

CR 2013/21

**International Court
of Justice**

LA HAYE

**Cour internationale
de Justice**

THE HAGUE

YEAR 2013

Public sitting

held on Monday 15 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 15 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

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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*

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The PRESIDENT: Please be seated. Good morning. The sitting is open. The Court meets this morning to hear Japan begin the presentation of its second round of oral argument. And I see Professor Payam Akhavan is ready, so you have the floor, Sir. Please start.

Mr. AKHAVAN:

OVERVIEW OF THE CASE

I. Introduction

1. Good morning, Mr. President, distinguished Members of the Court. I am greatly honoured to make the opening presentation on behalf of Japan for this second round of pleadings.

2. I will begin our pleadings today with an “overview of the case”, setting forth the points of agreement and disagreement among the Parties on the most important questions of law and fact. I will then briefly address the factual context within which, we submit, the Court should consider and decide this case. Following my presentation, Professor Pellet will address the “Jurisdiction of the Court and the ICRW framework”. Ms Takashiba will then discuss “Japan’s full compliance with the procedural requirements and co-operation” pursuant to paragraph 30. After that, Professors Boyle and Hamamoto will address our submissions on why “JARPA II is a Programme of Scientific Research”. Following that, Professor Lowe will discuss “The Standard of Review”. Professor Pellet will then consider the “Remedies requested by Australia” and provide the “General Conclusions” of our case. Finally, the Agent of Japan, Mr. Tsuruoka, will make “concluding remarks and final submissions”.

3. Mr. President, Members of the Court. You have now heard Australia’s second round of pleadings. What can be concluded at this final stage about its case against Japan? Allow me first briefly to set forth the evolution of Australia’s case from the filing of the Application on 31 May 2010 to its final submissions last week. Australia’s case began with what appeared to be a global case against Japan’s special permit whaling. It then ruled out JARPN II in the North Pacific, and limited its case only to JARPA II, coinciding in geographical scope with Australia’s Antarctic maritime claims¹. Australia’s case began with the Convention on International Trade in

¹Application of Australia, 31 May 2010, para. 34; Memorial of Australia, MA, para. 1.5.

Endangered Species and the Convention on Biological Diversity². It now relies solely on the Whaling Convention³. Australia began with alleging that Japan has acted in bad faith⁴ and now discourages the Court from deciding the case based on bad faith⁵. Australia began with extensive reliance on reports of the Scientific Committee⁶ and now argues that the Court should not rely on those same reports. It has all but dropped any mention of the testimony of its expert witness Dr. Gales. This in brief is the story of Australia's incredible, shrinking case.

4. Australia's primary evidence now is the testimony of Professor Mangel. Their reliance on him in second round pleadings was striking. Professor Sands went to great lengths to emphasize that Professor Mangel is, and I quote, "very well placed to offer totally independent, practical advice on what does and does not constitute scientific research"⁷. In effect, Australia invites the Court to decide this case based on his testimony as to what constitutes "scientific purpose" under Article VIII of the Convention. It would not be an exaggeration to say that Australia's case now hangs by a thread.

5. Mr. President, Members of the Court. My presentation will focus on four points. First, I will address the questions of law and fact on which Australia and Japan agree and disagree. Second, I will address Australia's failure to prove its allegations against Japan in light of the evidence before the Court. Third, I will address the proper approach to be taken in determining the fundamental question before the Court: namely, whether in issuing special permits under Article VIII, Japan reasonably concluded that JARPA II is a programme for the purposes of scientific research within the meaning of the Whaling Convention. Fourth and finally, I will make some general concluding observations concerning Australia's allegations of bad faith against Japan in this proceeding.

CR 2013/19, pp. 31-32, para. 23 (Sands) (observing that "It has been unable to function — the Scientific Committee — is at an impasse" and describing as "accurate" the statement of Dr. Gales that the Scientific Committee is "characterized by its polarity and its lack of assessment of the scientific weight of the issues raised by members of the Scientific Committee"). See also, CR 2013/20, p. 30, para. 80 (Crawford) citing "the increasingly dysfunctional Scientific Committee" and the Committee's current division on delay "to support his claim that 'There is currently no effective process for the Court to defer to when it comes to Article VIII'"; CR 2013/18, p. 19, para. 17 (Dreyfus) (discussing the Scientific Committee's review of the JARPA II proposal and criticizing Japan for having "the temerity to rely upon the outcomes of that flawed process").

²Application of Australia, para. 39.

³CR 2013/20, p. 47, para. 3 (Campbell); CR 2013/19, p. 29, para. 13 (Sands).

⁴CR 2013/7, p. 37, para. 55 (Gleeson).

⁵CR 2013/19, p. 67, para. 27 (Crawford).

⁶See, e.g., CR 2013/8, p. 33, para. 27 (Crawford).

⁷CR 2013/19, p. 40, para. 41 (Sands).

II. Points of Agreement and Disagreement

6. I will now turn to the points of agreement and disagreement in this case. First, on jurisdiction, there is no disagreement that the geographical scope of JARPA II coincides substantially with Australia's claimed exclusive economic zone in the Antarctic and the adjacent area⁸. There is also no disagreement that the Parties disagree as to delimitation of this maritime area which Japan considers as the high seas. In the first round pleadings, Mr. Burmester even argued, remarkably, and only in relation to jurisdiction, that this dispute is not about the commercial "exploitation" of resources, within the meaning of Australia's reservation, because the dispute is about scientific rather than commercial whaling⁹. It follows from this imaginative argument that if JARPA II is commercial "exploitation" of whales, as Australia contends, then the Court would have no jurisdiction to decide the merits of the case. To the contrary, according to this theory, if JARPA II is scientific whaling, then Australia wins on jurisdiction but loses on the merits. But we do not agree with this either: if, as we submit, JARPA II is scientific, it still "relates to" and "concerns" the exploitation of these areas. This was the still unrebutted submission of Professor Pellet during the first round¹⁰. Japan notes that having given barely any attention to jurisdiction in its written pleadings, Australia's arguments in the oral pleadings have been hesitant, contradictory, and unconvincing. Australia's case clearly falls within its own reservation to the Court's jurisdiction.

7. On the applicable law, the Agent of Australia argued, in the first round of pleadings, that the "whole purpose" of the Convention was "conservation and management"¹¹ of whale stocks. Australia now argues that conservation is an exclusive purpose¹². It accepts that some Aboriginal Subsistence Whaling is permissible¹³. It also accepts, despite its contrary statements at the IWC, that scientific whaling is permissible, if only in very narrow circumstances¹⁴. It does not accept, however, that sustainable commercial whaling, which it totally opposes, is even one among the

⁸CR 2013/18, p. 26, para. 18 (Burmester).

⁹CR 2013/11, p. 48, para. 34 (Burmester).

¹⁰See CR 2013/7, pp. 47-48, paras. 24-33 (Pellet).

¹¹CR 2013/7, p. 22, para. 12 (Campbell).

¹²CR 2013/18, p.19, para. 16 (Dreyfus).

¹³CR 2013/19, p.54, para. 79 (Sands).

¹⁴CR 2013/20, p.44, para. 8 (Dreyfus).

purposes of the Convention¹⁵. In the words of Professor Boisson de Chazournes: “C’est un objet et un but exhaustifs: celui de la conservation et de la reconstitution des peuplements baleiniers.”¹⁶ In this regard, there is a fundamental disagreement between the Parties. Japan maintains its position that the object and purpose of the Convention is — to quote its Preamble — both “conservation and development of whale stocks” and, in the words of Article V, the “optimum utilization of the whale resources”¹⁷. We submit that science-based sustainable whaling is clearly one of the objectives, if not the fundamental objective, of the 1946 Convention.

8. The parties also disagree on the scope of Article VIII. Australia characterizes this provision as a very limited exception, an exception subject to collective regulation, an exception intended for scientific research solely for the purpose of conservation, this being, in its view, the exclusive purpose of the Convention¹⁸. In contrast, Japan considers Article VIII to be an exemption from the Convention, an exemption that permits whaling for the purposes of scientific research. That includes research for both conservation and management of whale resources. Article VIII leaves each State free to decide for itself what should be included within its program of scientific research, within reason and subject to its duty under the Convention to take into account reviews and recommendations by the Scientific Committee concerning its proposals.

9. With respect to the sale of whale meat, Australia now concedes first, that Article VIII, paragraph 2, requires parties to process whale meat, and second, that the sale of such meat incidental to a program of scientific research does not constitute commercial whaling¹⁹. As Professor Crawford explained in response to Judge Gaja’s question, “any program of scientific research will have a commercial element” and “[t]he incidental sale of ‘by-product’ is not enough to invalidate a genuine program of scientific research . . .”²⁰. It must follow inevitably that if JARPA II is a program of scientific research, the disposal of whale meat through sale is lawful and cannot be regarded as commercial, unless there is conclusive proof of bad faith. It must also follow

¹⁵CR 2013/20, p. 41, para. 28 (Gleeson)

¹⁶CR 2013/7, p. 41, para. 7 (Boisson de Chazournes).

¹⁷Preamble, The International Convention for the Regulation of Whaling (entered into force 10 Nov. 1948) 161 United Nations, *Treaty Series (UNTS)* 72, amended by Protocol of 19 Nov. 1956, 338 *UNTS* 366; CMJ, Ann. 6.

¹⁸CR 2013/20, p. 29, para. 76 (Crawford).

¹⁹CR 2013/20, p. 26, para. 67 (Crawford).

²⁰CR 2013/20, p. 27, para. 71 (Crawford).

that the incidental sale of whale meat under JARPA II does not change the program's scientific purpose within the meaning of Article VIII.

10. The parties are also in agreement that JARPA II has not succeeded in taking its full sample size²¹. Australia has made no attempt in its second round to rebut Japan's first-round submissions that the real reason for this reduced catch is the attacks of Sea Shepherd, as recognized by the Scientific Committee's 2013 Report.

11. The parties are in disagreement as to the inference that should be drawn from the statements of Japanese officials from between 1982 and 1987 regarding the continuation of "the tradition of whaling"²². Australia still claims that these are proof that at its inception, JARPA had a commercial purpose²³. Counsel before this Court must often wish that each and every utterance of every ^{official of the} State that they represent could have been cleared by lawyers before they were made, to ensure that they contain no passages which, taken out of context, have the potential for misrepresentation in this or that legal proceeding. That, of course, is impossible. The best that can be done is for the Court to have regard to the context in which such statements are made. Australia's assertion completely disregards that context. In particular, in 1982, paragraph 10 (e) of the Schedule specifically provided that the moratorium was not a permanent ban, and Japanese officials reasonably anticipated that it would be subject to review no later than 1990, just three years after the entry into force of the moratorium in respect of Japan, consistent with the express wording of paragraph 10 (e)²⁴. It was only in that context that Japanese officials referred to the continuation of "the tradition of whaling" after what they had been led to believe would be a brief and temporary pause. Furthermore, Japan has never hidden the fact that the objective of JARPA and JARPA II has been the resumption of sustainable commercial whaling, based on sound scientific research.

²¹CR 2013/18, p. 19, para. 17 (Dreyfus).

²²CR 2013/16, p. 24, para. 29 (Iwasawa).

²³CR 2013/20, p.21, para. 56 (Crawford).

²⁴Para. 10 (e), Schedule, ICRW; CMJ, Ann. 6.

III. Evidence of scientific purpose

12. With respect to the evidence, the parties were in agreement until the conclusion of the first round that the Court can substantially rely on the factual findings of the Scientific Committee as to whether JARPA II has scientific merit. In its Memorial, Australia refers to the reports of the Scientific Committee on no less than 100 occasions. In its first round pleadings, Mr. Burmester observed that “[t]he Scientific Committee is of particular importance to this case”²⁵ and Professor Sands emphasized that these reports constitute the views of a relevant “independent third party bod[y]”²⁶. He concluded in the first round that these reports have “never” provided a positive assessment of JARPA or JARPA II²⁷. In second round pleadings however, Professor Crawford insisted that the Court should not rely on these reports because the Scientific Committee is “increasingly dysfunctional”, operating in a state of “division and disarray”²⁸. Similarly, Professor Sands emphasized that the Scientific Committee “has been unable to function . . . it is at an impasse.”²⁹ This is a truly abrupt volte-face. It is in stark contradiction with all of Australia’s prior written and oral pleadings. This dramatic retreat from the most substantial body of evidence before the Court, is best explained by examining those reports, the contents of which, we submit, are fatal to Australia’s factual case.

13. First, Australia has failed to rebut the fact, evident from the IWC official records, that scientific data obtained from JARPA and JARPA II have made useful contributions to the work of the Scientific Committee since at least 1990³⁰. Second, Australia has failed to rebut the fact that both proposals and results of Japan’s scientific research have been consistently submitted to the Scientific Committee for reviews in accordance with established procedures³¹. Third, Australia has

²⁵CR 2013/8, p. 15, para. 7 (Burmester).

²⁶CR 2013/8, p. 61, para. 16 (Sands).

²⁷CR 2013/8, p. 63, para. 19 (Sands).

²⁸CR 2013/20, p. 30, para. 80 (Crawford).

²⁹CR 2013/19, p. 31, para. 23 (Sands).

³⁰“Report of the Sub-Committee on Southern Hemisphere Minke Whales”, Ann. F, Report of the Scientific Committee, *Rep. int. Whal. Commn* 41, 1991, pp. 113-131, Ann. 86; “Report of the Scientific Committee”, *Rep. int. Whal. Commn* 48, 1998, p. 103, Ann. 94, “The Committee noted that JARPA is at the half-way point and has provided substantial improvement in the understanding of stock structure”; “Report of the Review Meeting of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA) called by the Government of Japan, Tokyo, 18-20 January 2005”, SC/57/O6 (2005), p. 25, Ann. 102, “[T]he meeting agreed that JARPA work remains relevant for providing data important for management (of whales).”; CR 2013/15, p. 40, para. 34 (Takashiba); CR 2013/15, p. 50, para. 21 (Boyle).

