conceded that Article VIII "does not establish a completely unreviewable and self-judging right"[38]. But its observations do not explain what constraint, other than outright arbitrariness, applies. In fact, Japan suggests that any such review is circumscribed by deference to "a margin of appreciation in cases such as this"[39]. What "cases such as this" may be is left unexplained. Similarly, Japan's assertion that the margin of appreciation must be a generally applicable "axiom of international law and relations" is also unsupported. Despite its reference to "extensive jurisprudence on the subject", no citation to any decision of this Court is given in support of the existence of such an "axiom"[40].

33. The reason for that is clear. There is no decision of this Court to support Japan's proposition. Indeed, outside of the specific context of the European Court of Human Rights, there is no widespread acceptance of a separate doctrine of "margin of appreciation" as a general principle of international law. The one judicial decision cited by Japan — the *Hormones* case — does not even use the term. Its reasoning turns on considerations specific to the provision and Agreement in question in that case[41].

Article VIII must be applied for its specific purpose, reasonably, and consistent with the object and purpose of the Convention

34. Rather than importing a "margin of appreciation", this Court need only rely on its own principles of interpretation and application. As a first principle, the Court has stated on numerous occasions that a provision must be applied in a reasonable manner. That principle is confirmed in

---

[37]See, e.g., *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports* 2003, p. 161.

[38]WOJ, para. 9.

[39]WOJ, para. 9.16.

[40]*Ibid.*, see also footnote 1104 and para. 9.7.

[41]*United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R (16 Oct. 2008).

the case of the *Rights of Nationals of the United States of America in Morocco*[42], *Barcelona Traction*[43], and *Gabčíkovo*[44] to name but a few.

35. Closely linked with the principle of reasonableness, this Court has required that a power must also be exercised *properly*, that is, for the purpose for which it has been given[45]. Similarly, this Court has repeatedly emphasized the principle of *effectiveness* — that a power must not be exercised in a manner that would undermine the object and purpose of provisions of the treaty as a whole[46].

36. On the basis of fundamental principles of interpretation relied upon by this Court, Article VIII must be applied for its stated purpose, "scientific research", "in a reasonable way", and in such a manner that the purpose of the Convention can be realized. Article VIII cannot be applied to permit whaling where the effect of that whaling would be to circumvent the other obligations of the Convention, or to undermine its central objective.

37. Mr. President, that conclusion is a straightforward application of established principles of interpretation as stated by this Court. To interpret Article VIII as providing a special margin of appreciation to a Contracting Government, placing it beyond the ordinary review of the Court, would be inconsistent with this Court's established jurisprudence.

38. It would also be inconsistent with Article VIII and the Convention itself. Such an interpretation would have to read something into the language of Article VIII that is not there in the text. It would be inconsistent with the structure of the Convention, which clearly establishes a link between the Commission and special permit research. And it would be fundamentally inconsistent with the object and the purpose of the Convention. Creating such a loophole in the middle of its

---

[42] *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America), Judgment, I.C.J. Reports 1952*, p. 212.

[43] *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Judgment, I.C.J. Reports 1970*, p. 48, para. 93.

[44] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 78-79, para. 142.

[45] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 229, para. 145; *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 241, para. 61.

[46] See, for example, *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I. C. J. Reports 1994*, p. 25, para. 51.

carefully constructed system of collective regulation would effectively destroy the Convention altogether.

Whaling "for purposes of scientific research"

39. Mr. President, I now turn to the central requirement of Article VIII, that a special permit must be issued "for purposes of scientific research". I will address three points:

(a) First, Article VIII requires that whaling be conducted *exclusively* "for purposes of scientific research".

(b) Second, whether a programme of whaling is "for purposes of scientific research" is a factual question to be objectively determined by the Court in the usual way.

(c) Third, that objective determination can be ascertained from the programme's scale, its structure, the manner in which it is concluded and its results.

Scientific research is the only purpose permitted under Article VIII (1)

40. It is clear from the language of the Article that "scientific research" is the only and exclusive purpose for which a special permit may be issued. Using the words of this Court in the *Navigational and Related Rights* case: "expressly stating the purpose for which a right may be exercised implies in principle the exclusion of all other purposes"[47].

41. The test to be met is not whether "scientific research" is *a* purpose of the whaling programme. Any whaling programme has the potential to deliver *some* scientific information, hence the reporting requirements of Article VIII, paragraphs 3 and 4, and the detailed requirements of Part VI of the Schedule. The distinction between special permit whaling and other whaling under the Convention is that special permit whaling is authorized *exclusively* "for purposes of scientific research". The test is whether "scientific research" is *the only* purpose for which the whaling is conducted.

42. To respond to the question raised by Judge Gaja on this point[48], if a programme of whaling is designed for, or directed towards, achieving commercial purposes, even in part, it cannot

---

[47] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 241, para. 61.

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

claim to be special permit whaling under Article VIII. The other rules of the Convention regarding commercial whaling, including the regulations in the Schedule, would therefore apply.

43. Japan itself has accepted this point[49]. But it has tried to use the provision in Article VIII, paragraph 2, to avoid its application. Paragraph 2 can be read to allow the sale of whales killed under special permit, although it certainly does not *require* such sale as Japan implies[50]. But that is a statement of permitted incidental consequence, not of purpose. Paragraph 2 says nothing about *why* whales may be killed. That statement is contained in paragraph 1 of the Article, which states a single purpose for which whales may be killed under special permit. That purpose is "scientific research". If whales are killed for the sale of their meat, then their killing is not exclusively for "scientific research" and must, on any ordinary meaning of the words, be "commercial".

Purpose is a matter of fact to be determined objectively

44. The purpose for which a special permit is issued is the first question to be determined under Article VIII. Whether a special permit is "for purposes of scientific research" cannot be determined simply by deferring to the stated intention of the Contracting Government issuing it. It is clear from the language of the provision that Article VIII is not "self-judging" in that sense. Again, to borrow from the words of the Court, this time in the *Nicaragua* case, "the text does not refer to what the party 'considers necessary' for that purpose"[51].

