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International Court of Justice

LA HAYE

Cour internationale de Justice

THE HAGUE

YEAR 2013

Public sitting

held on Monday 15 July 2013, at 3 p.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 15 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

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

COMPTE RENDU

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

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

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The PRESIDENT: Please be seated. Good afternoon, the sitting is open, I give the floor to Professor Boyle, who is going to continue presentation of Japan's arguments. You have the floor, Sir.

Mr. BOYLE: Thank you, Mr. President.

JARPA II IS A PROGRAMME OF SCIENTIFIC RESEARCH (PART I)

A. JARPA II is a programme of scientific research

1. Mr. President, Members of the Court, this is not a case about good or bad science. Australia is not inviting you to identify scientific weaknesses in JARPA II so that you might comment on how those weaknesses could be remedied. Australia's case is that JARPA II is not scientific research at all. It wants Japan to stop lethal research on whales. And that is the sole reason for its critique of JARPA II. If it cannot persuade you that Japan is not doing real scientific research in the Antarctic its case fails.

2. In responding to that case, Japan does not have to show that its science is perfect, or beyond criticism. No science is beyond criticism, even Newtonian physics and Darwinian biology are not unassailable and that is how science progresses. Some of the criticism directed at JARPA II is politically motivated, and JARPA II is plainly controversial. But political objections and controversy do not make research any less scientific in character. Nor do scientists always agree on whether research is necessary or useful. So much is common sense.

3. Is JARPA II scientific research? If that question is one for experts to answer then Professor Walløe gave you an unambiguous answer: "JARPA II is definitely a scientific research program."[1] Does it matter that some Australian scientists disagree? In our view, no, it does not.

4. Australia and New Zealand maintain that what is scientific research can be determined by objective criteria. For that purpose they continue to offer you Professor Mangel, with his clearly defined hypotheses, his preference for non-lethal methods and for peer-reviewed publications.

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[1] CR 2013/14, p. 22 (Walløe).

5. But in contrast to Professor Mangel, here is how 72 Nobel Prize winners and other scientists have defined science in a case before the United States Supreme Court (*Edwards* v. *Aguillard*). [Tab 15-1/slide 1 on] According to them:

> "Science is devoted to formulating and testing naturalistic explanations for natural phenomena. It is a process for systematically collecting and recording data about the physical world, then categorizing and studying the collected data in an effort to infer the principles of nature that best explain the observed phenomena."[2]

6. Now this definition bears only some resemblance to Professor Mangel's account. And even Professor Mangel has admitted that scientists differ on what they regard as science[3]. That is obvious. [Slide 1 off]

7. In Japan's view, when a treaty refers to "scientific research" or "scientific evidence" or "scientific findings", the question what these terms mean cannot be answered by asking scientists what they understand by science. It is a question of treaty interpretation. The answer will depend on the object and purpose of the treaty and the terms in which it is expressed.

8. Some treaties, to take for example the 1982 Convention on the Law of the Sea, seek to facilitate scientific research in broad terms. Article 246 (5) of that Convention implicitly distinguishes between applied research involving amongst other things exploration or exploitation of natural resources, such as whales[4], and "pure research", which is defined by Article 246 (3) as research carried out "in order to increase scientific knowledge of the marine environment for the benefit of all mankind". An oceanographic scientist writing about the Convention's articles on marine scientific research in 1987 notes that: "The value of data per se is referred to in several articles of UNCLOS."[5]

9. Again you will notice how little resonance any of this has with those philosophical debates on the nature of science to which you were treated in the opening week of these proceedings.

10. In most cases, the science relevant to treaties concerned with environmental protection or the sustainable use of living resources typically involves monitoring and data analysis of things

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[2]Amicus Curiae Brief of 72 Nobel Laureates *et al.*in *Edwards v. Aguillard*, 18 August 1986, 1986 WL 727658, p. 23.

[3]CR 2013/9, p. 59 (Mangel).

[4]R. Churchill and A.V. Lowe, *The Law of the Sea* (Manchester University Press, 3rd ed. 1999), pp. 405-406.

[5]N. Flemming, Institute of Oceanographic Sciences, "The Exchange of Scientific Information and Data", in Law of the Sea Institute, *The UN Convention on the Law of the Sea: Impact and Implementation* (1987, Hawaii), p. 398. See UNCLOS, Arts. 200; 244 (2); 249 (1) *(c)-(d)*; 277 *(e)-(f)*.

such as fish stocks or other biological resources, or pollution levels in air and water, or global warming and so on. Long-term monitoring provides the "scientific evidence", the "scientific findings", the "scientific research" that underpin the effectiveness and evolution of all of these multilateral environmental agreements and also regional fisheries treaties among others. So, if seeking this essential data is not science then we have no legal basis for collecting it or for basing decisions upon it.

11. Continuous monitoring programmes form the backbone of all scientific research programmes which have the aim of providing advice on sustainable levels of catch for marine or terrestrial living resources. The reason is obvious. Population dynamics, and hence the size of the sustainable yield, can change in a manner that may not be predictable. It has to be monitored. That is true for whales. It's as true for whales as it is for any other animal. Factors indexing these dynamics must therefore be monitored so that changes can be detected and adjustments made.

12. And in fisheries throughout the world, both national and international, monitoring of that kind involves measuring "age, length and breeding condition", a task which requires lethal sampling. The International Council for Exploration of the Sea (ICES), a scientific organization responsible for giving advice of that kind in the North Atlantic, describes such data as "crucial"[6]. And you will see its view of what fisheries scientists do at tab 16 in your folder. This is the kind of data that the RMP Implementation process requires, as Professor Hamamoto explained in his first round speech[7].