³¹CR 2013/15, pp. 32-34, paras. 16-19 (Takashiba).

failed to rebut the fact that JARPA has been modified to take into account the recommendations of the Scientific Committee³². Ms Takashiba showed that Japanese scientists have modified and strengthened their research in response to comments from the Scientific Committee³³. Thus, the Scientific Committee “welcomed the presentation of this report in response to a request last year”³⁴, noted that methods of data collection had been strengthened “in response to comments from the [Scientific] Committee”³⁵ and even the IWC, in which the anti-whaling block often commands a majority, “noted that the programme had been revised to try to take into account comments made by the Scientific Committee” in the previous year³⁶. Australia’s case is that under the paragraph 30 procedure, this review should be conducted annually rather than periodically in accordance with the temporal scope of a program of scientific research³⁷. There is however, no basis for this argument in either the wording or the practice relating to paragraph 30. Even if Australia’s argument that reviews should be more frequent had any merit, *quod non*, it would at best be a technical procedural point rather than proof of bad faith. In pursuing this argument, Australia is truly clutching at straws.

14. Australia still maintains that the Scientific Committee has never given a positive assessment of either JARPA or JARPA II³⁸. It has failed, however, to rebut the plain and unambiguous conclusions of both the 1997 and 2006 reviews of JARPA. It has argued in its second round pleadings that these two Review Workshops were dominated by Japanese scientists, without recognizing that the Scientific Committee has adopted these reports. Indeed, the 2008 report of the Scientific Committee confirms that “considerable data have been collected by the JARPA programme by both lethal and non-lethal methods” and “endorses” the Review’s “conclusions and recommendations”³⁹. If Australia seeks endorsement of JARPA by the Scientific Committee, it needs to look no further than this report.

³²CR 2013/15, p. 37, paras. 28-29 (Takashiba).

³³*Ibid.*

³⁴*Rep. Int. Whal. Commn.* 46, 1996, p. 78.

³⁵*Rep. Int. Whal. Commn.* 43, 1993, p. 75.

³⁶*Rep. Int. Whal. Commn.* 42, 1992, p. 13.

³⁷CR 2013/20, p. 39, para. 19 (Gleeson).

³⁸CR 2013/8, p. 63, para. 19 (Sands).

³⁹*J. Cetacean Res. Manage.* 10 (Suppl.), 2008, p. 58.

15. Australia has also argued in second round pleadings that these two reviews are somehow irrelevant because they relate to JARPA and not JARPA II. Australia however, has consistently linked these as two interdependent phases of the same program of scientific research, and it has disregarded the Scientific Committee's reliance on JARPA data in its assessment of JARPA II in 2005. Australia has also failed to explain, in response to Judge Greenwood's question, why the views of 63 boycotting scientists in the 2005 review should prevail over the views of the 122 scientists who remained, or how this disagreement is even relevant to determining the scientific merit of JARPA II. Australia has failed to explain why the Scientific Committee views concerning the necessity of lethal sampling with respect to age data, blubber thickness or stomach contents should be disregarded by the Court. Australia has presented no evidence that Japan was wrong in 2005 to conclude that whale stocks will not be harmed by lethal sampling. Indeed, with respect to "stock structure studies", the JARPA Final Review Workshop recognized in 2006 "the very considerable amount of work undertaken", "the progress that has and can be made given the data collected", and the scientific agreement on stock structure in the JARPA research area "[b]ased on the analyses of the genetic and morphometric data presented"⁴⁰. Japan's assessment of JARPA II's impact on whale stocks remains un rebutted. Indeed, Australia's own expert witness Professor Mangel confirmed before the Court that "that very small take of [minke] whales will not in any way endanger this stock"⁴¹.

16. Australia has also failed to address the positive assessment of JARPN II, a research program substantially similar to JARPA II, in the 2009 review by the Scientific Committee under Annex P. For example, it was noted that "[t]he Panel appreciates the notable amount of effort undertaken and the generally high quality of the sampling programme, resultant data and information from JARPN II studies on whale food habits and prey preferences", and added that "[t]hese efforts have resulted in valuable datasets that have great potential for concerted analytical work on a broad range of topics . . ."⁴². Australia has also failed to address the positive comments

⁴⁰Report of the Intersessional Workshop to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic, Tokyo, 4-8 December 2006, *J. Cetacean Res. Manage.* 10 (Suppl.), 2008, p. 422; CMJ, Ann. 113.

⁴¹CR 2013/9, p. 63 (Mangel).

⁴²Report of the Expert Workshop to Review the Ongoing JARPN II Programme, *J. Cetacean Res. Manage.* 11 (Suppl. 2), 2010, p. 408, available at: <http://iwc.int/index.php?cID=workshop-reports&year=2009>.

of Scientific Committee members on JARPA II at its most recent meeting in June 2013. For example, the Committee noted that “the approach and results provide useable input data for Catch at Age Analysis”⁴³. This evidence of scientific purpose, from the IWC’s own official records, is credible, unambiguous, and stands unrebutted by Australia.

17. In short, Australia’s best case is that there is some scientific disagreement on aspects of JARPA II. Japan agrees with Australia that there is some scientific disagreement. Article VIII however, does not require scientific consensus. It merely requires “scientific purpose”, and in that regard, there can be no doubt.

18. Mr. President, Members of the Court. Throughout these proceedings, Australia has attempted to equate scientific criticism with lack of scientific merit. My colleagues at the university would say that it takes five researchers to change a light bulb: one to screw in the light bulb, and four to criticize the methodology. Scientific criticism is the vocation of scientists. It is their *raison d’être*. Even Japan’s own expert witness, Professor Walløe, criticized aspects of JARPA, confirming his independence as an eminent expert and scientist⁴⁴. But the question before the Court is not whether Japan could improve its scientific research. Rather, the question is, as Australia has alleged, whether it has no scientific merit at all; the question is whether it is commercial whaling in disguise.

19. By any measure, the Scientific Committee record concerning JARPA II does no more than establish scientific debate and scientific disagreement. It is debate and disagreement. But it is scientific. And that is all the Court needs to satisfy itself that JARPA II has a “scientific purpose”. The documentary evidence, evidence that Australia relied on extensively until it was abruptly abandoned in second round pleadings, this evidence fundamentally contradicts Australia’s case that JARPA II has “no scientific merit”. The Scientific Committee reports are simply fatal to Australia’s case.

20. Australia’s highly selective use of Scientific Committee reports merits one final and brief comment. The Court will recall that in Professor Sands’s second round pleadings, he referred to

⁴³SC Report 2013, p. 39, available at: <http://iwc.int/index.php?cID=3318&cType=document&download=1>.

⁴⁴CR 2013/14, p. 44 (Walløe).

several such reports⁴⁵. These were included in the judges' folder. These documents were copied upright, as one might expect. But there was one notable, mysterious exception. For example, here are the upright documents at tab 29 and tab 30 of Professor Sands's presentation, which we have included in tab 2 and tab 3 of your folder. And here is the next document at his tab 31, which is at tab 1-2 of your folder. It is suspiciously copied sideways. This document you will recall was page 426 of the 2009 JARPN II review. Professor Sands complained that counsel for Japan had "overlooked page 426"⁴⁶. He claimed that this page showed that non-lethal alternatives were not "impracticable or unavailable"⁴⁷. Mindful of the brilliant advocacy of my dear friend and colleague, I consulted that document. It quickly became apparent why it had been presented to you sideways. The upright copy of page 426, at tab 1-3 of your folder, demonstrates why the lower half, indicated by the red line, was accidentally cut off. That portion of the review states, and I quote: "The Panel recognises that at present, certain data, primarily stomach content data, are only available via lethal sampling."⁴⁸

21. Mr. President, Members of the Court, I stand accused of "creative lawyering", but fortunately, I am not guilty of "creative photocopying". We urge you to treat with considerable caution Australia's account of the contents and conclusions of Scientific Committee reports.

22. As previously mentioned, Australia's case that JARPA II is not scientific now stands or falls based on the criteria set forth in Professor Mangel's testimony. Unlike Annex P, these criteria have never been accepted or applied by either the Scientific Committee or the Parties to this case. If Australia complains that there has never been a positive review of JARPA II under Annex P, that is because the review is scheduled for 2014. It is absurd to suggest that pending this review, Annex P should be substituted with Professor Mangel's standards as the measure of JARPA II's scientific merit.

23. But even the expert testimony of Professor Mangel is inconclusive. For example, he agreed with Professor Walløe that JARPA II's sample size amounts to "a very small take" of minke

⁴⁵CR 2013/19, p. 47, para. 60 (Sands).

⁴⁶*Ibid.*

⁴⁷*Ibid.*

⁴⁸Report of the Expert Workshop to Review the Ongoing JARPN II Programme, *J. Cetacean Res. Manage.* 11 (Suppl. 2), 2010, 405-449 (SC/61/Rep.1), available at: <http://iwc.int/workshop-reports#!year=2009>, pp. 426.

whales⁴⁹. It may be recalled that according to Professor Walloe it was “obvious that some of the objectives for JARPA were not met during the JARPA period, partly because the sample sizes were too small”⁵⁰. There were of course points of disagreement between the two experts in their appreciation of JARPA II’s scientific merit. But, at most, this shows that two equally reasonable scientists may arrive at differing conclusions based on their respective methodologies and assumptions. Leaving that aside, the Parties fundamentally disagree on the role of experts in this case. Having suddenly abandoned the Scientific Committee Reports, Australia now argues that the case should essentially be decided on Professor Mangel’s testimony as to what constitutes “science”. Japan is of the view that it is for the Court to decide that legal question; it is for the Court to determine whether Japan reasonably concluded that JARPA II is for the purposes of scientific research within the meaning of Article VIII. What constitutes science in this case is not an abstract academic question, it is not a matter for metaphysical speculation. It is a legal question to be decided based on the applicable rules. Those rules are Article VIII, paragraph 30, and Annex P. These are clearly the criteria agreed upon by the Parties as the basis for determining scientific merit.

24. It is noteworthy in this regard that Australia has said little on the standard of review under Article VIII of the Convention. It is Japan’s submission that Contracting States have broad discretion to issue special permits for scientific whaling under that provision. The Court should only intervene where the exercise of that discretion is manifestly unreasonable. That, we submit, is clearly not the case. The evidence before the Court can leave little doubt that JARPA II has a scientific purpose based on the reviews of the IWC Scientific Committee and the objective criteria set forth in Annex P; it can leave little doubt that for the past 30 years, Japan has pursued this program of research in good faith and reasonably for a scientific purpose.

25. In conclusion, taken at its best, Australia has merely established that there is scientific debate and disagreement over aspects of JARPA II. It attempts, unconvincingly, to equate lack of scientific consensus with lack of scientific purpose. Even the politicized IWC Resolutions that Australia invokes do not state that JARPA II violates Article VIII of the Convention. To the

⁴⁹CR 2013/9, p. 63 (Mangel).

⁵⁰CR 2013/14, p. 50 (Walloe).

contrary, as indicated in my first round pleadings, despite their serious opposition to JARPA II, senior Australian officials have on several occasions admitted that it is within Japan's rights under Article VIII. Australia manifestly fails to demonstrate that in the exercise of its broad discretion under that provision, Japan has in any way acted unreasonably or unlawfully. Australia's case that JARPA II constitutes commercial whaling in disguise, its case that Japan has pursued a program of fraudulent pseudo-science, acting in bad faith, for almost 30 years, that case we submit, must fail. It is manifestly and wholly without merit.

IV. Japan's Commitment to the IWC

26. Mr. President, Members of the Court. As I set forth in our first round pleadings, Australia's case is fundamentally that Japan has acted in bad faith. To quote from the Agent's speech, Japan has "disguised" commercial whaling "in the lab-coat of science"⁵¹.

27. Bad faith, of course, is a legal euphemism for intentional deception. In other words, Australia's case is that Japan has lied, and that it has done so systematically, as a matter of State policy, for almost thirty years, before the Scientific Committee, before the IWC, and now, before this Court. Needless to say, this is a serious accusation, an affront to the dignity of a nation. Surely, it is not an accusation to be made lightly. My highly-esteemed friend and colleague, Professor Crawford, rightly noted in his pleadings last week that: "Like-minded States do not ordinarily accuse each other of bad faith. Counsel appearing for them in international courts and tribunals are bound not to do so unless they have actual evidence."⁵²

28. Professor Crawford now contends that the Court should not decide the case "wholly or primarily" based on what he calls "fluctuating and subjective notions [such] as bad faith"⁵³. This, of course, is a significant reversal of Australia's theory, at the eleventh hour. "Lack of good faith" is at the core of its Memorial, and a central theme of its first round pleadings. Japan would of course agree that Australia should not have thrown about accusations of bad faith so loosely, especially in plain disregard of its own evidence. Contrary to his own admonition however, Professor Crawford's conclusion is that in this case, "a strong presumption of good faith is, in

⁵¹CR 2013/7, p. 24, para. 18 (Campbell).

⁵²CR 2013/19, p. 64, para. 20 (Crawford).

⁵³*Ibid.*, p. 65, para. 22.

effect, to allocate [resources in the public domain] to a State good at concealment”⁵⁴. What exactly is meant by “a State good at concealment”? This is clarified by what he called “a cautionary tale” about the *Southern Bluefin Tuna Case*: he said that even while it was engaged in those proceedings, Japan was “deliberately and substantially overfishing its quota of tuna”⁵⁵. It is not clear what inference he asks the Court to draw from that, unrelated case, from more than a decade ago. But even if it was somehow relevant, the allegation that Japan engaged in wilful deception in that case is simply not true. The reference that Professor Crawford gave shows nothing of the kind. Once more, Japan can only regret the readiness of Australia to make unwarranted accusations of bad faith, just as it argues that the Court should not base its decision on bad faith.

29. Japan has been placed in the unpleasant situation of having to repeatedly defend itself against such baseless accusations before this Court. In his round two opening statement, the Honourable Mark Dreyfus, Attorney-General of Australia, found Japan’s response to these grave accusations “offensive”⁵⁶. He clarified that this case is not about what he called “cultural imperialism”; it is a “disagreement between friends”; it is about Japan’s bad faith and defiance against collective regulation by the IWC⁵⁷.