45. The question is not whether a Contracting Government has determined correctly that its whaling is "for purposes of scientific research" as Japan would like to frame it[52]. The question is whether the whaling has *in fact* been conducted exclusively for those purposes.

46. How is the Court to approach that question? The answer is, as it always does, by assessing the evidence before it. There is nothing special about Article VIII in this respect. The purpose for which whaling is conducted can be determined by the Court just as it determines any other question of compliance with international obligations. Science, Professor Pellet says, "*est*

---

[49]WOJ, para. 9.

[50]CR 2013/13, p. 64, para. 15 (Pellet).

[51]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986,* p. 141, para. 282.

[52]WOJ, para. 53.

une ignorance qui se sait"[53]. But there can be little doubting the observation of the Nobel laureate Sir Peter Medawar that "research is surely the art of the soluble"[54]. It is in that practical spirit that the words "scientific research" — like any other words in a treaty — can be interpreted and applied by this Court. To borrow the Court's words from the *LaGrand* case: "The exercise of this function, expressly mandated by Article 8 of its Statute, does not convert this Court into a court of appeal."[55] Japan seeks to obfuscate the point by raising illusory arguments about standards and intensity of review[56], and issues of "science policy"[57], for which it offers no authority. To the same end, Japan seeks to question the ability of the Court to perform its judicial function[58]. In short, it attempts by another means to turn Article VIII into a self-judging provision, despite its disclaimer of that purpose elsewhere in its observations.

47. Mr. President, Japan further attempts to convert Article VIII into a self-judging provision by suggesting that New Zealand is seeking to "reverse the burden of proof under international law"[59]. But to the contrary, New Zealand leaves the burden of proof where it naturally falls. As stated in the *Nicaragua* case: "Ultimately, it is the litigant seeking to establish a fact who bears the burden of proving it."[60] Consistent with that principle, this Court has also recognized in the *ELSI* case that it falls to the party invoking the protection of a provision to establish that provision properly applies[61]. In this case, Australia alleges that Japan has breached the Convention's prohibitions on commercial whaling, and Japan has invoked Article VIII in its defence. That includes the onus to convince the Court that its whaling was, in fact, conducted "for purposes of

---

[53]CR 2013/12, p. 23, para. 1 (3) (Pellet).

[54]*New Statesman*, 19 June 1964, reproduced in Robert Andrews (ed.), *New Penguin Dictionary of Modern Quotations* (Penguin, London, 2003).

[55]*La Grand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 486, para. 52.

[56]WOJ, paras. 54-57; CR 2013/15, p. 15, para. 15 (Lowe).

[57]WOJ, para. 58; CR 2013/15, p. 19, para. 24 (Lowe).

[58]WOJ, para. 58; CR 2013/15 p. 19, para. 26 (Lowe).

[59]WOJ, paras. 43-47.

[60]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101.

[61]*Elettronica Sicula S.p.A (ELSI) (United States of America* v. *Italy), Judgment, I.C.J. Reports 1989*, pp. 47-48, paras. 62-63. See also Bin Cheng *General Principles of Law as Applied by the International Courts and Tribunals*, 1953, pp. 326-335.

scientific research". It is the role of the Court, in turn, to reach its own determination as to whether Japan has done so.

48. The WTO Appellate Body wrestled with the task of determining objectively the purpose for which a measure had been taken in the *Japan Alcohol* case[62]. In that case, the Appellate Body looked to "the design, the architecture, and the revealing structure of a measure", giving "full consideration to all the relevant facts and all the relevant circumstances in any given case"[63].

49. That approach provides some useful signposts for the Court to follow. Whether or not a programme is "for purposes of scientific research" can be determined from its "design, architecture and revealing structure" or, to put it another way in the scientific context, its "methodology, design and characteristics". That determination is made by giving full consideration to all relevant facts and circumstances.

50. Further signposts can be found in the work of the International Whaling Commission itself. The IWC has adopted a series of Resolutions in relation to special permit whaling, many by consensus[64].

51. In response to a question from Judge Greenwood[65], New Zealand does not assert that those Resolutions are themselves legally binding texts. But they do have two consequences. First, they provide valuable guidance as to how the parties themselves have interpreted "scientific research" under Article VIII. As such, they are legitimate interpretative aids of the kind frequently relied upon by this Court in accordance with the rules of Articles 31 and 32 of the Vienna Convention on the Law of Treaties[66]. Together, they describe the conditions that the parties to the Convention themselves consider that "scientific research" under Article VIII must meet.

52. Second, the duty of meaningful co-operation requires that a Contracting Government must give due account to those conditions. Japan says it has no quarrel with that proposition[67].

---

[62] *Japan — Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 Oct. 1996), p. 29.

[63] *Ibid.*

[64] WON, paras. 55-60.

[65] CR 2013/12, pp. 63-64.

[66] WON, para.11 and the authorities cited therein.

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

Where a proposed special permit programme has not met those conditions, the members of the Commission are entitled to expect it will not proceed without amendment or further dialogue. That expectation has been expressed repeatedly by the Commission in numerous Resolutions[68].

53. The precise language of the Commission's Resolutions and guidelines may have changed over time, but their essence has been consistent throughout. [Slide 12: criteria] That can be distilled to the following elements:

(a) First, "scientific research" must be specifically defined. The aims, methodology and samples to be taken must be adequately specified.

(b) Second, the research must be "essential for rational management, the work of the Scientific Committee or other critically important research needs".

(c) Third, the research must identify a question and the methodology and sample size used must be "likely to provide reliable answers" to that question.

(d) Fourth, it must avoid lethal research methods, giving preference to "non-lethal methods".

(e) Fifth, it must be conducted without having an "adverse effect on the stock".

54. These elements can be traced through numerous IWC Resolutions, particularly Resolutions 1986-2, 1987-1, 1995-9, and 1999-2. The language you see in front of you is a useful distillation prepared by the IWC Secretariat itself[69], with references to the original texts. Copies of the Resolutions themselves are in your judges' folders at tabs 12 to 15. It is simply not correct to state that Annex P has revoked those Resolutions as Professor Boyle asserted[70]. The Commission made no such statement when it adopted Annex P[71], as it has expressly done on other occasions. In any event, Annex P was adopted in 2008, three years after the commencement of the programme at the centre of this case.