30. In this light, to the extent that collective regulation is at issue, Japan observes that had Australia not abruptly rejected the IWC Proposed Consensus Decision in 2010, had it not brought this case just days before negotiations started at the 2010 IWC Annual Meeting in Morocco, had its Environment Minister not defiantly said that “it was now time to close the door on the Proposed Consensus Decision”⁵⁸, in other words, had Australia expressed the slightest willingness to compromise, there would most probably be a collective solution to this dispute today. The IWC would have overcome its impasse; it would have been saved from the brink of collapse.

31. Japan has noted in this regard the leadership of Sir Geoffrey Palmer — the eminent New Zealand statesman and IWC Commissioner — who had chaired the Support Group in that

⁵⁴*Ibid.*

⁵⁵CR 2013/19, pp. 64-65, paras. 20-21 (Crawford).

⁵⁶CR 2013/18, p. 15, para. 5 (Dreyfus).

⁵⁷CR 2013/18, p. 16, para. 7; *ibid.*, p. 14, para. 4.

⁵⁸Peter Garrett, “Whales worth more alive than dead”, available at: <http://www.theage.com.au/opinion/politics/whales-worth--more-alive-than-dead-20100428-trc1.html> (last checked on 1 July 2013).

important negotiation process on the “Future of the IWC”. It may be recalled that after the collapse of the exhaustive three-year long negotiations, Sir Geoffrey paid notable tribute to Japan, and I quote, “for their huge commitment and their willingness for compromise”⁵⁹. His silence on Australia’s role was equally notable.

32. It is in this light that Japan notes with regret the role that New Zealand has played in this proceeding. It cannot go unnoticed that on several occasions, New Zealand made submissions on the facts of the case, including Japan’s “burden of proof” and whether it had properly considered certain scientific evidence⁶⁰. These submissions were in support of Australia’s allegations of bad faith against Japan. They clearly went beyond the matters of treaty interpretation that circumscribe the proper scope of interventions under Article 63 of the Court’s Statute. They were also in express contradiction with the New Zealand IWC Commissioner’s views as to whether it was Japan or Australia that had undermined a consensual solution for the collective regulation of whaling.

33. In this regard, Japan refers the Court to the 15 December 2010 “joint media release” by the Honourable Kevin Rudd, then the Foreign Minister of Australia, and the Honourable Murray McCully, the Foreign Minister of New Zealand, concerning New Zealand’s intervention in this case⁶¹. In that statement, which appears on the official Government website, the two Foreign Ministers confirm that “both countries have agreed to work together towards the elimination of whaling in the Southern Ocean through complementary strategies”⁶². The following statement leaves no doubt as to what that strategy is:

“Australia has indicated that they would prefer New Zealand not to file as a party. Because New Zealand has a judge on the ICJ . . . the joining of the two actions would result in Australia losing its entitlement to appoint a judge for the case. New Zealand’s decision to intervene will allow the case to proceed without delay.”⁶³

34. It is with great regret that Japan must raise this matter, but it is difficult not to conclude in light of this statement and the subsequent conduct of oral pleadings that the two parties have

⁵⁹IWC Chair’s Report of 62nd Annual Meeting, p. 8.

⁶⁰See, e.g., CR 2013/17, p. 29, para. 47 (Finlayson): discussing the appropriate party upon whom to place the “burden of proof”; CR 2013/17, p. 40, para. 18 (Ridings): commenting on JARPA II and observing that Japan has “failed to take into account” certain scientific considerations.

⁶¹“Joint Media Release”, 15 Dec. 2010, available at: http://foreignminister.gov.au/releases/2010/kr_mr_101215.html.

⁶²*Ibid.*

⁶³*Ibid.*

acted in collusion. It is difficult not to conclude that they are parties in the same interest. This is an unfortunate precedent for Article 63 interventions. It has clearly prejudiced Japan in these proceedings.

35. What is particularly discouraging for Japan is that, despite the accusations of bad faith that it has had to answer before this Court, despite the insistence of the Australian Attorney-General that it is in the spirit of “upholding the rule of law” that Australia has brought this case, Australia seems to have no intention of ending its campaign against Japan, irrespective of the Court’s decision. Immediately after his second round opening speech on 10 July, in an interview with Leigh Sales of the Australian Broadcasting Corporation, posted on the Attorney-General’s website and that appears at tab 5 of your folders, the Attorney-General was asked the following question: “If the ICJ rules in favour of Japan, will the Australian Government accept that decision and move on?”⁶⁴ The Attorney-General responded: “Well, we’ll accept the decision just as we would expect Japan to accept the decision, but we’re going to keep working with other nations in the International Whaling Commission to get Japan to stop their program.”⁶⁵ He further clarified: “but if the International Court of Justice rules against us that the whaling convention does permit Japan to do what it’s been doing for many years, we’ll keep arguing in the whaling commission with other nations”⁶⁶.

36. This position is consistent with the earlier statements made by the Attorney-General on 5 July, immediately before he travelled to The Hague to make his submissions. He was asked the following question from an Australian journalist, a certain Jon Faine, and I quote here from the official transcript that appears on the Attorney-General’s website which appears at tab 6 of your folder:

[The journalist asks]: “. . . if you lose, does that ever put an end, for instance, to the Sea Shepherd battles that we’ve seen in the Southern Ocean and their call for Australia to back their tactics.”

[The Attorney-General responds]: “If we are unsuccessful, we will, of course, abide the decision of the court, but equally, we will continue to use diplomatic means to argue the point that we are making, the points that we are making within the

⁶⁴Australian Broadcasting Corporation, “Attorney-General accuses Japan of ‘commercial whaling dressed up as science’”, 10 July 2013, available at: <http://www.abc.net.au/7.30/content/2013/s3800400.htm>.

⁶⁵*Ibid.*

⁶⁶*Ibid.*

International Whaling Commission, and that will be arguing with Japan that they should stop doing what they are doing . . .”

[The journalist asks again]: “But if we got to court and we lose, isn’t that the end of the argument? We’ve just got to basically put up with the court’s decision.”

[The Attorney-General responds]: “On the contrary . . . we’re talking about protecting the world’s environment . . .”⁶⁷

A bit later in the same interview, the Attorney-General was asked about Sea Shepherd, and I quote once again from the same website:

[The journalist asks]: “So what do we do about Sea Shepherd if, indeed, we go ahead and Japan wins? What do we do? Do we then heed their calls to take a different stance, a different attitude, to the activities, then, of Sea Shepherd, which the court may well determine are outside international law?”

[The Attorney-General responds]: “Well, Sea Shepherd, along with other boats, have got the right to come to Australian ports . . . it’s absolutely right that Sea Shepherd have the right to come to port at Australian ports.”⁶⁸

37. The Court will recall that in his statement in this proceeding, the Attorney-General confirmed that: “The fact that Sea Shepherd vessels visit Australian ports or may be registered in Australia is not indicative of Australian Government support⁶⁹”.

38. In light of these unambiguous statements, Japan cannot help but to conclude that irrespective of the Court’s decision, Australia will continue its campaign of confrontation at the IWC and its toleration of Sea Shepherd attacks on the high seas. It cannot help but to conclude that for Australia, this Court is merely one instrument among others to achieve the unyielding purpose of imposing its will on Japan, one way or another. Australia will stop at nothing. That is what it means by the international rule of law: we will get what we want, no matter what the Court says.

39. It cannot go unnoticed that consistent with the statement of the Attorney-General, the former head of the Green Party, Bob Brown, now the so-called “mission commander” of Sea Shepherd, acting in collaboration with former Environment Minister Ian Campbell who, as I mentioned in first round pleadings, is now also with Sea Shepherd. Mr. Brown made it clear in a 10 July interview that, and I quote: “We are preparing as if the outcome doesn’t prevent future

⁶⁷Attorney-General of Australia, Transcript of interview with Jon Faine — 774 ABC Melbourne, 5 July 2013, available at: <http://www.attorneygeneral.gov.au/transcripts/Pages/2013/Third%20quarter/5-July-2013---Transcript-of-interview-with-Jon-Faine---774-ABC-Melbourne.aspx>.

⁶⁸*Ibid.*

⁶⁹CR 2013/18, p. 15, para. 6 (Dreyfus).

whaling . . . We are standing by to keep up the fight.”⁷⁰ This leaves little doubt that even as the Court deliberates on its decision in the coming months, the JARPA II research vessels will face another season of violent attacks in Antarctic waters.

40. Mr. President, Members of the Court, even as this case was being argued before the Court, even as Japan spoke of the intransigence of Australia, the politicization of science and its policy of “zero tolerance”, even as these pleadings were being made, the IWC was unfortunately, brought one step closer to the brink of collapse. You may recall that Professor Sands made much of the fact that Australia exempted Aboriginal Subsistence Whaling from its otherwise total opposition to whaling at the IWC⁷¹. On 1 July, the IWC Commissioner of Denmark, Gitte Hundahl, submitted the following letter to IWC Commissioners and Contracting States⁷². This letter appears at tab 7 of your folders and was circulated by the IWC Secretariat on 3 July 2013. It states in relevant part that because the IWC could not agree on Aboriginal Subsistence Whaling catch limits for Greenland for 2013 and beyond, the Government of Greenland has “decided to unilaterally implement on a temporary basis the proposal on catch limits put forward by the Kingdom of Denmark at the 64th annual meeting” of the IWC in 2012; that is to say, catch limits that were rejected by anti-whaling nations, including Australia⁷³. The letter continues: “That decision was taken in order to ensure undisrupted whaling in Greenland to meet the needs of the population and to avoid unregulated whaling.”⁷⁴ The letter further emphasizes that: “The proposal was consistent with the advice of the Scientific Committee at the time of submission as not harming stocks. The Government of Greenland has informed that it will continue to follow the advice of the Scientific Committee in this regard.”⁷⁵

⁷⁰<http://www.theaustralian.com.au/news/japan8217s-whaling-claims-8216untrue-and-offensive-to-australia8217-attorneygeneral-tells-un-court/story-c6frg6n6-1226676931653>.

⁷¹CR 2013/19, p. 54, para. 79 (Sands).

⁷²<http://iwc.int/cache/downloads/c0mqg34ohp4ck8ccko084ko0k/Letter%20from%20Denmark%20to%20IWC%20Greenland%20asw.pdf>.

⁷³*Rep. Int. Whal. Commn.* 2012, p. 23 <http://iwc.int/cache/downloads/3svqu6d4dlogg0owc8oswswk0/AnnualReport2012.pdf>.

⁷⁴<http://iwc.int/cache/downloads/c0mqg34ohp4ck8ccko084ko0k/Letter%20from%20Denmark%20to%20IWC%20Greenland%20asw.pdf>.

⁷⁵*Ibid.*

41. What is particularly alarming is Denmark's indication that: "Should a solution not be found consistent with the convention, the Kingdom of Denmark intends to submit notification on withdrawal from the Convention on the Regulation of Whaling before 1 January 2014."⁷⁶

42. Mr. President, Members of the Court, the message is clear. If the hijacking of the Convention continues, if the politicization of science persists, if the traditions and cultures of people are sacrificed to appease other people's sentiments and selective moral judgment, if international law continues to be disregarded, soon there will be no whaling nations at the IWC. Then Australia and its allies can adopt all the resolutions that they want, and triumphantly ban all whaling for all time in the name of "collective regulation", without the need to negotiate, without the need to compromise, without the need to listen to the Scientific Committee. But they will achieve their objectives without the whaling nations, because they will all have left the IWC to find viable alternatives elsewhere, for regulation of sustainable whaling. Soon, there will be two competing international organizations, one for banning all whaling, and the other for science-based sustainable whaling. There will be a Whaling Commission and an anti-Whaling Commission, and nations can choose which organization they wish to join. But there will be no collective forum where matters of collective interest can be regulated through meaningful co-operation. That is exactly where Australia's policy of "no compromise" will eventually lead.

43. Mr. President, Members of the Court, this brings me to the supreme irony of this case, the most obvious fact that completely undermines Australia's conspiracy theory of JARPA II — its theory of commercial whaling disguised as science. It is such a self-evident fact, so fundamental, that it can be easily overlooked, and we invite the Court to carefully consider it. Australia could bring this case against Japan, it could accuse Japan of bad faith and commercial whaling in disguise, only because Japan has elected not to withdraw from the IWC. It could bring this case only because Japan still respects the moratorium on commercial whaling. How difficult would it be for Japan to simply withdraw from the IWC as Canada did in 1981, as Iceland did in 1992, or as Denmark may now do in 2014? How difficult would it be to simply remove the legal impediment to sustainable commercial whaling if indeed that was the policy of intentional deception that

⁷⁶<http://iwc.int/cache/downloads/c0mqg34ohp4ck8ccko084ko0k/Letter%20from%20Denmark%20to%20IWC%20Greenland%20asw.pdf>.

Australia attributes to Japan? Why go through the extraordinary trouble of creating a fraudulent program of pseudo-scientific research for 30 years as Australia alleges? It is true that Japan's trust has been repeatedly betrayed, as the moratorium became a permanent ban despite assurances to the contrary, as the RMP was followed by the RMS, only to be endlessly discussed and debated. It is true that the Proposal for a Consensus Decision was sabotaged at the eleventh hour by a "no compromise" policy; it is true that the politicization of science has brought the IWC ever closer to collapse. So why, it may be asked, has Japan remained in the IWC and subjected itself to harassment, intolerance, insults, and even violence, for so long? Why does it stand before the Court today to answer baseless accusations of bad faith?

44. The answer is simple. Japan has remained in the IWC, despite this abusive behaviour, because of its genuine commitment to multilateralism, because of its unyielding commitment to negotiation, compromise, the rule of international law, and peaceful dispute settlement. And Australia comes before this Court to take advantage of that commitment; to unfairly and unreasonably portray Japan as a rogue State at the IWC; to level accusations of bad faith against what it deems to be a friendly State that it can mistreat with impunity; to cloak itself in the mantle of the international rule of law, even as the Attorney-General makes clear that it will persist in harassing and confronting Japan if this Court does not give Australia the decision that it wants.

45. Mr. President, Members of the Court, that concludes my submission. I thank the Court for its patience and indulgence. It has been a great honour and privilege to appear before you in this proceeding on behalf of Japan. I now ask that you give the floor to Professor Pellet.

The PRESIDENT: Thank you, Sir. J'invite maintenant le professeur Pellet. Monsieur Pellet, vous avez la parole.

M. PELLET : Merci, Monsieur le président.

LA COMPÉTENCE DE LA COUR - CONSIDÉRATIONS GÉNÉRALES SUR LA CONVENTION DE 1946

1. Monsieur le président, Mesdames et Messieurs les juges, le professeur Akhavan ayant replacé notre affaire dans son contexte, il m'appartient ce matin de répondre d'abord aux objections que l'Australie maintient faiblement, à l'encontre de l'exception d'incompétence qu'a soulevée le

Japon — et qu'il maintient, lui ~~Japon~~, fortement (I.). Je reviendrai ensuite sur la structure de la convention de 1946 et la place qu'y tient l'article VIII (II.). x

I. L'incompétence de la Cour

2. Mesdames et Messieurs les juges, il est toujours un peu embarrassant de venir expliquer à cette barre que vous n'êtes pas compétents... Telle est pourtant notre position — et, si le Japon soulève cette objection, ce n'est évidemment pas par méfiance vis-à-vis de la Cour, mais parce qu'il lui semble que, par sa nature très délicate techniquement, l'affaire que l'Australie vous a soumise ne se prête pas à un règlement par la Cour de céans.

3. Notre exception d'incompétence est fondée sur la réserve *b)* dont l'Australie a assorti sa déclaration en vertu de l'article 36, paragraphe 2, du Statut et qui doit s'appliquer au titre de la réciprocité, ~~réciprocité~~ qui imprègne tout le système de la clause facultative. x

[Projection n° 1 : La deuxième réserve australienne.]

4. Dès son discours introductif, l'*Attorney-General* d'Australie a résumé ainsi la thèse du demandeur : «the reservation only operates in relation to disputes between Australia and another country with a maritime claim that overlaps with that of Australia — that is, a situation of delimitation. Australia has no delimitation with Japan and hence the paragraph (*b*) reservation can have no operation»⁷⁷. Et tel a été, en effet, l'argument quasi unique qu'a développé M. Burmester à cette barre en faveur de la compétence de la Cour malgré les termes de la réserve et les explications données à l'époque par les autorités australiennes quant à la portée de cette clause. Toutefois, avant de m'attacher à réfuter cet argument, je souhaite faire deux observations liminaires sur des points que mon contradicteur n'a abordés qu'en passant : l'étendue *ratione loci* de la réserve australienne et la définition du mot exploitation.

5. Monsieur le président, comme je l'ai indiqué le 2 juillet, la traduction française de la déclaration australienne est exécrable⁷⁸ — à tel point que, en présentant mes excuses aux héroïques tenants de la francophonie, je me fonderai exclusivement sur le texte anglais — je laisse la

⁷⁷ CR 2013/18, p. 18, par. 15 (Dreyfus).

⁷⁸ CR 2013/12, p. 27, par. 9 (Pellet).

traduction à l'écran pour le cas où se trouveraient parmi les juges ou dans le public des francophiles suffisamment enrégés pour essayer de lui donner un sens...

6. Dans la langue originale donc, l'Australie écrit exclure de la compétence de la Cour les affaires concernant certaines matières (mais ce n'est pas ce qui nous intéresse dans l'immédiat), ~~certaines matières~~ relatives à «any disputed area of or adjacent to any such maritime zone». M. Burmester relève que JARPA II «extends well outside any waters claimed by Australia»⁷⁹. Et il est vrai qu'il n'y a pas coïncidence exacte entre le programme de recherche scientifique contesté et les zones de l'océan Austral revendiquées par l'Australie et dont l'appartenance à celle-ci est contestée par le Japon ; mais :

[Fin de la projection n° 1 — Projection n° 2 : Figure n° 3 : Crimes at Sea Act Cooperative Scheme Adjacent Areas (Illustrative Map, disponible à l'adresse http://www.comlaw.gov.au/Details/C2012C00054/Html/Text#_Toc316906735).]

- la réserve vise expressément non seulement les eaux qui font l'objet d'un différend, mais aussi celles qui leur sont *adjacentes*, et
- l'Australie a de l'adjacence une vision particulièrement large, comme le montre, exemple parmi d'autres, la carte projetée en ce moment — qui est reproduite à l'onglet n° 8-2 de vos dossiers — et qui illustre le *Crimes of Sea Act* australien de 2000 ; ce croquis est annexé à l'*Act*, et il est parlant : les «zones adjacentes» qu'il décrit s'étendent très au-delà de 200 milles marins des côtes des Etats du Commonwealth d'Australie ... — *très au-delà* ...

[Fin de la projection n° 2 — Projection n° 1bis : Reprise de la projection n° 1.]

7. Pour être exclu de la compétence de la Cour, le différend doit porter sur une activité particulière se déroulant dans une zone maritime contestée ou dans une zone adjacente : il doit s'agir de *l'exploitation* — *of the exploitation* — de ces zones. M. Burmester explique que «*[f]or a dispute arising out of, concerning, or relating to the exploitation of any disputed area ... , ordinarily requires competing claims by the relevant States to a right to exploit the relevant resources*»⁸⁰. Sous réserve de quelques mots que j'ai omis de ma citation, mais sur lesquels je vais

⁷⁹ CR 2013/18, p. 27, par. 18 (Burmester).

⁸⁰ *Ibid.*, par. 17 (Burmester).

revenir, je n'ai pas de querelle avec cela. Mais c'est la suite qui me stupéfie : comment Henry Burmester peut-il affirmer qu'il n'y a pas, en l'espèce, de différend sur l'exploitation des zones en question, tout en reconnaissant expressément, dans le même mouvement, que «seul le Japon souhaite se livrer à une telle *exploitation*» («only Japan wishes such *exploitation*»). Eh oui, le Japon souhaite se livrer à une certaine forme d'exploitation⁸¹ de ces zones et l'Australie lui conteste ce droit — je vois mal ce que cela peut être d'autre qu'un différend «*arising out of, concerning, or relating to the exploitation...*» !

8. Dès lors, mon contradicteur concentre ses attaques — ou place tous ses espoirs ... — dans les trois derniers mots de la réserve *b*) : «pending its delimitation» — mais, au lieu de s'en tenir à cette expression, qui, quoi qu'il en dise⁸², exprime clairement un moment, il transforme cette expression en une autre et l'on retrouve ici les mots que j'ai omis de ma citation précédente : «in a delimitation context»⁸³ ou «in a delimitation situation»⁸⁴. Mais ce ne sont pas les mots que l'Australie a choisis pour libeller sa réserve ; elle a utilisé un vocabulaire temporel : «pending delimitation» — «*pending*», «en attente de» : c'est bien de quelque chose de momentané qu'il s'agit ; une fois cette condition réalisée, la réserve ne s'applique plus. Ceci n'a rien d'extravagant et, en tout cas, c'est ainsi que l'Australie a choisi de rédiger sa réserve.

9. Mais, dit en substance, mon contradicteur et ami : «l'Australie et le Japon n'ont pas de différend impliquant une délimitation». Quelques remarques rapides sur ce point, Monsieur le président.

10. Tout au long de sa plaidoirie, M. Burmester a reconnu (pour écarter l'applicabilité de la réserve australienne) que les situations visées par celle-ci étaient celles résultant de revendications concurrentes sur les mêmes espaces marins :

- paragraphe 16 de son exposé : «the reservation only applies to exploitation disputes between Australia and another State with an *overlapping* claim with Australia»;
- paragraph 1 : «This is not a dispute *about overlapping claims* to sovereign rights»;

⁸¹ Voir CR 2013/12, p. 35-39, par. 23-33 (Pellet).

⁸² CR 2013/18, p. 26, par. 14 (Burmester).

⁸³ *Ibid.*, p. 27, par. 17 (Burmester).

⁸⁴ *Ibid.*, p. 22-23, par. 4 et 5 (Burmester).

- paragraph 15 : «Reservation (*b*) remains, however, a reservation directed at disputes about maritime boundaries or exploitation issues arising between Australia and another State *with overlapping claims...*» ;
- paragraph 9 : «The fundamental difference not addressed by Professor Pellet is that Australia and Timor-Leste are in a delimitation situation with each other —*there are overlapping claims*. This is not the case with Japan».

11. Avec tout le respect dû, c'est tout à fait inexact : l'Australie et le Japon ont des revendications concurrentes sur la zone maritime baignant le prétendu territoire antarctique australien. La situation est bien résumée dans un considérant de l'arrêt rendu le 15 janvier 2008 par la *Federal Court of Australia* dans une affaire concernant une société japonaise accusée d'avoir violé — en liaison avec le programme JARPA — le «sanctuaire baleinier australien» établi en application de l'*Act* de 1999 pour la protection de l'environnement et la conservation de la biodiversité (*EPBC Act*) :

«Australia's claim to sovereignty over the Australian Antarctic Territory is recognised only by four nations (New Zealand, France, Norway and the United Kingdom), themselves with asserted (and otherwise disputed) claims over various parts of the Antarctic land mass. Japan rejects Australia's purported exercise of jurisdiction over waters that are considered by Japan to be the high seas.»⁸⁵

Il y a bien là, Monsieur le président, des prétentions maritimes concurrentes des «overlapping claims» — ceux-là même qui, conformément à l'analyse de mon contradicteur, sont visés par la réserve australienne. Et il serait éminemment artificiel de les écarter de son champ d'application au prétexte que, dans la zone en question, le Japon ne revendique pas de droits souverains pour lui-même mais conteste ceux auxquels l'Australie prétend. Ce que le Japon conteste c'est la limite extérieure — une délimitation, donc — de la zone économique exclusive que s'est attribuée l'Australie. Et, de même qu'aux dires de M. Burmester, «[w]ith respect to Timor-Leste and Australia, the two States have reached no final delimitation agreement and have instead agreed to freeze their respective claims for 50 years», de même ici, l'Australie et le Japon n'ont pas résolu le litige résultant de leurs prétentions concurrentes concernant les eaux baignant l'Antarctique, mais les deux pays n'en sont pas moins convenus, en ratifiant le traité sur l'Antarctique du

⁸⁵ *Humane Society International Incorporated. v. Kyodo Senpaku Kaisha Ltd*, [2008] FCA 3, 15 January 2008, par. 13 [CMJ, annexe 177].

1^{er} décembre 1959, de *geler* eux aussi leurs prétentions territoriales⁸⁶ ; leur différend n'en subsiste pas moins.

[Fin de la projection n° 1bis — Projection n° 3 : National Interest Analysis, Australian Declaration under Paragraph 2 of Article 36 of the Statute of the International Court of Justice 1945 (par. 12 et 17 en sautant les points *a*) et *c*))] disponible à l'adresse <http://www.austlii.edu.au/au/other/dfat/ATNIA/2002/20.html>.]

12. C'est d'ailleurs bien ainsi que le Gouvernement australien a expliqué sa réserve dans une note au Parlement rédigée au moment du dépôt de la déclaration par le département de l'*Attorney-General*. Cette explication, exprimée à deux reprises dans les mêmes termes, dans ce document officiel, se lit ainsi :

«The new declaration limits Australia's acceptance of the compulsory jurisdiction of the ICJ. This means that an action cannot be commenced against Australia in the following circumstances:

...

(b) where disputes involve maritime boundary delimitation or disputes concerning the exploitation of an area in dispute or adjacent to an area in dispute.»⁸⁷

13. On ne saurait suspecter le Gouvernement australien d'avoir sciemment trompé son propre Parlement sur la portée de sa déclaration facultative en lui communiquant une interprétation erronée de celle-ci. Elle coïncide avec celle que le Japon vous demande de retenir aujourd'hui, Mesdames et Messieurs de la Cour. Et elle entraîne inévitablement votre incompétence, car elle soustrait à votre juridiction les «disputes involving maritime delimitations *or* disputes concerning the exploitation of an area in dispute or adjacent to an area in dispute». Le différend que l'Australie vous a soumis concerne très évidemment un différend concernant l'exploitation d'une zone maritime en litige ou adjacente à une telle zone. En conséquence, il échappe à votre juridiction.

[Fin de la projection n° 3.]

⁸⁶ Article IV, par. 1.

⁸⁷ National Interest Analysis, *Australian Declaration under Paragraph 2 of Article 36 of the Statute of the International Court of Justice 1945*, lodged at New York on 22 March 2002, tabled in the Australian Parliament 18 June 2002, disponible à l'adresse <http://www.austlii.edu.au/au/other/dfat/ATNIA/2002/20.html>.

14. Comme nombre d'Etats acceptant la clause facultative, l'Australie a voulu «finasser» en l'acceptant, en principe, mais en en excluant les différends à propos desquels elle risquait réellement d'être atraite devant la Cour. Elle doit subir les conséquences de ses ... «habiletés». Monsieur le président, je vais passer à un sujet complètement différent et je me demande...

Le PRESIDENT : Oui, c'est un moment important maintenant pour une pause de 15 minutes. The hearing is suspended for 15 minutes.

The Court adjourned from 11.20 a.m. to 11.40 a.m.

Le PRESIDENT : Veuillez vous asseoir. Professeur Pellet, vous avez la parole.

M. PELLET :

II. La structure de la convention

15. Monsieur le président, avant que vous décrétiez la pause, j'ai montré que la Cour n'avait pas compétence du fait de la réserve *b)* figurant dans la déclaration australienne d'acceptation de la juridiction obligatoire de la Cour dont le Japon peut se prévaloir au titre de la réciprocité. Par conséquent, *tout* ce que vont dire dorénavant les avocats du Japon doit s'entendre comme étant plaidé à titre subsidiaire, dans l'hypothèse seulement où vous écarteriez notre exception d'incompétence. Cela vaut pour la présentation que je vais faire maintenant de la structure générale de la convention du 2 décembre 1946 pour *la réglementation* (pas l'abolition...) *de la chasse* à la baleine dont nos amis australiens (et néo-zélandais — mais ils font cause commune) donnent une description fort trompeuse.

16. Ceci nous oblige à revenir, d'une part, sur l'objet et le but de la convention (A.) et, d'autre part, sur la manière dont toutes les Parties — et j'inclus la Nouvelle-Zélande dans cette appellation — s'accordent à considérer que l'article VIII est la clef de l'affaire qui nous occupe (B.).