---

[68]WON, note 195.

[69]*See website of the International Whaling Commission* "Scientific Permit Whaling: Scientific Committee Review" http://iwc.int/permits (accessed on 7 July 2013).

[70]CR 2013/15, p. 55, para. 38 (Boyle).

[71]Chair's Report of the 60th Annual Meeting, *Report of the International Whaling Commission*, 2008, p. 26, para. 10.1.2.

The purpose of a programme of whaling emerges from a consideration of its scale, its structure, the manner in which is conducted, and its results

55. The Court's assessment of whether a particular programme of whaling is conducted exclusively "for purposes of scientific research" can be determined by considering a range of factors. [Slide 13: factors]

56. A first factor to look at is the *scale of the programme*. That is, the type and the number of the whales to be killed. It will be relevant for the Court to consider the evidence before it as to how that number was arrived at. Likewise, it will be relevant to compare the number of whales to be killed to the levels of other catch under the Convention, including both commercial and special permit catch prior to the introduction of the moratorium. Similarly, the Court may find it helpful to consider any comments made by the scientific experts in relation to the number of whales to be killed.

57. A second factor to consider is the *structure of the programme*. Here, relevant considerations include the timing of commencement and the stated duration of the programme, its objectives, and how these relate to the work of the Scientific Committee. Other relevant factors include the organization that carries out the whaling, how it is funded, what other scientific research it conducts — if any — and the professional background and qualifications of the personnel involved.

58. A third factor to consider is the *manner in which* the programme is conducted. The Court may question whether a programme has been conducted "for purposes of scientific research" if it is instituted using lethal research techniques at the expense of available non-lethal alternatives, particularly where other members of the Commission have demonstrated that those lethal techniques may be unnecessary and are unlikely to deliver any meaningful results. The Court should also have regard to the fact that the whaling is carried out in previously valuable commercial whaling grounds now specifically set aside by the Commission as a sanctuary for the protection of whales.

59. Finally, it is also important to look at the *results* of the programme. The utility of the data obtained will be relevant here. Similarly, a relevant consideration will be what happens to the whales once they have been killed. For example, are they sold on the commercial market?

60. Full consideration must be given to all these factors. The assessment must be made as a whole. Those factors that reflect purely scientific requirements must be balanced against those that reflect commercial considerations. Where there is direct evidence that a programme has been structured to take account of economic considerations, then that evidence would strongly militate against the programme being one exclusively "for purposes of scientific research".

61. For example, serious questions would arise as to whether a programme of special permit whaling were exclusively "for purposes of scientific research" if:

— it was commenced at exactly the point that the door was closed to commercial whaling;

— it was conducted in the same whaling grounds, using the same vessels, and the same personnel as prior commercial whaling;

— it was entirely isolated from other research programmes and institutions;

— meat from the whales killed was sold on the commercial market to generate revenue;

— the number of whales to be killed under the special permit was significantly in excess of the levels set in special permits by other States; and

— expert witnesses had questioned the scientific basis for that number.

[Slide 14: logo]

62. The task of assessing the application of Article VIII to the facts in this case lies beyond New Zealand's role as intervener. That is for the Court. I cannot describe the task more clearly than the members of the Commission have put it themselves: whaling under special permit must be "conducted solely in accordance with scientific requirements"[72] and "in a manner consistent with the principles and in accordance with the provisions of the Convention"[73].

Conclusion

63. Mr. President, Members of the Court, the Convention is a collective enterprise, in recognition of the shared interest of its parties in the long-term survival of whale stocks. Under that collective enterprise, parties to the Convention have agreed to conduct all of their whaling activities in accordance with the Convention's rules.

---

[72]IWC Resolution 1985-2, "Resolution on Scientific Permits" (adopted by consensus), para. 4.

[73]IWC Resolution 1986-2, "Resolution on special permits for Scientific Research (adopted by consensus), at preliminary paragraph 5; MA, Vol. II, Ann. 43, p. 148.

64. Those rules include specific rules around the provision of special permits for the purposes of scientific research, set out in Article VIII. Article VIII is not a "stand-alone régime". It is not an exemption from the Convention. It is an integral part of the Convention's system of collective regulation.

65. To reiterate, Article VIII, paragraph 1, allows for a Contracting Government to issue special permits subject to three requirements: first, the special permit must be issued exclusively "for purposes of scientific research"; second, it must be issued subject to restrictions as to number; and, third, it must be issued consistent with the procedural requirements of paragraph 30 of the Schedule, and the duty of meaningful co-operation they entail.

66. In accordance with the established principles of interpretation applied by this Court, Article VIII must be applied in a reasonable way, consistent with its purpose of scientific research, and in accordance with the object and purpose of the Convention as a whole. No margin of appreciation exists that allows it to be used to side-step the other rules of the Convention, or to undermine the management measures that have been adopted under it. Whether Article VIII has been applied properly in a particular case is a question of fact that is open for the judicial determination of this Court in the usual way.

67. Mr. President, Members of the Court, thank you for your attention. Mr. President, may I invite you to call on the Agent to address the two further requirements of Article VIII, and so to conclude New Zealand's observations.

The PRESIDENT: Thank you, Sir. And I give the floor to the Agent of New Zealand. You have the floor, Madam.

Ms RIDINGS:

NECESSITY, PROPORTIONALITY AND THE DUTY OF MEANINGFUL CO-OPERATION

1. Mr. President, Members of the Court, the Attorney-General has explained the key requirement of Article VIII that whaling under special permit must be conducted exclusively "for purposes of scientific research". My presentation will address the two remaining elements of Article VIII:

(a) first, the requirement that a Contracting Government that issues a special permit must restrict the number of whales to be killed under that permit; and

(b) second, that such a Contracting Government must first discharge its duty of meaningful co-operation with the IWC.