A. L'objet et le but de la convention

17. Monsieur le président, je suis tout prêt à admettre que les traités ne sont pas des papyrus figés dans un éternel hier et qu'ils doivent, dans la mesure où leur texte le permet, être interprétés

en fonction du contexte dans lequel ils s'appliquent et de son évolution. Mais interprétation n'est pas revision⁸⁸ et l'on ne saurait, sous couvert d'interprétation, convertir un traité relatif à la réglementation de la chasse à la baleine en un traité l'interdisant ; ni une disposition d'un traité autorisant expressément les Etats à subordonner telle ou telle activité aux conditions «qu'il jugera opportunes», comme les obligeant à se soumettre à une autorisation préalable.

[Projection n° 4 : Article V, paragraphe 2, de la convention pour la réglementation de la chasse à la baleine.]

18. Cela est d'autant plus évident en l'espèce que les rédacteurs de la convention ont expressément prévu un mécanisme permettant de l'adapter de manière relativement souple aux évolutions dans les domaines couverts par l'annexe à la convention. Mais ces modifications sont expressément limitées aux matières énumérées au paragraphe 1 de l'article V et doivent respecter les conditions fixées au paragraphe 2 de cette disposition — une disposition sur laquelle il n'est peut-être pas superflu de revenir⁸⁹ quelques instants :

- le point *b*) oblige la commission à «*se fonder sur* des données scientifiques» — *se fonder sur*, Monsieur le président, pas seulement «tenir compte» ou «prendre en considération» — je souligne ceci au passage, bien que ce ne soit pas directement lié au sujet de cette présentation, car le moins que l'on puisse dire est que, dans maintes décisions concernant l'objet de notre affaire, la CBI s'est souciée des données scientifiques comme d'une guigne ;
- le point *d*) l'invite à «tenir compte», cette fois, «des intérêts des consommateurs de produits tirés de la baleine et des intérêts de l'industrie baleinière» ; on est loin des intérêts des baleines «en soi»⁹⁰ ;
- et cela est confirmé de manière éclatante par le point *a*) qui précise que les modifications de l'annexe *devront «s'inspirer de la nécessité d'atteindre les objectifs et les buts de la convention »* ^{romain} *et d'assurer la conservation, le développement et l'utilisation optimum des ressources* ^{italiques} *baleinières*. ^{italiques}

⁸⁸ Voir CR 2013/13, p. 68-69, par. 25-26 et CR 2013/14, p. 73, par. 73 (Pellet).

⁸⁹ Voir aussi CR 2013/13, p. 39, par. 3, et 42, par. 11 (Boyle).

⁹⁰ Voir CR 2013/18, p. 34-35, par. 23-25 et p. 36, par. 29 (Boisson de Chazournes).

19. Nous sommes d'accord, je pense, sur la conservation ; peut-être sur le développement
- ✕ — encore que la Partie australienne n'utilise guère ^{ce} ~~le~~ mot, [/] important pour comprendre la philosophie même qui est à la base de la convention ; mais d'«utilisation optimum» il ne saurait être question aux yeux de l'Australie⁹¹ et de la Nouvelle-Zélande⁹², qui affichent le plus profond mépris à l'encontre des intérêts des consommateurs et de l'industrie baleinière, pourtant
- ✕ expressément protégés par le traité et définis comme un but ~~du traité~~ ^{de celui-ci} dans l'article V en particulier.
- [Fin de la projection n° 4.]

20. Ceci me paraît être le bon moment, Monsieur le président, pour répondre à l'une des questions posées par le juge Cançado Trindade : «How do you interpret the terms «conservation and development» of whale stocks under the International Convention for the Regulation of Whaling ?»⁹³. Nous avons pris note de la réponse de l'Australie donnée par la voix de la professeure Boisson de Chazournes⁹⁴ ; mais il me semble que réduire la conservation et le développement des stocks de baleines au *Whale watching* est un peu court... Et cela appelle un certain nombre de remarques :

- 1) il ne s'agit pas de préserver «les baleines *en soi*» (on l'a abondamment souligné : la convention de 1946 n'est pas un traité de pure préservation⁹⁵), mais de conserver «les *stocks* de baleines» ;
- 2) cette conservation étant assurée — car c'est évidemment un préalable — il faut «gérer», c'est-à-dire éviter toute exploitation des stocks d'espèces réellement menacées et toute surexploitation de ceux d'espèces qui, comme les petits rorquals, ne sont pas menacées ;
- 3) en d'autres termes, Monsieur le juge, comme l'indique très clairement le préambule, il s'agit «de protéger toutes les espèces de baleines» contre «l'exploitation excessive d'une zone après l'autre et ... la destruction immodérée d'une espèce après l'autre», ceci en vue de permettre «d'augmenter le nombre des baleines pouvant être capturées sans compromettre ces ressources naturelles» ; et

⁹¹ Voir CR 2013/18, p. 35, par. 26 (Boisson de Chazournes).

⁹² Voir la réponse écrite de la Nouvelle-Zélande en date du 12 juillet 2013 à la question du juge Cançado Trindade, par. 5 et 6.

⁹³ CR 2013/17, p. 49.

⁹⁴ Voir 2013/18, p. 37, par. 31 (Boisson de Chazournes).

⁹⁵ Voir CR 2013/13, p. 48-59, par. 30-63 (Boyle).

4) cela montre bien que la conservation des baleines — pour important et indiscutable que constitue cet objectif — n'est pas un but en lui-même ; il s'agit *in fine*, de «faire en sorte que les peuplements baleiniers atteignent leur niveau optimum aussi rapidement que possible», afin de «donner à l'industrie baleinière la possibilité de se développer d'une manière méthodique».

21. Au demeurant s'il est exact que l'insouciance qui a marqué les années 1960 et 1970 a conduit la CBI à adopter des mesures «conservationnistes», dont l'instauration du moratoire et des sanctuaires porte la marque, il s'agit de mesures provisoires devant être levées aussitôt que, sur le fondement «des données scientifiques» (dont la commission s'applique à ne pas tenir compte...), les conditions d'une chasse commerciale durable seront réunies. Mais il n'a jamais été question de renoncer à l'objectif — statutaire — d'une telle chasse, non plus que d'interdire la chasse à des fins scientifiques en vertu de l'article VIII. Ou plutôt si, il en a été question, car l'Australie et la Nouvelle-Zélande ont présenté des projets en ce sens, mais en reconnaissant que ceci ne pourrait se faire que par la voie d'un protocole d'amendement formel à la convention, que tous les Etats parties devraient ratifier⁹⁶ ; ces propositions sont restées sans suite.

22. La Nouvelle-Zélande a repris, lors de l'audience du 8 juillet, l'argument qu'elle voudrait tirer du caractère ouvert de la participation à la convention : «Membership of the Commission is universal. It is open for all countries to join, whether they have a whaling industry or not»⁹⁷. Je vois mal, à vrai dire, ce que cela peut changer à l'affaire : au départ, la convention a été négociée et ratifiée par un petit nombre d'Etats pratiquant la chasse à la baleine. Ces Etats l'ont rédigée en fonction de leurs intérêts et de leurs préoccupations. D'autres Etats, ont, par la suite, adhéré à la convention conformément à l'article X, manifestant ainsi leur intérêt pour le traité tel qu'il était, et son but et son objet, tels qu'ils y sont définis. Mais pourquoi leur arrivée aurait-elle abouti à une modification de cet objet et de ce but ? C'est prendre les choses à l'envers.

23. Dans sa réponse à la question que lui avait posée M. le juge Bhandari⁹⁸, l'Australie a affirmé que tous les Etats parties ont un intérêt commun en vue d'assurer l'intégrité des objectifs et

⁹⁶ CR 2013/14, p. 71-73, par. 67-73 (Pellet).

⁹⁷ CR 2013/17, p. 19, par. 16 (Finlayson) ; voir aussi OEN, par. 27 et 32 et OEJ, par. 21-22.

⁹⁸ CR 2013/13, p. 73.

du régime instaurés par la convention⁹⁹. C'est vrai — et ceci veut dire que «chasseurs» ou non, membres originaires ou non de la CBI, tous les Etats parties sont liés par la convention telle qu'elle a été et demeure conçue — et non telle qu'ils voudraient qu'elle le soit. En d'autres termes, tous doivent accepter que le mécanisme institutionnel que la convention a mis en place se mobilise en vue des objectifs qu'elle énonce : c'est-à-dire la conservation et la gestion des stocks des différentes espèces de baleines, afin de permettre le développement «méthodique de l'industrie baleinière».

24. Reprenant l'idée clef de ses observations écrites¹⁰⁰, la Nouvelle-Zélande a amorcé un mouvement de contournement de cet entêtant problème (entêtant pour elle...) de l'objet et du but de la convention. Au lieu de s'intéresser à l'objectif *substantiel* de celle-ci, l'Etat intervenant se polarise sur son aspect procédural : «the object and purpose of the Convention (...) is to establish a system of collective regulation for the conservation and management of whales»¹⁰¹ ; or even more explicitly :

«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.»¹⁰²

25. Cette analyse est discutable à certains égards, objectivement fautive à d'autres.

26. Elle est discutable car elle confond l'objectif avec le moyen. Certes, la convention crée un mécanisme de régulation partielle des activités baleinières (et en français le mot «régulation» est sans doute plus adapté que «réglementation») mais ceci n'est pas l'*objectif* poursuivi par les auteurs de la convention ; c'est un moyen pour atteindre le but et l'objet de celle-ci, tels qu'ils sont définis par le préambule et rappelés au paragraphe 2 de l'article V, que j'ai projeté tout à l'heure, ou à l'article VI.

27. Dans une question adressée à la Nouvelle-Zélande, M. le juge Cançado Trindade a demandé si «to replace unregulated, unilateral whaling by States with collective regulation as a

⁹⁹ Voir CR 2013/18, p. 33-34, par. 17-20 (Boisson de Chazournes).

¹⁰⁰ Voir OEN, par. 6, 7, 14-32.

¹⁰¹ CR 2013/17, p. 17, par. 3 a) (Finlayson) ; voir aussi p. 16, par. 9 (Ridings) et p. 17, par. 5 (Finlayson).

¹⁰² CR 2013/17, p. 18, par. 13 (Finlayson).

mechanism to provide for the interests of the parties in the proper conservation and management of whales» as New-Zealand had written in its Written Observations¹⁰³ is «a widely accepted interpretation nowadays of the object and purpose of the International Convention for the Regulation of Whaling?»¹⁰⁴. Par sa lettre au greffier du 12 juillet, l'Etat intervenant donne à la question une réponse prudente, qu'il ne me paraît pas utile de commenter en détail. Mais j'espère que l'auteur de cette question, qu'il ne nous a pas non plus adressée, ne m'en voudra pas de compléter la réponse néo-zélandaise en citant un passage de la proposition de consensus faite par le président et le vice-président de la commission, proposition, comme l'on sait, torpillée par l'Australie en 2010 :

«Le rapprochement des points de vue divergents sur les baleines et la chasse à la baleine renforcera les actions liées à *l'objectif commun*, à savoir le maintien de populations de baleines saines et l'optimisation de la probabilité de rétablissement des populations appauvries.»¹⁰⁵

En outre, et c'est peut-être encore plus significatif, dans sa résolution 2006-1, l'importante déclaration de Saint-Kitts-et-Nevis, la commission a dit comprendre

«that the purpose of the 1946 International Convention for the Regulation of Whaling (ICRW) is to 'provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry' (quoted from the Preamble to the Convention) and that the International Whaling Commission (IWC) is therefore about managing whaling to ensure whale stocks are not over-harvested rather than protecting all whales irrespective of their abundance»,

and the Commission noted — it is a resolution of the Commission —

«that the position of some members that are opposed to the resumption of commercial whaling on a sustainable basis irrespective of the status of whale stocks is contrary to the object and purpose of the International Convention for the Regulation of Whaling»¹⁰⁶.

A ma connaissance, Monsieur le président, ce sont les prises de position les plus autorisées et les plus récentes de la commission sur ce qui constitue réellement le but et l'objet de la convention.

¹⁰³ OEN, p. 16, par. 33.

¹⁰⁴ CR 2013/17, p. 49-50.

¹⁰⁵ Voir décision de consensus proposée par le président et le vice-président de la commission afin d'améliorer la conservation des baleines, présentée à la commission le 22 avril 2010, doc. IWC/62/7rev-FR, disponible à l'adresse : <http://iwc.int/index.php?cID=1740&cType=document> (les italiques sont de nous) ; en anglais, voir «Proposed Consensus Decision to Improve the Conservation of Whales from the Chair and Vice Chair of the Commission», annexe E, Chair's Report of the 62nd Annual Meeting, *Annual Report of the International Whaling Commission 2010* (CMJ, annexe 118).

¹⁰⁶ CBI, résolution 2006-1, déclaration de Saint-Kitts-et-Nevis. Voir aussi CR 2013/16, p. 59-60, par. 55 (Pellet).

28. Et il me semble que ceci n'est pas sans rapport avec l'une des questions qu'a posées de nouveau M. le juge Cançado Trindade à la Nouvelle-Zélande : «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?»¹⁰⁷. Dans sa réponse, annexée à sa lettre au greffier en date du 12 juillet, l'agent de la Nouvelle-Zélande se borne à revenir à l'antienne de ce pays selon laquelle la conservation des baleines (la gestion des stocks n'est mentionnée que tout à fait à la fin de la réponse et comme à regret) est une «entreprise collective» «collective enterprise» ; c'est exact — dans les limites que j'ai indiquées — mais cela ne nous avance guère et ne répond pas vraiment à la question. Or il me semble qu'elle mérite plus d'attention. Bien qu'elle ne nous soit pas non plus adressée, je me permets de souligner les points suivants :

- 1) contrairement à d'autres actes constitutifs d'organisations internationales¹⁰⁸, la convention de 1946 ne prévoit pas expressément de mécanisme en cas de divergence sur son interprétation ;
- 2) la Cour n'en est surement pas empêchée pour autant d'exercer à l'égard de la convention, «traité multilatéral, une fonction d'interprétation qui relève de l'exercice normal de ses attributions judiciaires»¹⁰⁹ ;
- 3) dans le cadre de cette fonction d'interprétation, la Cour peut légitimement prendre en considération les interprétations données par les organes de l'organisation, y compris lorsque ceux-ci définissent expressément l'objet et le but de celle-ci, comme c'est le cas des exemples que je viens de donner ;
- 4) Ce faisant, la Cour de céans doit tenir le plus grand compte des circonstances dans lesquelles ces interprétations ont été données — et je me permets de renvoyer sur ce point à ma plaidoirie du premier tour, dans laquelle j'ai énoncé les précautions à prendre pour conclure à l'existence d'une pratique interprétative — à plus forte raison modificative¹¹⁰.

¹⁰⁷ CR 2013/17, p. 49.

¹⁰⁸ Voir, par exemple, les articles IX du Statut de la BIRD, XXIX des Statuts du FMI, 75 de la Constitution de l'OMS, 286 de la convention des Nations Unies sur le droit de la mer ou IX, par. 2, de l'accord de Marrakech du 15 avril 1994 créant l'OMC.

¹⁰⁹ *Conditions de l'admission d'un Etat comme Membre des Nations Unies (article 4 de la Charte)*, avis consultatif, 1948, C.I.J. Recueil 1947-1948, p. 61.

¹¹⁰ CR 2013/14, p. 64-65, par. 50-53 (Pellet).

29. En outre, Monsieur le président, s'agissant de la définition même du pouvoir de réglementation collective dont bénéficie la CBI, l'analyse de la Nouvelle-Zélande est inexacte :

- il est en effet faux que les Etats aient conféré à la CBI un pouvoir généralisé de décision en matière de chasse à la baleine ; contrairement à ce que voudraient faire croire la Nouvelle-Zélande et l'Australie, la commission n'est pas une organisation supranationale d'intégration pouvant imposer des décisions à la majorité (ni même à l'unanimité) aux «gouvernements contractants» — une appellation parlante en elle-même ;
- l'*Attorney-General* de la Nouvelle-Zélande a affirmé que «[a]ll decisions of the Commission are taken collectively by a vote of its members. And the regulations so adopted are binding on members of the Commission¹¹¹ ; *with all due respect*, il n'en n'est absolument rien : sauf dans le cadre de l'article V, la CBI ne peut adopter que des recommandations qui ne lient nullement les Etats¹¹² ; et
- même lorsqu'elle peut prendre des décisions, au sens propre du mot, dans le cadre de l'article V de la convention, il est toujours loisible aux gouvernements contractants d'y faire objection, sans avoir à donner de raison ;
- enfin, *last but not least*, il n'est pas exact que la convention ait promu un système de régulation complet — *a «comprehensive system of collective regulation»*¹¹³.

30. En réalité, le système de la convention laisse subsister des domaines dans lesquels le pouvoir d'appréciation des Etats continue à se déployer largement. Tel est le cas du système d'*opting out* de l'article V, que je viens d'évoquer, du droit de libre retrait expressément envisagé par l'article XI et, bien sûr, de l'article VIII relatif aux permis spéciaux. J'en arrive donc à la présentation de la structure de la convention et de la place qu'y tient cette désormais fameuse disposition.

B. La structure de la convention et le rôle de l'article VIII

31. Monsieur le président, les Etats peuvent, en vertu de leur souveraineté, s'engager par voie de traités ; mais il s'agit là d'une «faculté»¹¹⁴ et, sauf circonstance très particulière non

¹¹¹ CR 2013/17, p. 19, par. 16 (Finlayson).

¹¹² Voir 2013/14, p. 60-70, par. 38-66.

¹¹³ CR 2013/17, p. 18, par. 13 (Finlayson)

pertinente ici, en aucune manière, d'une obligation. Au surplus, lorsqu'ils réglementent une certaine matière par voie de traité, les Etats parties peuvent exclure de cette réglementation conventionnelle tel ou tel aspect de la matière considérée soit par une clause spéciale du traité en question, soit même par l'acte unilatéral que constitue une réserve (sur laquelle je m'abstiendrais de faire un cours magistral...).

32. Il n'est pas question ici de réserve au sens technique du terme. En revanche, en incluant l'article VIII de la convention de 1946, les Etats parties ont entendu se réserver la compétence d'octroyer — ou non — des permis spéciaux qui implique, par définition même, l'autorisation de «tuer, capturer et traiter les baleines», «sans qu'il y ait lieu de se conformer aux dispositions de la présente convention». Ils ont en outre permis aux gouvernements participants de l'assortir de «restrictions en ce qui concerne le nombre» et de «telles autres conditions que le gouvernement contractant jugera opportunes» ; et tout ceci «[n]onobstant toute disposition contraire» de la convention. Monsieur le président, nos contradicteurs ont beau faire : tout leur talent, toute leur science, toute leur imagination n'y peuvent rien changer : «[c]e serait une singulière interprétation que de faire dire à un traité exactement le contraire de ce qu'il dit»¹¹⁵ ; en l'occurrence que les permis spéciaux ne peuvent être accordés qu'en conformité non seulement avec les autres dispositions de la convention (dont l'article VIII exclut par deux fois l'application), mais aussi ~~en~~ ~~conformité~~ avec des recommandations non obligatoires adoptées par les organes de la convention, dont il résulterait au profit de ceux-ci une compétence d'autorisation ou de refus de ces permis. Monsieur le président, c'est tout simplement absurde.

33. Certes, «Article VIII forms an integral part of the Convention» and it must, indeed, «be interpreted and applied consistently with the Convention's other provisions»¹¹⁶ — *consistently* en fonction de la manière dont cet article VIII lui-même se positionne par rapport à la convention ; c'est-à-dire comme une exception ou une «exemption» — le mot *exempt* figure expressément dans le texte anglais, qui seul fait foi.

¹¹⁴ *Vapeur Wimbledon, arrêts, 1923, C.P.J.I. série A n° 1, p. 25.*

¹¹⁵ *Ibid.*

¹¹⁶ CR 2013/17, p. 21-23, par. 22-27 (Finlayson).

34. M. Finlayson s'est attardé sur les paragraphes 3 et 4 de l'article VIII et sur le paragraphe 30 du règlement pour défendre son analyse du rôle que joue l'article VIII dans la convention (de l'«integral role of Article VIII within the Convention»). Mais ces dispositions sont des exceptions, des *leges speciales*, par rapport au régime dérogatoire général qui s'applique à la délivrance des permis spéciaux, qu'il s'agisse de l'obligation faite aux gouvernements contractants de communiquer les permis spéciaux et l'ensemble des «renseignements de caractère scientifique dont il disposera sur les baleines et la chasse à la baleine» au comité scientifique, ou qu'il s'agisse «de rassembler et d'analyser constamment les renseignements biologiques recueillis à l'occasion des opérations des usines flottantes et des stations terrestres». Tout ceci doit être fait car c'est prévu par la convention ; pour le reste, l'article VIII est exempt des dispositions de la convention car ... c'est prévu par les dispositions de celle-ci.

35. Bien entendu, le Japon doit agir en conformité avec les obligations spéciales contenues dans l'article VIII ou dans le paragraphe 30 du règlement¹¹⁷ (sur lequel Mme Takashiba reviendra dans quelques instants). Et il doit aussi se plier aux obligations lui incombant, en liaison avec la convention, en vertu du droit international général, à commencer par l'obligation de respecter de bonne foi la convention elle-même — *pacta sunt servanda*. Mais c'est précisément parce que, comme les autres Parties, y compris l'Australie et la Nouvelle-Zélande, il est tenu de respecter la convention telle qu'il l'a acceptée (et rien de plus), que l'on ne saurait lui imposer d'autres obligations conventionnelles en important celles-ci dans l'article VIII alors qu'elles n'y figurent pas et, pis, qu'elles en sont, au contraire, expressément exclues¹¹⁸. L'Australie et la Nouvelle-Zélande en sont tellement conscientes qu'elles n'ont de cesse de vouloir modifier ou abroger la disposition spéciale que constitue l'article VIII¹¹⁹ ; si elles y parvenaient, alors, en effet, il n'y aurait plus de permis spéciaux et les règles applicables à la chasse à la baleine seraient uniformisées ; je le répète : elles n'y sont pas parvenues.

¹¹⁷ Voir CR 2013/17, p. 23-24, par. 29 (Finlayson).

¹¹⁸ Voir CR 2013/15, p. 15-16, par. 6-14 (Lowe).

¹¹⁹ Voir CR 2013/17, p. 22, par. 25 (Finlayson) ; voir aussi CR 2013/14, p. 71-73, par. 67-73 (Pellet).

36. Ce n'est pas à dire, Monsieur le président, que le Japon revendique une «carte blanche» comme le *Solicitor-General* de la Nouvelle-Zélande voudrait le faire croire¹²⁰, ou une liberté d'appréciation purement arbitraire comme l'affirme le professeur Crawford, lorsqu'il caricature ce qu'il appelle aimablement le «Pellet void» et la «Lowe vacuity»¹²¹. Ce que nous disons, beaucoup plus simplement et raisonnablement, c'est qu'à partir du moment où, pour l'essentiel, les dispositions particulières de la convention ne s'appliquent pas à la délivrance et à la mise en œuvre des permis spéciaux, on se trouve sous l'empire des seules règles générales du droit international public, qui reconnaissent aux Etats souverains une très large faculté d'analyser les situations dans lesquelles ils sont et d'agir en conséquence. Le professeur Lowe reviendra sur cet aspect fondamental cette après-midi.

37. Je voudrais pour ma part conclure par notre réponse à une question posée par M. le juge Gaja — qui ne m'en voudra pas, j'en suis sûr, de le faire en français, langue qu'il pratique aussi bien que l'*Oxbridge*, qui lui est aussi naturel ! Je la lirai tout de même en anglais : «If a whaling programme is both for purposes of scientific research and for commercial purposes, what are the applicable rules according to the ICRW?»¹²².

38. Monsieur le président, la Cour semble avoir considérablement assoupli sa pratique en matière de questions posées par les juges — mais pas encore au point de laisser les conseils dialoguer avec eux. Eût-elle été jusque-là, je me serais permis de demander au juge Gaja ce qu'il entend par programme à finalité à la fois scientifique et commerciale... Faute de pouvoir le faire, je vais envisager plusieurs hypothèses (dont je ne cache pas qu'elles me sont soufflées par notre espèce) :

— premier cas de figure : le programme est scientifique par son objectif et ses méthodes de recherche, mais recourt à des procédés «commerciaux» pour assurer son financement ; c'est une façon très habituelle de procéder pour financer la recherche — ainsi que l'a fait remarquer le professeur Walløe dans sa déclaration écrite¹²³ par exemple ; ceci ne modifie pas l'objectif

¹²⁰ CR 2013/17, p. 21, par. 24 (Finlayson).

¹²¹ CR 2013/19, p. 57, par. 2-4 (Crawford).

¹²² CR 2013/16, p. 63.

¹²³ Lars Walløe, "Scientific review of issues raised by the Memorial of Australia including its two Appendices", 9 avril 2013, p. 9.

même de la recherche, qui est et reste scientifique ; les règles applicables sont exclusivement celles de l'article VIII — je suis heureux de rejoindre sur ce point la position de l'Australie telle que l'a exprimée le professeur Crawford en réponse à la question du juge Gaja¹²⁴ ;

- deuxième hypothèse — qui, probablement, est plus en phase avec la question du juge, un programme de recherche incluant des permis spéciaux est alimenté par des informations recueillies en partie à l'occasion d'opérations de chasse commerciale, comme l'étaient les programmes scientifiques avant l'adoption du moratoire, et comme cela demeure ou peut demeurer le cas dans les pays qui ne sont pas liés par le moratoire ; même réponse : la finalité demeure scientifique si les renseignements ainsi acquis sont traités selon des méthodes scientifiques ; l'article VIII doit trouver application ;
- il en va différemment lorsque des chasses commerciales sont programmées en fonction d'informations scientifiques : là, l'objectif est commercial par hypothèse ; la science ne fait qu'en faciliter la réalisation ; le droit applicable est celui des dispositions de la convention relatives à la chasse commerciale ;
- quatrième et dernier cas de figure — c'est le nôtre à vrai dire : un programme de recherche scientifique vise à terme un objectif commercial, en l'occurrence, la reprise soutenable de la chasse commerciale ; il ne me paraît pas douteux que le programme demeure scientifique — raisonner autrement reviendrait à nier le caractère scientifique de toute recherche appliquée ; l'article VIII s'applique.

Une règle générale peut être énoncée, me semble-t-il : aussi longtemps que la recherche est la finalité principale et immédiate, le moteur de l'opération, et que la dimension commerciale et économique demeure «incidente» ou comme un but lointain («incidental» selon le terme employé par James Crawford¹²⁵), les règles de l'article VIII doivent trouver application et elles s'appliquent à l'exclusion de toute autre (sous réserve bien sûr des principes généraux du droit international).

39. Et ceci me conduit à une dernière remarque, Monsieur le président : ni l'Australie, ni la Nouvelle-Zélande n'expliquent comment elles concilient l'affirmation selon laquelle l'article VIII est soumis aux règles établies par la CBI (les divers amendements au règlement, en particulier au

¹²⁴ CR 2013/20, p. 26, par. 66 et p. 27, par. 71 (Crawford) ; *contra* : CR 2013/17, p. 19, par. 16 (Finlayson).

¹²⁵ CR 2013/20, p. 26, par. 67 et p. 27, par. 71 (Crawford)

paragraphe 30, dont ces deux Etats invoquent la violation) avec la proposition selon laquelle la convention établit trois types de chasse et trois seulement : la chasse commerciale, la chasse aborigène de subsistance, et la chasse à des fins scientifiques, auxquelles des règles spécifiques s'appliquent¹²⁶. Ou bien l'Australie et la Nouvelle-Zélande réussissent à établir que JARPA II est, en réalité, de la chasse à des fins commerciales, et, dans ce cas, les règles relatives aux permis spéciaux ne sont pas applicables ; ou bien il s'agit d'un programme à des fins scientifiques et, au contraire, seules ces règles s'appliquent. Or, dans ses conclusions finales lues à l'audience, l'Australie invoque, pêle-mêle, la violation des règles relatives à la chasse commerciale et de celles relatives à la chasse scientifique. Le Japon ne peut pas être tenu pour responsable des unes *et* des autres. J'en redirai un mot dans l'ultime plaidoirie que j'aurai l'honneur de faire (dans cette affaire...) demain.