Setting the number of whales that may be taken under special permit

2. Turning to the setting of the number of whales that may be killed under special permit, Article VIII, paragraph 1, requires that special permits are to be granted "subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit". As Japan has accepted, this obliges the Contracting Government to set a limit on the number of whales to be killed[74]. Japan also accepts that the number must be set at a level that will not have an adverse effect on the status of the stocks[75]. It further concedes that this discretion is "not wholly unlimited — it is not a blank cheque"[76].

3. These points are therefore not in contention. However, what *is* in contention is how the number is to be determined, and whether that determination is entirely self-judging and completely beyond the review of this Court. In light of your decision in the *Mutual Assistance* case[77] that cannot be so. The number should be determined objectively in accordance with the ordinary rules of interpretation. As I will explain, this means that the following factors must be taken into account:

(a) first, the number of whales killed must be the lowest necessary for, and proportionate to, the purposes of scientific research;

(b) as a consequence, there is an expectation that non-lethal methods of research will be used;

(c) third, the number of whales to be killed must be set at a level which takes into account the precautionary approach; and

---

[74]WOJ, para. 9.

[75]*Ibid*, para. 9.

[76]*Ibid*, para. 65.

[77]*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 177.

(d) finally, the discretion to set the number of whales to be killed must be exercised reasonably and consistent with the object and purpose of the Convention.

The numbers killed must be necessary and proportionate

4. Taking the first point: the number of whales to be killed must be the lowest necessary for, and proportionate to, the purposes of scientific research. That is, there must be a direct relationship between the number of whales to be taken and the purposes for which a special permit is granted. There can be no rationale, other than scientific rationale, for determining the number of whales to be taken under special permit.

5. Japan claimed in its Written Observations that a requirement that the number of whales killed must be necessary and proportionate cannot be inferred from the obligation in Article VIII to impose "restrictions as to number"[78]. Professor Boyle then accepted that "the number of whales taken must be 'necessary and proportionate' to the objectives of the research"[79]. He could not do otherwise. The obligation to set a restriction as to number must be interpreted in light of the express purpose for which special permits may be issued — "scientific research". However, what Professor Boyle fails to appreciate is that the obligation must also be interpreted in light of the context of Article VIII, which creates a mechanism for parties to the Convention to obtain the scientific research necessary for the IWC to carry out its functions. And it must be interpreted in light of the object and purpose of the Convention, namely to replace unilateral whaling with collective regulation in order to provide for the interests of the parties in the proper conservation and management of whales. In other words, the sample size must be proportionate to the role of Article VIII within that system of collective regulation. The collective interest means that the killing of whales must be justified by the utility of the data obtained for the Commission's needs.

6. The justification for this is clear. Once a whale has been killed it is gone. It cannot be used in the future by another Government for research, or for any other purpose. In this way, killing under special permits directly impacts on the interests of the other parties to the Convention.

---

[78]WOJ, para. 65.

[79]CR 2013/15, p. 65, para. 78 (Boyle).

In a system of collective regulation, those impacts should be kept to a minimum — where they can be justified as both necessary and proportionate.

7. This interpretation is supported by the Guidelines and Resolutions of the IWC. [Slide 15: quotes] They provide evidence of the factors that may be taken into account in determining whether the number of whales to be killed is necessary and proportionate. At its Fifteenth meeting in 1963, the IWC agreed that "the numbers shown in each permit should be the lowest necessary for the purposes indicated in that permit"[80]. In 1986, it agreed that Contracting Governments should take into account whether the numbers taken are "necessary to complete the research"[81]. These show the need for there to be a direct link between the number killed and the scientific objectives of the research.

8. But the Guidelines and Resolutions also evidence concern for the broader role of Article VIII as a mechanism which supports the IWC in carrying out its functions. [Slide 16: quotes] Thus, in 1986, it was agreed that the numbers of whales that are sacrificed for the scientific good should "contribute information essential for rational management of the stock"[82]. And, in 1987 and 1995, that any lethal programme should address "critically important" research needs[83]. [Slide 17: logo]

9. Professor Boyle has criticized New Zealand for not saying anything about the methodology of calculating sample sizes[84]. We do not wish to try the Court's patience by delving into factual matters. That is not our role as an intervener. We would, however, invite the Court to look at whether, according to the expert evidence that the Court has heard, there is a clear scientific reason for the number of whales to be taken.

10. The Court may also wish to look at the scientific research being undertaken, and whether it will contribute to the operation of the IWC, and not just the interests of one of its members.

---

[80]Chairman's Report of the 15th Meeting, 15th Report of the Commission, 1965, p. 20, para. 17, http://iwc.int/cache/downloads/drr7ewtgj88c8ggc0kck8c04w/RIWC15.pdf.

[81]IWC Resolution 1986-2 "Resolution on Special Permits for Scientific Research" (adopted by consensus); MA, Ann. 43, Vol. II, p. 148.

[82]*Ibid.*

[83]IWC Resolution 1987-1, "Resolution on Scientific Research Programmes"; MA, Ann. 44, Vol. II, pp. 150-156; IWC Resolution 1995-9, "Resolution on Whaling under Special Permit"; MA, Ann. 46, Vol. II pp. 153-154.

[84]CR 2013/15, p. 65, para 78 (Boyle).

Where, for example, a large number of whales is to be killed in order to establish a fact that is not in dispute, or to collect information which does not contribute to, nor is relevant for, the Commission's central management tool, there must be a question mark over whether that is necessary and proportionate. An indication that the stock might bear the killing of a certain number is not in itself a licence for failing to place realistic limits on the number killed for science.

11. Setting the number that is necessary and proportionate requires balancing the means employed against the end sought. Where the means employed are disproportionate to the actual or anticipated scientific results, or are not necessary to achieve the objective of the scientific research, the discretion to set a catch limit has been exercised improperly.