Merci, Mesdames et Messieurs de la Cour, pour votre attention. Monsieur le président, auriez-vous la bonté de donner la parole à Mme Takashiba ?

Le PRESIDENT : Merci, Monsieur le professeur. Je passe la parole à Mme Takashiba. Vous avez la parole, Madame.

Ms TAKASHIBA: Thank you, Mr. President.

JAPAN'S FULL COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS AND CO-OPERATION

1. Mr. President, distinguished Members of the Court. Further to Professor Pellet's submission on the framework of the ICRW, my task is to clarify Japan's full compliance with the procedural requirements concerning the issuance of special permits and Japan's record of co-operation.

I. Binding Schedule

A. Paragraph 30 of the Schedule

2. In addition to a finding by the Court that JARPA II is not a program within the meaning of Article VIII of the ICRW, Australia is also requesting the Court to rule that Japan is in breach of

¹²⁶ CR 2013/17, p. 19, par. 16 (Finlayson) et Australie, CR 2013/11, p. 15, par. 46 (Crawford).

the following paragraphs of the Schedule: namely paragraph 10 (e) on the moratorium on commercial whaling, paragraph 7 (b) on the prohibition of commercial whaling of fin whales in the Southern Ocean Sanctuary, paragraph 10 (d) on the moratorium on the taking, killing or treating of whales except minke whales by factory ships, and paragraph 30 on the procedural requirements applicable to special permit whaling¹²⁷. I have two preliminary remarks.

3. First, Australia's allegation that Japan has violated paragraph 30 is nothing but a "retro-fit", a convenient argument thought up for the purposes of this case alone. Indeed, before the institution of this case, Australia never claimed that Japan was acting in violation of paragraph 30. The Scientific Committee never took issue with Japan's compliance with this provision, nor did any other Contracting Government. It is curious that this allegation — while its treatment was cursory in its Memorial¹²⁸ — has now found its way into Australia's final submissions for the first time at this late hour of the oral proceedings. It is worth noting that Australia started to give significant importance to the provision only after New Zealand filed its ~~Written~~ ^{Twenty-Six} Observations in which it referred to paragraph 30 ~~24~~ times.

4. Second, this retro-fit addition is damaging Australia's own case. By putting alleged violations of all four paragraphs cumulatively together, Australia is revealing the inconsistency of its case. In fact, the only provision in the Schedule relevant to special permit whaling under Article VIII is paragraph 30 adopted by the IWC in 1979. Supposing for the sake of argument that Australia's case were to stand, it can be either the violation of paragraphs 10 (e), 7 (b) and 10 (d) — except minke whales — based on the prohibition of commercial whaling or the violation of paragraph 30 pertinent to special permit whaling. It is logically untenable to hold a State in breach of all four paragraphs.

5. In any case, since Australia alleges Japan's violation of paragraph 30, I shall now turn to clearing any doubt that Australia has tried hard to create.

¹²⁷CR 2013/20, p. 47 (Campbell).

¹²⁸MA, para. 5.127.

B. Japan's full compliance with paragraph 30 when the JARPA II proposal was submitted in 2005

6. Mr. President, Japan's full compliance with paragraph 30 is firmly established by the fact that the JARPA II proposal was submitted to the IWC in March 2005 to give the Scientific Committee the opportunity to review and comment on it before Japan issued special permits based on that proposal¹²⁹.

7. Australia's approach is again artificial. First, it places its hope in the wording of paragraph 30, "proposed special permits" that need to be provided by the Contracting Governments, so as to read that unless the permits are submitted annually beforehand to the IWC Secretariat, there is a breach of paragraph 30¹³⁰. But this interpretation completely disregards how this review and comment procedure is implemented in practice within the Scientific Committee.

× The Committee accepts ^{the submission of} the proposal of special permits as falling within the meaning of paragraph 30. Otherwise, the Scientific Committee could not have recorded that the multi-year proposal of research submitted by Japan set out "information required under paragraph 30 of the Schedule", as it did in its report of 2005¹³¹.

8. The proposal being a multi-year research plan is not unique to JARPA II. The proposals of JARPN II, another scientific whaling program in the western North Pacific, were submitted to cover research spanning over two years for its feasibility study in 2000¹³², and for its full-scale research in 2002¹³³. The Committee took no issue¹³⁴. It was on this basis that the Scientific Committee Chair from the United States noted in 2010 "that both JARPA II and JARPN II are continuing on the basis of plans already submitted and reviewed in the Scientific Committee"¹³⁵.

9. This is also in line with the most recent guidelines of the Scientific Committee, Annex P. Annex P sets out guidelines according to which the Scientific Committee performs its role relevant to paragraph 30 to review and comment on the proposals for special permits. Under the Annex P

¹²⁹SC/57/O1; CMJ, Ann. 150.

¹³⁰CR 2013/18, p. 19, para. 17 (Dreyfus); CR 2013/20, pp. 39-40, paras. 19-26 (Gleeson).

¹³¹*J. Cetacean Res. Manage. (JCRM)* 8 (Suppl.), 2006, p. 50.

¹³²SC/52/O1, <<http://www.icrwhale.org/pdf/SC52O1.pdf>> accessed 12 July 2013

¹³³SC/54/O2, <<http://www.icrwhale.org/pdf/SC54O2.pdf>> accessed 12 July 2013

¹³⁴*JCRM* 3 (Suppl.), 2001, pp. 61-64; *JCRM* 5 (Suppl.), 2003, pp. 66-77.

¹³⁵*JCRM* 12 (Suppl.), 2011, p. 57.

review process, only “new proposals” are to be reviewed. The Scientific Committee decided that ongoing unchanged proposals that have already been reviewed would not be subject to annual review by the Committee.

10. This practice, that is now formally recognized in Annex P, has not come about out of the blue. In fact, since 2000 when the JARPN II proposals were submitted, the Scientific Committee did not find it useful to review the same proposal year after year and instead referred to its comments recorded in its reports of previous years¹³⁶. Japan reported to the Scientific Committee this year that “there was no plan to change the JARPA II programme”¹³⁷ and accordingly there was no discussion under the agenda item of “review of new or continuing proposals”¹³⁸. The same is true with the Committee’s review of the results of the research. At its 2008 meeting when Annex P was adopted, the Scientific Committee agreed “it would not discuss ongoing permit results in the years between periodic reviews”. Rather, it would merely note short annual reports provided by those undertaking the permit research”¹³⁹.

11. Against this background, it is all the more curious that Australia accused Japan of violating paragraph 30, by referring to the concerns expressed about “a lack of review and comment outside the periodic reviews under Annex P”¹⁴⁰. Such concerns were never recorded at the Scientific Committee up until the last Scientific Committee session in June 2013. But the way in which Australia referred to this reveals again a tactic deployed by Australia throughout the oral proceedings, that is: misrepresentation of the findings of the Scientific Committee¹⁴¹. The document — at tab 9 of your folders — is the complete report on Special Permits annexed to the Scientific Committee Report of this year — the title “Annex P” is a mere coincidence that has nothing to do with the guidelines known as Annex P. What Australia conveniently omits is the fact that this is another example of “concerns” expressed by some members of the Committee that are

¹³⁶E.g., *JCRM 8 (Suppl.)*, 2006, p. 259; *JCRM 9 (Suppl.)*, 2007, p. 63; *JCRM 10 (Suppl.)*, 2008, p. 60.

¹³⁷Report of the Scientific Committee 2013, p. 80 <<http://iwc.int/cache/downloads/11wj9m9sehus40kswskggk8cw/2013%20IWC%20SC%20report.pdf>>; accessed 12 July 2013.

¹³⁸SC Report 2013, Annex P: Special Permits, p. 5 <<http://iwc.int/index.php?cID=3313&cType=document&download=1>> accessed 13 July 2013; tab 9.

¹³⁹*JCRM 11 (Suppl.)*, 2009, p. 64.

¹⁴⁰SC Report 2013, Ann. P : Special Permits, p. 5; tab-9.

¹⁴¹CR 2013/8, p. 63, para. 19 (Sands); CR 2013/9, p. 37, para. 78 (Sands); CR 2013/19, pp. 25-32, paras. 4-24 (Sands).

of Australia's description of this incidence

- x refuted by other members¹⁴². The resemblance with the review and comment procedure of
- x JARPA II in 2005 and the way in which Australia treats these opposing views are striking. It is this aspect of the case to which I will now turn.

12. The absence of 63 scientists from the review and comment procedure in 2005 is the second point that Australia continues to rely on in order to assert that the process was “flawed”¹⁴³. Setting aside the contradiction that this argument presupposes a submission of the JARPA II proposal, this incident is situated in the very context of a divergence of scientific opinions. The Scientific Committee was not precluded from completing its “review and comment” procedure. Upon further examination, the composition of the 122 scientists who did participate in the review is rather interesting. I invite you to look at the list of scientists at tab 10 of your folders. They include four former and the then Chairs of the Scientific Committee from Australia, the United Kingdom and the United States (and three future Chairs). It is a mark of special distinction to be elected as the Chair of the Scientific Committee and the presence of these members in particular during the review process carries a certain weight. In total, the scientists from 19 out of 31 Contracting Governments were represented¹⁴⁴, including Brazil, Republic of Korea, New Zealand, Russian Federation, the United Kingdom and the United States, to name some of them. In addition, there was also a former Chair from Australia who participated as an invited participant, Dr. John Bannister. The declaration of objection by the 63 scientists¹⁴⁵ was rebutted by a working document¹⁴⁶, which Professor Sands omitted to mention. There is no way to suggest that the views of the minority of scientists who left the room should weigh more than those in the majority who remained.

¹⁴²CR 2013/20, pp. 39-40, para.23 (Gleeson); SC Report 2013, Ann. P: Special Permits, p. 10, Ann. P3, “Comments by some members on the Special Permit Whaling Programmes: General comments”, pp. 10-11, Ann. P4, “Response by other members to Annex P3”; tab -9.

¹⁴³CR 2013/18, p. 19, para. 17 (Dreyfus); CR 2013/19, p. 27, para. 10, pp. 32-36, paras.25-32, p. 37, para.34, p. 38, para. 37, pp. 43-44, para. 50, pp. 50-51, para. 68 (Sands); CR 2013/20, pp. 32-33 (Sands).

¹⁴⁴Antigua and Barbuda, Australia (a former Chair), Brazil, Denmark, Dominica, Grenada, Iceland, Japan, Republic of Korea, New Zealand, Nicaragua, Norway, Portugal, Russian Federation, St. Kitts and Nevis, St. Lucia, St. Vincent and Grenadines, Spain, the United Kingdom (a former Chair), and the United States (a former Chair and the then Chair).

¹⁴⁵J. Cetacean Res. Manage. 8 (Suppl.), 2006, p. 260, Ann. O1, App. 2; JCM (Ann. 108, tab 11).

¹⁴⁶J. Cetacean Res. Manage. 8 (Suppl.), 2006, p. 262, Ann. O1, App. 3; JCM (Ann. 152, tab 11).

13. After the completion of the JARPA Final Review in 2006, 50 among the 63 scientists were present at the Scientific Committee in 2007¹⁴⁷ but there was no production of a “detailed critique” that they refrained from formulating at the time of the review of the JARPA II proposal. There was no rebuttal from Australia on this point.

14. The Court recognized in its Advisory Opinion case concerning *Legal Consequences for States of the Continued Presence of South Africa in Namibia* that compliance with established practice of an international organization is sufficient¹⁴⁸.

15. Finally, a few words are called for on New Zealand’s interpretation of paragraph 30. New Zealand exaggerated the proper scope of paragraph 30 when it stated last week that “[i]t 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.”¹⁴⁹ Japan disagrees. Paragraph 30 establishes a mechanism of co-operation between the Contracting Government and the Scientific Committee and Japan demonstrated that it was fully engaged in continuous scientific dialogue. Of course, New Zealand, as an intervening State under Article 63 of the Statute, was conveniently precluded from commenting on Japan’s engagement.

16. New Zealand still attempts to reverse the burden of proof, by maintaining that the views of other parties “should be seen to have been taken into account”¹⁵⁰, New Zealand stated last week that “[i]t is not a question of bending to the views of [other parties]”¹⁵². However its interpretation of paragraph 30 “as the mechanism through which . . . the interests of the parties in the Special Permit process can be protected”¹⁵³, and its use of contentious IWC Resolutions as evidence of these interests¹⁵⁴, strongly suggest otherwise.

¹⁴⁷“Comments on the Government of Japan's Proposal for a Second Phase of Special Permit Whaling in the Antarctica (JARPA II)”, App. 2, Ann. O1 to the Report of the Scientific Committee, *J. Cetacean Res. Manage.* 8 (Suppl.), 2006, p. 260; “List of Participants”, Ann. A to the Report of the Scientific Committee, *J. Cetacean Res. Manage.* 10 (Suppl.), 2008, p. 75.

¹⁴⁸*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports* 1971, p. 22, para. 22.

¹⁴⁹WON, para. 95; CR 2013/17, p. 46, para. 33 (Ridings).

¹⁵⁰CR 2013/17, p. 46, para. 33 (Ridings);

¹⁵¹CR 2013/17, p. 47, para. 37 (Ridings).

¹⁵²CR 2013/17, p. 46, para. 33 (Ridings).

¹⁵³WON, para. 86.

¹⁵⁴CR 2013/17, p. 31, para. 54 (Finlayson).

II. Non-binding IWC Resolutions and Guidelines

A. IWC Resolutions

17. Mr. President, Members of the Court. So far, I have had the honour to explain Japan's compliance with the only binding provision of the Schedule governing special permit whaling. I will now turn to soft law, namely the IWC Resolutions and Guidelines on which Australia puts much emphasis.

18. It is well established under international law that resolutions are recommendations. The Court stated in the *South West Africa* case¹⁵⁵:

“The persuasive force of Assembly resolutions can indeed be very considerable, — but this is a different thing. It operates on the political not the legal level: it does not make these resolutions binding in law.”

19. The Resolutions by the deeply divided IWC cannot constitute subsequent agreement or subsequent practice among the Contracting Governments¹⁵⁶, as Professor Pellet explained in the first round.

20. It would be strange to argue that Contracting Governments are bound by non-binding resolutions of the treaty body, where there is an opt-out mechanism in the binding Schedule amendment. Australia's case has retreated considerably on this point. While in its Memorial it argued that the Resolutions of the IWC constituted subsequent agreement, or interchangeably subsequent practice¹⁵⁷, Australia now agrees that decisions of the IWC other than the Schedule amendments are mere recommendations. Australia is also in agreement that the issuance of special permits does not “have to be consented to or authorized by the Commission or the Scientific Committee, or that any other Government or authority than the issuing State can revoke or cancel those permits”¹⁵⁸.

21. This is where the close interplay between Australia and New Zealand begins. Australia is quick to add that the question is “whether Japan's actions are or are not consistent with . . . the decisions taken under that Treaty”¹⁵⁹. Then, it systematically relies on New Zealand's

¹⁵⁵*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment, I.C.J. Reports 1966, p. 51, para. 98.*

¹⁵⁶CR 2013/14, pp. 63-70, paras. 47-66 (Pellet).

¹⁵⁷MA, paras. 4.65-4.69; see also CR 2013/18, pp. 35-39, paras. 35-48 (Crawford).

¹⁵⁸CR 2013/18, p. 39, para. 1 (Crawford).

¹⁵⁹*Ibid.*

interpretation of the legal significance of IWC Resolutions¹⁶⁰. Namely, that such resolutions provide “legitimate interpretative aids” and that meaningful co-operation requires a Contracting Government to give due account to the conditions described in the resolutions¹⁶¹. Based on this interpretation offered by New Zealand, Australia concludes that “Japan is required to take into account the interests of the other members of the Treaty as well reflected in those resolutions”¹⁶².

22. Then New Zealand picks up the baton and goes further: “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 . . .”¹⁶³

23. Australia, for its part, attempted to unilaterally re-write the findings of the Scientific Committee, as if there were consensus views critical of Japanese special permit whaling¹⁶⁴, where there were none. Or, it speaks as if the Scientific Committee dismissed the JARPA II data and its analysis as useless¹⁶⁵, which is not true either. Then it invokes the Resolutions criticizing the program adopted by the divided IWC and claims that Japan has not taken them into account¹⁶⁶.

24. Here, Japan is facing two cases advanced by two States. Setting that aspect aside, there is a duty to take into account the Resolutions of the IWC¹⁶⁷. But this does not go as far as to require the Contracting Governments to change their positions.

25. Australia and New Zealand’s interpretation runs counter to the interpretation expressed even at the beginning of a series of resolutions critical of special permit whaling in the aftermath of the adoption of the moratorium under paragraph 10 (*e*). Thus, the United States delegate stated regarding to the resolution on scientific research programmes in 1987:

“The United States admits freely and in fact insists upon the fact that a nation would remain free to disregard the advice of the Commission and to issue permits.

¹⁶⁰CR 2013/19, p. 63, para. 16 (Crawford); CR 2013/20, p. 37, para. 12 (Gleeson); CR 2013/19, p. 63, para. 16 (Crawford); CR 2013/20, p. 42, para. 32 (Gleeson).

¹⁶¹CR 2013/17, pp. 30-31, paras. 51-54 (Finlayson); emphasis added.

¹⁶²CR 2013/20, p. 42, para. 32 (Gleeson).

¹⁶³CR 2013/17, p. 31 para. 52 (Finlayson) ; emphasis added.

¹⁶⁴CR 2013/8, p. 25, para. 44 (Burmester); CR 2013/8, p. 63, para. 19 (Sands); CR 2013/19, p. 32, para. 24, p. 36, para. 32 (Sands).

¹⁶⁵CR 2013/19, p. 17, para. 11 (Gleeson).

¹⁶⁶CR 2013/11, pp. 35-36, para. 36 (Gleeson).

¹⁶⁷*Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, separate opinion of Judge Lauterpacht, p. 120.

There can be no question about that. The nation has that right. It would be within its right under this Convention to disregard the recommendation.”¹⁶⁸

It seems that Australia’s view of the effect of IWC Resolutions is not shared by all the parties to the Convention.

B. Guidelines

26. I would now like to turn next to guidelines. A series of guidelines were adopted by the IWC in the form of resolutions, starting from 1986. The resolutions being mere recommendations, they are not binding. The Guidelines are then annexed to the Scientific Committee Reports of the year of incorporation and are referred to as “Annexes”.

27. The applicable guidelines according to which the Scientific Committee reviewed and commented on the JARPA II proposal are contained in Annex Y (2000). As Professor Boyle explained in the first round, Annex Y is “a compendium of non-binding Whaling Commission resolutions on special permits”¹⁶⁹ compiled by the Head of Science of the IWC Secretariat, including Resolution 1999-2 that Japan voted against¹⁷⁰. It was not the Scientific Committee itself that elaborated the Guidelines according to which the scientific review was to be conducted. Annex Y is attached to the Scientific Committee report of 2000¹⁷¹. The most recent set of Guidelines are included in Annex P and it has a unique status from other Annexes in that, as the Parties agree, Annex P was elaborated and adopted by the Scientific Committee in 2008 to be subsequently endorsed by the IWC¹⁷².

28. Mr. President, it is wrong to assert that Japan is turning its back on the IWC Resolutions¹⁷³. Despite the fact that Japan was opposed to the adoption of some of the Resolutions in which the IWC — *and not the Scientific Committee* — set out the criteria for the scientific review, Japan submitted the JARPA II proposal in 2005 to a “review and comment” procedure under Annex Y. The procedure was conducted following the exact structure of the Annex Y

¹⁶⁸Verbatim Record, 1987, p. 40 (United States of America).

¹⁶⁹CR 2013/15, p. 53, para. 33 (Boyle).

¹⁷⁰Verbatim Record 1999, p. 157.

¹⁷¹*J. Cetacean Res. Manage.* 3 (Suppl.), 2001, pp. 371-372.

¹⁷²Chair’s Report of the 60th Annual Meeting, p. 26 <http://iwc.int/index.php?cID=2555&cType=document&download=1>, accessed 13 July 2013.

¹⁷³CR 2013/11, pp. 35-36, para. 36 (Gleeson).

format¹⁷⁴. Under each item, the Scientific Committee reproduced detailed criteria in Annex Y. There was no finding of the Scientific Committee that the JARPA II proposal did not satisfy the criteria as set out in Annex Y.

C. On “meaningful co-operation”

29. Mr. President, Members of the Court, finally, I would like to turn to the question of co-operation on the part of Japan from two angles: first, Japan’s taking into consideration of the views of other Contracting Governments at the IWC and, second, continuous scientific dialogue in which Japan has been engaged with the Scientific Committee.

30. On the first point, in light of the foregoing, it is untenable to argue that Japan is not engaged in meaningful co-operation¹⁷⁵ just because Japan has had some serious disagreement with some of the views expressed in the form of IWC Resolutions (which are not based on the findings of the Scientific Committee)¹⁷⁶. This is far from saying that Japan thinks “it can do what it likes under Article VIII”¹⁷⁷, as Australia insists.

31. On the contrary, it was in response to the voice of other States that Japan abstained from catching humpback whales that was planned to start in the 2007/2008 season. Resolutions 2005-1 and 2007-1 reflected the opposition of certain Contracting Governments to the proposed catch of humpback and fin whales in JARPA II Program. At the 2007 IWC Annual Meeting, under the agenda item “Special Permits”, Australia made a statement opposing Japan’s proposed catch of humpback whales under JARPA II as follows:

“[Australia] noted that the JARPA II programme is of particular importance to Australia in view of proposed inclusion in the 2007/08 season of takes of humpback whales. *It believed Japan should show goodwill and at least withdraw the proposed takes of humpback whales even if it would not drop all lethal aspects of the programme.* It also believed that the taking of humpback whales would further inflame an already heated debate and would cause an adverse reaction of the Australian public against Japan which it considered would be regrettable.”¹⁷⁸

¹⁷⁴J. Cetacean Res. Manage. 8 (Suppl.), 2006, pp. 48-53. Cf. CR 2013/19, pp. 38-39, paras. 36-37 (Sands).

¹⁷⁵WON, paras. 81-107; CR 2013/17, pp. 43-47, paras. 27-36 (Ridings).

¹⁷⁶CR 2013/19, p. 36, para. 33 (Sands).

¹⁷⁷CR 2013/18, p. 20, para. 20 (Dreyfus).

¹⁷⁸Chair’s Report of the 59th Annual Meeting, *Annual Report of the International Whaling Commission 2007*, p. 40; emphasis added.

32. In December 2007, Japan decided to suspend the proposed taking of humpback whales. No humpback whale has ever been taken under JARPA II. This was in response to a request from the then IWC Chair, Dr. William Hogarth of the US¹⁷⁹. Australia requested that Japan show goodwill, *inter alia*, not to inflame the adverse reaction of the Australian public. It now refuses to acknowledge the decision of Japan in a proper light and instead mocks the JARPA II program because it is not proceeding in the manner in which it was originally designed.

33. Second, on the question of continuous scientific dialogue, Japan's responsiveness to the comments and recommendations by the Scientific Committee has been demonstrated in detail in the first round and has not been rebutted¹⁸⁰.

34. Australia ignores the scientific merits of JARPA II in order to claim that the programme is not for purposes of scientific research within the terms of Article VIII¹⁸¹. But Australia could not rebut the very point that Japan had been engaged in a continuous and serious scientific dialogue.

35. In relation to Statistical Catch-at-Age Analysis (SCAA), Australia sought in vain to demolish the significance of Japan's contribution¹⁸². Australia's description of the views of the Scientific Committee on the utility of the age data obtained by lethal methods is again a complete misrepresentation. Japan's full commitment to scientific dialogue is unshaken. This can be demonstrated both from the context and substance. Professor Boyle will address the substance of the matter, and I will now focus on the context.

36. For the last decade, the Scientific Committee has allocated funds for development of the Statistical Catch at Age (SCAA) method to make yet better use of the JARPA and JARPA II age data¹⁸³. The Committee unanimously agreed — with no dissent from Australia's own scientists — to recommended funding of the IWC to the SCAA, Statistical Catch at Age, for further

¹⁷⁹CMJ, para. 5.80, fn. 740, Press Conference by Minister for Foreign Affairs Masahiko Komura, Friday, 21 December 2007, 6:35 p.m.; http://www.mofa.go.jp/announce/fm_press/2007/12/1221-2.html, accessed 14 July 2013 [tab-12].

¹⁸⁰CR 2013/19, p. 36, para.32 (Sands).

¹⁸¹CR 2013/8, p. 63, para. 19 (Sands); CR 2013/9, p. 37, para. 78 (Sands); CR 2013/19, pp. 25-32, paras. 4-24, pp. 47-50 and paras. 61-65 (Sands).

¹⁸²CR 2013/19, p. 48, para. 62 (Sands).

¹⁸³E.g., Report of the Scientific Committee, *JCRM 7 (Suppl.)(2005)*, p. 55, Table 5; Report of the Scientific Committee (2013), Table 10, p. 89

investigation at its 2013 meeting¹⁸⁴. This would hardly be logical action for the Committee, if it considered this data to be valueless, and its analysis to “produce nothing reliable” as Professor Sands asserted.

37. Here is what the Sub-Committee on In-depth Assessment in Annex G of the Scientific Committee Report of this year states in the body of the text, at tab 13 of your folders: “Estimates of age-at-length, obtained from reading of annual rings in earplugs, constitute an important input to SCAA.”¹⁸⁵

38. Instead, Professor Sands gave a distorted interpretation of a few keywords from the summary table at the bottom of a page in the same report, without looking at the report as a whole. Australia’s mere reliance on matching a few words — “MSYR” and “not robust” or “natural mortality” and “further investigation recommended” — in the summary table without showing Australia’s understanding of what it all means points to a lack of genuine engagement with the scientists participating in that sub-committee.

39. Discussions within the Scientific Committee are polarized when it comes to the debate over lethal and non-lethal sampling methods. But it is irrefutable that the data obtained from lethal sampling of JARPA and JARPA II is being used by the Scientific Committee. Australia asserts that nothing has been achieved in the eight years since the JARPA II proposal¹⁸⁶. On the contrary valuable results have been obtained¹⁸⁷. Australia could not destroy the case of Japan’s full engagement in the process of scientific dialogue¹⁸⁸.

Conclusion

40. By way of conclusion, I would like to make a few remarks. First, in light of the above, Australia failed to establish that Japan acted in violation of any procedural requirement. Japan

¹⁸⁴SC Report 2013, p. 39, pp. 88-91; <http://iwc.int/cache/downloads/1lwj9m9sehus40kswskggk8cw/2013%20IWC%20SC%20report.pdf>, accessed 13 July 2013.

¹⁸⁵Report of the Sub-Committee on In-depth Assessments, Ann. G, Report of the Scientific Committee 2013, p. 1; <http://iwc.int/cache/downloads/d1k3x3g3hy0ckww8k4ogw0kgo/AnnexG.pdf>, accessed 13 July 2013 [tab 14].

¹⁸⁶CR 2013/19, p. 36, para. 32 (Sands).

¹⁸⁷CR 2013/15, pp. 40-41, paras. 33-36, footnotes 93-105 (Takashiba).

¹⁸⁸CR 2013/18, p. 41, para. 5 (Crawford).

accepted the review and comment procedure under Annex Y and the JARPA II proposal passed that scrutiny.

41. Second, meaningful co-operation for the management of whales is achieved through engaged scientific dialogue. The scientific data analysis provided by JARPA II has tangibly contributed to the work of the Scientific Committee and several Sub-Committees in particular.

x 43. Finally, meaningful co-operation cannot mean unilateral acceptance of the interests of other parties as reflected in Resolutions adopted with a slight majority and which, in any case, are not binding.

x 44. And Professor Akhavan already addressed Japan's commitment to the IWC. Mr. President, distinguished Members of the Court, it has been a great honour to appear before you on behalf of Japan. Thank you very much for your kind attention.

The PRESIDENT: Thank you, Ms Takashiba. I understand this completes this morning's presentation by Japan. The Court will meet again this afternoon from 3 o'clock for the continuation of arguments by Japan. This sitting is adjourned.

The Court rose at 12.45 p.m.