12. Japan seeks to evade this point in its Written Observations by suggesting that the number of whales to be killed is beyond this Court's review — claiming it is the technical result of the application of standard algorithms to the identified research objectives of a particular programme[85]. At this hearing Japan presented the formula as proof to the Court, even though counsel for Japan admits that he does not understand it[86]. Nevertheless he invites the Court to rely on it. But the research objectives can be reverse engineered to supply a desired sample size. The assessment of "necessity and proportionality" is not a technical scientific calculation, as Japan seeks to present it. To the contrary, "necessity" and "proportionality" are established concepts in international law — which this Court has applied on numerous occasions, in numerous different factual contexts[87]. To concede to Japan's interpretation is to leave Article VIII wide open. It would render meaningless and ineffective the obligation to restrict the number of whales to be killed. And it would be inconsistent with the object and purpose to interpret Article VIII as permitting whales to be killed, even where that is "unnecessary" or "disproportionate".

---

[85]WOJ, para. 66.

[86]CR 2013/15, p. 63, para. 69 (Boyle).

[87]See, for example, *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I. C. J. Reports 1997*, p. 7; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 168; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I. C. J. Reports 2003*, p. 161; *Legality of the Threat of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 244, para. 30.

There is an expectation that non-lethal methods of research will be used

13. As a consequence of the requirement that the number taken must be necessary and proportionate, there is an expectation that non-lethal methods of research will be used wherever possible. In 1986, the Commission recommended by consensus that Contracting Governments issuing special permits are to take into account whether "the objectives of the research are not practically and scientifically feasible through non-lethal research techniques"[88]. Annex Y, applicable to JARPA II, repeats this and further asks "whether the research sought could be obtained by non-lethal means"[89]. The 2008 Guidelines also require assessments to be made of the utility of lethal, compared to non-lethal, methods of research[90]. It is not a question of what is workable from a practical or financial perspective, as claimed by Japan[91]. Rather, it comes down to the simple proposition that you do not kill whales unless you need to. And you only do so if it is necessary to answer a research question that is important for conservation and management purposes.

14. This expectation that non-lethal means will be used wherever possible is supported by a consistent pattern of IWC Resolutions highlighting the importance of obtaining scientific information without needing to kill the objects of that research[92]. The reason for this is clear. The parties to the Convention have a collective interest in ensuring that whales are not killed unnecessarily.

The Precautionary Approach applies

15. The expectation that non-lethal methods of research are to be used is reinforced when recourse is made to general principles of international law. It is widely accepted in international agreements that Contracting Governments should act with prudence and caution when applying provisions, such as Article VIII, which may have an effect on the conservation of natural

---

[88]IWC Resolution 1986-2 "Resolution on Special Permits for Scientific Research" (adopted by consensus); MA, Ann. 43, Vol. II, p. 148.

[89]Guidelines for the Review of Scientific Permit Proposals, Ann. Y, "Report of the Scientific Committee", *J. Cetacean Res Manage.* 3 (Suppl.) 2001; MA, Ann. 48, Vol. II, pp. 156-157.

[90]"Process for the Review of Scientific Permits and Research Results from Existing Permits" Report of the Scientific Committee, Annex P, *J. Cetacean Res. Manage.* II (Suppl.), 2009, 398-401 ; MA, Ann. 49, Vol. II pp. 158-161.

[91]WOJ, para. 63; CR 2013/15, p. 61, para. 64 (Boyle).

[92]See MA, Vol. II, Anns. 10-14.

resources[93]. The need for prudence and caution, or for the application of the precautionary approach, is greatest when the information is uncertain, unreliable or inadequate[94].

16. Japan "does not dispute that it should act with prudence and caution" in line with the precautionary approach[95]. It concedes that the precautionary approach may be invoked "for the purposes of interpreting and applying Article VIII and in so far as permissible under the law of treaties"[96]. It even argues that JARPA II "supports a precautionary approach" because it entails the collection of more scientific information[97] — notwithstanding, I might add, the large number of whales killed in the process. What Japan forgets, however, is that it is still necessary to be precautionary in that collection of scientific data. And that data should serve some useful scientific purpose.

17. A "prudent and cautious" approach would ensure that the number to be taken is necessary and proportionate, and would give preference to the conduct of non-lethal methods of research. It does not, contrary to what Japan argues, place the onus on a State to prove a risk of serious or irreversible harm before the precautionary approach can come into play[98]. Indeed to do so would be to eviscerate the precautionary approach of any meaning. To first prove risk of serious or irreversible harm would eliminate any uncertainty. Yet uncertainty is the very reason for acting with caution.

18. The need to act with prudence and caution conditions the conduct of JARPA and JARPA II. Japan has made much of the abundance estimate for minke whales that was agreed by the Scientific Committee in 2012[99]. But it fails to take into account the uncertainty in stock abundance that prevailed until that time. And it also fails to take into account the continuing

---

[93]See WON, p. 40, footnote 136.

[94]See *Southern Bluefin Tuna cases (New Zealand v Japan; Australia* v. *Japan), Provisional Measures Order, 27 August 1999*; (1999) 38 *ILM* 1624 at para. 7. See also *Rio Declaration on Environment and Development*, adopted at the United Nations Conference on Environment and Development on 13 June 1992 (UN doc. A/CONF.151/26 (Vol. 1)), Principle 15.

[95]CMJ, Vol. I, p. 424, para. 9.33.

[96]CMJ, Vol. I, p. 298, para. III.3.

[97]CMJ, Vol. I, p. 424 para. 9.33.

[98]CMJ, Vol. I, pp. 424-425, para. 9.34.

[99]CR 2013/15, pp. 65-66, paras. 80-85 (Boyle).

uncertainty in the abundance of humpback and fin whales[100]. In those circumstances, New Zealand should not be required to prove a risk of harm to the stocks before asking Japan to act with prudence and caution.

A discretion must be exercised reasonably and consistent with its purpose

19. As I highlighted earlier, the crucial difference between New Zealand and Japan is that Japan considers that it is entirely up to the Contracting Government issuing the special permit to make the determination of the number of whales necessary for the completion of the proposed research[101]. It argues that no other Contracting Government has any say in this. Japan even goes so far as to eschew a role for this Court in reviewing that determination[102]. Indeed, while it appears to accept that a Court could criticize a Contracting Government for making a "clearly arbitrary" decision[103], it nullifies this apparent concession by failing to provide any yardstick by which the Court could make such an assessment.

20. Japan's contention that the Court is incapable of such an assessment is clearly inconsistent with the approach you yourselves have taken. This Court dealt directly with the review of the exercise of discretionary power in the *Mutual Assistance* case[104]. In that case, you found that the question of whether the requirements for the exercise of a discretion have been met remains open to the Court's review to ensure that the discretion is exercised in good faith[105]. That in turn requires that the discretion must be exercised for the specific purpose for which it is given[106]. To use the words of this Court in *Gabčíkovo*, the requirement of good faith "obliges the

---

[100]See Report of the Scientific Committee and Annex O1, Report of the Standing Working Group on Scientific Permits, *J. Cetacean Res. Manage.* 8 (Suppl.), 2006, 48-52; MA, Vol. II, Ann. 52, pp. 172-182.

[101]WOJ, paras. 9 and 64.

[102]WOJ, para. 66.

[103]WOJ, para. 66.

[104]*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008,* p. 177.

[105]*Ibid.*, p. 229, para. 145.

[106]*Ibid.* See also *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009,* p. 213, at p. 241 (para. 61).

Parties to apply [the provision] in a reasonable way and in such a manner that its purpose can be realized"[107].

21. Clearly this is a determination for the Court to make based upon the facts before it.

Procedural obligations

22. Mr. President, Members of the Court, I turn now to the procedural obligations which must be complied with by a Contracting Government which proposes to issue a special permit. In this part of my presentation I will review:

(a) First, the specific procedural obligations which a Contracting Government must fulfil in such circumstances;

(b) Second, the duty of meaningful co-operation which is fundamental to an understanding of the duties of a Contracting Government; and

(c) Then, the nature of this duty of meaningful co-operation.

Specific procedural obligations

23. Paragraph 30 of the Schedule establishes a prior review mechanism under which the Scientific Committee is to review and comment on proposals that have been notified to it[108]. It is a *prior* review mechanism of *proposals*, not an *ex post facto* review of permits already granted. Under the Rules of Procedure, the Scientific Committee is to submit reports and recommendations to the Commission[109]. According to Article VI, the Commission may in turn make recommendations to the Contracting Government in relation to the proposed special permit[110].

24. This process of notification, review, reporting, and recommendation is, in essence, a process of dialogue between those parties seeking to issue special permits and the other parties to the Convention. It is through such dialogue and consultations that the use of special permits can be monitored, and the interests of the other parties can be protected. Such a requirement of prior consultation is — in the words of the late Patricia Birnie — "a natural counterpart of the concept of

---

[107]*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 79, para. 142.

[108]Para. 30 of the Schedule.

[109]Rules of Procedure, Rule M (4) *(a)*.

[110]Art. VI of the Convention.

equitable utilization of a shared resource"[111]. It is not up to the Contracting Government proposing to issue a special permit to decide what interests of the other parties will be affected by its proposals. That is essentially the point made in the *Lac Lanoux* Arbitration[112]. Nor can those interests act as a "veto" on the Contracting Government's actions[113]. But, as this Court recognized in *Pulp Mills*, it is incumbent on the Contracting Government to undertake genuine consultations in good faith. Such consultations must not be mere formalities[114].

25. In this way, the procedural obligations, to use the words of this Court in *Pulp Mills*: "enable the parties to fulfil their substantive obligations"[115]. In other words, they are a safeguard which ensures the substantive obligations are complied with. Indeed, that is the very reason for which the paragraph 30 review mechanism was adopted[116].

26. Japan has sought to obscure this by citing *Pulp Mills* to the effect that a breach of procedural obligations does not *automatically* entail the breach of substantive obligations[117]. That may be so. But in a system of collective regulation, procedure and substance are intrinsically and necessarily linked. The procedural obligations serve to prevent parties from acting unilaterally where to do so would be to undermine the object and purpose of the Convention. The failure to comply with procedural obligations directly effects the performance by the Contracting Government of its substantive obligations under Article VIII.

Duty of meaningful co-operation

27. I turn now to the duty of meaningful co-operation.

28. The obligations of notification and consultation under paragraph 30 of the Schedule provide a specific expression of an overarching duty of co-operation. Japan initially sought to

---

[111]Patricia Birnie, Alan Boyle, Catherine Redgwell, *International Law and the Environment*, 3rd edition, (Oxford University Press), 2009, p. 177.

[112]*Lac Lanoux Arbitration*, 24 *ILR* (1957), 101, p. 119.

[113]*Ibid.*, pp. 128-130; 140-141.

[114]*Ibid.*, p. 119.

[115]*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p 49, para. 78.

[116]Report of the Scientific Committee to the 29th Meeting of the Commission, *Rep. Int. Whal. Commn.* 28, 1978, p. 41, para. 9.3.2. http://www.iwc.int/annual-reports.

[117]As indicated in the Court's decision in *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 49, para. 78.

minimize the role of paragraph 30 by claiming that it merely introduced an obligation of notification[118]. It then admitted that paragraph 30 is a "mechanism of co-operation" between Contracting Governments and the organs of the IWC[119]. Still later it conceded that a duty of co-operation arises under the Convention[120]. It would have been difficult for Japan to do otherwise. The obligation to co-operate permeates international environmental law. It was recognized in Principle 24 of the 1972 Stockholm Declaration[121] and in the 1982 Law of the Sea Convention[122]. And the relevance of the duty of co-operation is clear in light of the view of this Court in *Gabčíkovo* that treaties should be interpreted in light of other rules of international law, including developing environmental norms[123].

29. Having conceded a duty of co-operation, Japan attempts to eliminate its application by claiming that the rights of a Contracting Government under Article VIII cannot be diminished by any *procedure* of co-operation[124]. Professor Pellet restated this in his presentation to you last week[125]. However Professor Lowe sought to confuse us by accepting that Japan was bound to consider and take into account comments provided by the Scientific Committee under paragraph 30[126]. This attempts to conceal Japan's failure to have regard to the proper role of Article VIII as an integral part of the Convention. Furthermore, it is fundamentally at odds with the object and purpose of the Convention. The negotiators decided to develop a Convention which would provide for collective regulation in contrast to unilateral action.

---

[118]CMJ, para. 8.28.

[119]CMJ, para. 8.29.

[120]WON, paras. 9 and 42.

[121]Principle 24, para. 2: "Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States."; United Nations doc. A/CONF.49/14/Rev. 1, 11 *ILM* 1421 (1972).

[122]Art. 65 United Nations Convention on the Law of the Sea: "States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study".

[123]*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, paras. 112 and 140; *Arbitration regarding the Iron Rhine Railway (Belgium* v. *Netherlands)*, PCA (2005), pp. 28-29, paras. 57-60.

[124]CMJ, para. 8.12.

[125]CR 2013/13, p. 65, para. 18. (Pellet).

[126]CR 2013/15, p. 23, para. 46. (Lowe).

30. The duty of co-operation requires that co-operation be *meaningful*. This Court recognized in the *North Sea Continental Shelf* cases that parties under a duty to negotiate must conduct themselves so that the negotiations are meaningful[127]. In its Commentary on the Draft Articles on Prevention, the International Law Commission commented that even though the Court spoke of "negotiations" in that case, the good faith requirement applied equally to consultations[128]. As consultations and negotiations are but two aspects of an overarching duty to co-operate, a duty of co-operation must itself also be meaningful.

The nature of the duty of meaningful co-operation

31. There are four aspects to the duty of meaningful co-operation.

32. First, consultation procedures must be allowed to run their course[129]. There cannot be meaningful co-operation where a party acts without waiting for the consultation process to be completed. It would be contrary to the fundamental duty of meaningful co-operation for a party to initiate a new proposal without receiving and considering a proper scientific review of the earlier proposal. As I mentioned earlier, one of the reasons that JARPA II has come under such criticism within the IWC is because it was commenced without Japan waiting for a review by the Scientific Committee of the results of JARPA[130]. This was contrary to the requirements of paragraph 30, and the guidelines developed by the Scientific Committee.

33. Second, in its work on prevention, the International Law Commission confirmed that meaningful co-operation requires that account be taken of the views and legitimate interests of others[131]. This includes a willingness to modify one's approach in light of the views of others. Indeed, Japan has conceded this[132]. The requirement for meaningful consultation does not mean

---

[127]*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 47, para. 85.

[128]International Law Commission, "Draft Articles on Prevention of Transboundary Harm", Commentary on Art. 9, p. 161, para. 4.

[129]*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay) Judgment, I.C.J. Reports 2010 (I)*, p. 67, para. 147.

[130]See Chair's Report of the 57th Annual Meeting, *Annual Report of the International Whaling Commission 2005* p. 5, paras. 37-39; CMJ, Vol. II, Ann. 64, pp. 409-412.

[131]International Law Commission, "Draft Articles on Prevention of Transboundary Harm", Commentary on Art. 9, at p. 160, para. 2.

[132]WOJ, para. 9.

that the consulted party has a right of veto over the activity[133]. However, and this has been made clear by the International Law Commission, while the party may decide to go ahead, it is still obliged to take into account the interests of others[134]. It does not merely have to provide an explanation for its reasons, as claimed by Japan[135]. Neither is it sufficient for the Contracting Government to merely state that the comments of the Scientific Committee have been given due consideration — as Japan indicates in both its Written Observations[136], and even more categorically in its oral presentation[137]. It requires that the legitimate interests of the parties can be seen to have been objectively taken into account. To say otherwise would be to deny paragraph 30 of any meaning. Rather, the duty of meaningful co-operation ensures that the party — in the words of the *Lac Lanoux* Arbitral Panel — gives "a reasonable place to adverse interests"[138]. Ms Takashiba has misrepresented our position. It is not a question of bending to the views of others[139]. Rather, even if you disagree with them, those views should be seen to have been taken into account.

34. The third aspect of a duty of meaningful co-operation is that, where a discretion is exercised, due process must be observed in order to avoid encroaching on the rights of others. As the WTO Appellate Body has said in the *Shrimp/Turtle* case: there is a "need to maintain a balance of rights and obligations between the right of a Member to invoke one or other of the exceptions . . . on the one hand, and the substantive rights of the other Members . . . on the other hand"[140]. The Convention and paragraph 30 establish a role for the Scientific Committee in the issuance of special permits. It is contrary to due process for the rights of other Contracting Governments, in the effective functioning of an international organization, to be ignored by a Contracting Government intent on asserting a unilateral, and unregulated, power to issue special permits under Article VIII.

---

[133] *Lac Lanoux Arbitration*, 24 *ILR* (1957), 101 at pp. 128-130; 140-1.

[134] International Law Commission, "Draft Articles on Prevention of Transboundary Harm", commentary, p. 161, para. 10.

[135] CMJ, Vol. I, paras. 8.63 and 8.76.

[136] WOJ, para. 9.

[137] CR 2013/15, p. 37, para. 28 (Takashiba).

[138] *Lac Lanoux Arbitration*, 24 *ILR* (1957), 101 at p. 141.

[139] CR 2013/15, p. 35, para. 24 (Takashiba).

[140] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, (12 October 1998), para. 156.

35. Finally, the duty of meaningful co-operation requires that a party not only to take into account the interests of other parties, but to increase the level of engagement where the interests of those other parties are adversely affected[141]. Where the co-operation is in respect of a shared resource, as pointed out by the ITLOS Chamber in the *Area Advisory Opinion*[142], the duty to co-operate must take into account these shared interests. One party alone cannot dictate how that shared resource is to be utilized. Indeed, the greater the degree of unilateral action, the greater the expectation that the views of others will be taken into account.

36. It is therefore incumbent on a Contracting Government issuing a special permit to pay heed to the concerns of parties, where those concerns have been consistently, and unambiguously, expressed over a number of years. The resolutions of the IWC on special permit whaling, and on special permits issued by Japan, provide clear evidence of those concerns. Failure to engage with those concerns, and the exercise of strident unilateralism in a Convention for collective regulation, would be contrary to the duty of meaningful co-operation.

37. To return to Judge Greenwood's question, the IWC Resolutions, while not themselves binding, in this way give content to the duty of meaningful co-operation. In fulfilling this duty, a Contracting Government must take into account the interests of others as expressed in the Resolutions. Contrary to the suggestion of Japan[143], New Zealand does not seek to reverse the burden of proof at international law. But where there is prima facie evidence that other parties to the Convention consider that their legitimate interests have not been taken into account, the onus is on a Contracting Government to show that it has done so, and that it has properly fulfilled its duty of meaningful co-operation.

Concluding Observations

38. Mr. President, Members of the Court, I now wish to make some concluding observations regarding the issues which New Zealand believes are of critical importance to the correct construction of the Convention.

---

[141] WON, para. 104.

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

[143] WOJ, paras. 43-47.

39. Mr. President, the interpretation of the Convention in this case boils down to a question of stark choices. Is Article VIII to be interpreted as permitting unregulated and unreviewable unilateral action, or is it to be interpreted within the context of a system of collective regulation? Is Article VIII to be interpreted as a stand-alone provision, or as part of the fabric of the Convention as a whole? Is it a self-judging provision, so that it is purely up to the Contracting Government to determine the nature, scale and purpose of a special permit? Or are there reasonable constraints placed upon that Contracting Government which may be objectively determined by this Court?

40. Mr. President, the Convention establishes a system of collective regulation for the conservation and management of whale stocks. Article VIII must be interpreted in light of that object and purpose.

41. Article VIII permits the grant of special permits only to take whales "for purposes of scientific research". Japan has sought to mystify the determination of what is scientific research, and to accord for itself the right to decide whether a programme of whaling is for that purpose. Mr. President, Members of the Court, New Zealand rejects this ousting of your interpretative role in this case.

42. Even where a Contracting Government issues a special permit "for purposes of scientific research", it is still required to ensure that the number of whales to be killed under that permit is the lowest necessary for, and proportionate to, the scientific purpose, and takes into account the collective interests of the parties. This is a matter for objective determination in light of the facts, as evidenced through the Guidelines and Resolutions of the Scientific Committee and the Commission.

43. There is, in any case, a substantive duty of meaningful co-operation on a Contracting Government which proposes to issue a special permit. This requires it to show that it has taken into account the legitimate interests of the other parties to the Convention; that it has balanced the interests of all the parties in the conservation and management of whale stocks.

44. Finally, I wish to recall the historical context of this Convention — the initial optimism of a common international endeavour, which was eroded by unilateral action. New Zealand believes that this Court is the gateway to the resolution of the dispute over the interpretation of Article VIII of the Convention. It is only through recourse to international dispute settlement that

the fundamental legal issue, which has hampered the effective functioning of the IWC, can be resolved.

45. Mr. President, Members of the Court, this concludes New Zealand's observations on this case. Thank you for your attention.

The PRESIDENT: Thank you very much, Dr. Ridings. Before concluding this morning's sitting, I give the floor to two Judges who have questions. I shall now give the floor to Judge Cançado Trindade. Judge Cançado Trindade, if you please.

Judge CANÇADO TRINDADE: Thank you, Mr. President. After listening to the arguments of Australia and Japan, as well as of New Zealand, I have questions to put to the three participating Delegations, in order to obtain written or oral clarifications from them, on their views as to the interpretation and application of the *International Convention for the Regulation of Whaling.* My questions are put, first, to Australia, Japan and New Zealand together; secondly, only to Japan; and thirdly, only to New Zealand.

- *So, first, my questions to Australia, Japan and New Zealand together are the following ones:*

- How do you interpret the terms "conservation and development" of whale stocks under the *International Convention for the Regulation of Whaling*?

- In your view, can a programme that utilizes lethal methods be considered "scientific research", in line with the object and purpose of the *International Convention for the Regulation of Whaling*?

- *Secondly, my questions only to Japan are the following ones:*

- To what extent would the use of alternative non-lethal methods affect the objectives of the JARPA-II programme?

- What would happen to whale stocks if many, or even all States Parties to the *International Convention for the Regulation of Whaling,* decide to undertake "scientific research" using lethal methods, upon their own initiative, similarly to the *modus operandi* of JARPA-II?

- *And thirdly, my questions only to New Zealand are the following ones:*

- In your view, does the fact that the *International Convention for the Regulation of Whaling* is a multilateral treaty, with a supervisory organ of its own, have an impact on the interpretation of its object and purpose?

- You have stated in your *Written Observations* (of 4 April 2013) that the object and purpose of the *International Convention for the Regulation of Whaling* is: "to replace unregulated, unilateral whaling by States with collective regulation as a mechanism to provide for the interests of the parties in the proper conservation and management of whales" (p. 16, para. 33). In your view, is

this a widely accepted interpretation nowadays of the object and purpose of the *International Convention for the Regulation of Whaling*? Thank you, Mr. President.

The PRESIDENT: Thank you, Judge Cançado Trindade. And now I give the floor to Judge Charlesworth. Judge Charlesworth, you have the floor.

Judge CHARLESWORTH: Thank you, Mr. President. My questions are both of clarification also. My first question is for Australia.

> "Is Australia's argument that Japan's conduct of JARPA II is an abuse of right an alternative to its argument about the proper construction of Article VIII of the Convention, or is it made on a subsidiary basis to the treaty construction argument?"

And my second question of clarification, Mr. President, is for Japan.

> "In Japan's view, are there any objective elements in the phrase 'for the purposes of scientific research' as used in Article VIII of the Convention, or is the definition of scientific research solely a matter for the determination of those Contracting Governments that issue special permits under Article VIII?"

Thank you, Mr. President.

The PRESIDENT: Thank you, Judge Charlesworth. The written text of these questions will be sent to the Parties and the intervening State as soon as possible. The Parties are invited to provide a reply orally during the second round of arguments. Japan can present its comments on replies orally next week. Australia, if it wishes, may submit its brief comments on Japan's replies in writing not later than on 19 July 2013. New Zealand is invited to answer the questions in writing by this Friday, 12 July, by 3 p.m., so that Japan can comment on New Zealand's replies. And Australia will be entitled to comment on New Zealand's answers in a written form by the same deadline of 19 July 2013. This sitting is adjourned.

The Court rose at 11.40 a.m.