13. So JARPA II is in essence doing exactly the same monitoring that fisheries scientific programmes perform, with "age, length and breeding condition" information requiring lethal research. If JARPA II is not a programme of scientific research, then neither are the primary research activities of institutions providing advice on sustainable catch levels for fisheries worldwide.

14. So, Mr. President, the Court's decision in this case could have broad systemic implications across the whole field of international environmental law. Do we really want to say

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[6]International Council for the Exploration of the Sea, "Fish Stocks: Counting the Uncountable?" (Copenhagen, Denmark, ICES, 2004-2005), p. 3.

[7]CR 2013/13, pp. 25-29 (Hamamoto).

that governments and environmental treaty bodies cannot take any decisions about scientific matters unless they are based on peer-reviewed academic publications, and supported by multiple hypotheses, and posing questions that would secure research funding in Southern California? That is the absurd position that Australia invites the Court to take. Truly absurd.

15. It is also wrong to conclude that monitoring and data analyses lack hypotheses — the essential hypothesis is to see whether things are changing or staying the same. Is the fish population going up or down? How much effluent can we put in the sea before it becomes polluted? Are the oceans more or less acidic now than 50 years ago? Are the whales getting bigger or smaller? On any reasonable common sense view these are questions that entail scientific research and they are exactly the kind of questions that JARPA II is designed to address, if necessary, using lethal methods and non-lethal methods.

16. JARPA II is based on the fundamental hypothesis that large whale species once severely depleted are now recovering, and that abundant species — the minke whale — have ~~now~~ to compete for food and have reached a natural ceiling. That is the essence of the krill surplus hypothesis. It was remarkable that you heard almost nothing about the krill surplus hypothesis last week, or from Australia at all. The larger whales — blue whales and fin and humpback whales — are efficient at consuming krill. Minke whales are not so efficient. Fin and humpback recovery is strong — about 10 per cent per annum for some of the humpback ~~species~~ stocks[8]. So the krill surplus hypothesis is important — what happens when there is no longer a surplus? But it is not the only hypothesis for whale population dynamics in Antarctica.

17. Professor Walløe expressly pointed out, and I will quote his words: the krill surplus hypothesis, he said "is definitely not the only clearly identifiable hypothesis in JARPA or JARPA II" and he gave the example of a further, independent hypothesis in his ~~written~~ evidence. If I quote from that, he said: "The hypothesis of the constant overall carrying capacity is not related to the krill surplus hypothesis. That could be related to climate change, for instance."[9]

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[8]IWC website, "status of whales" <http://iwc.int/status> accessed 13 July 2013; see also MA, App. 1, para. 5.18, p. 309.

[9]CR 2013/14, p. 38 (Walløe).

Assessing the possible effect on whale stocks of changes in the Antarctic marine ecosystem is precisely what differentiates JARPA II from JARPA.

18. So how then can the Court assess whether Japan acted lawfully in concluding that JARPA II constitutes scientific research for the purposes of Article VIII? We have made our view very clear. But there are two elements that will help the Court come to the conclusion that Japan has acted reasonably in this regard.

19. First, you must look at the context: the object and purpose of the Whaling Convention which, as you have seen this morning, is to secure conservation and development of whale stocks and their optimum utilization. Scientific research pursuant to Article VIII can serve any of those interrelated purposes. It is not simply a limited exception to an almost complete elimination of sustainable whaling. It can, at the very least, serve the purpose of facilitating legitimate sustainable whaling pursuant to the RMP — and the RMP is a very conservative procedure which provides an agreed precautionary basis for sustainable catch of abundant stocks such as the Antarctic minke whale. This is a reality which cannot be ignored when assessing the legality of JARPA II.

20. Secondly, Annex P, about which you heard more this morning, gives the only agreed guidance on what the Whaling Commission and the Scientific Committee expect to see in a programme of special permit research. It is not for Australia or New Zealand to add additional criteria unilaterally. The criteria covered by Annex P have evolved over time and Ms Takashiba has explained its genesis and its relationship to Annex Y, and earlier IWC Resolutions.

21. Yes, Annex P is based on IWC Resolutions, but it also reformulates them so that all Scientific Committee members could agree on the text, including Japanese and Norwegian scientists carrying out research programmes such as JARPA II. And the International Whaling Commission endorsed Annex P and therefore it endorsed whatever changes it makes to their earlier understandings[10].

22. None of these resolutions or annexes is binding on the parties. They offer only guidance and they should not be read as if there were treaty texts. They are applied by scientists. But the

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[10]"Revised Chair's Report of the 60th Annual Meeting", *Annual Report of the International Whaling Commission, 2008*, p. 26.

guidance given in Annex P is obviously important in telling us what the IWC regards as appropriate for a scientific research programme that uses lethal methods.

23. Australia would prefer you to ignore Annex P and it has said almost nothing about it. And there is good reason for its silence — because of all the guidance given by the Scientific Committee, Annex P is the most liberal in its treatment of research that is not immediately related to the management of whale stocks.

24. Let me remind you what Annex P envisages — I hope the slide is coming up any moment now: Annex P envisages that a special permit for lethal whaling may be issued for research within any of the following objectives: [tab 15-2: slide 2 on]

(i) improving conservation and the management of whale stocks;

(ii) improving the conservation and management of other living marine resources or the ecosystem of which the whale stocks are an integral part; and

(iii) testing hypotheses not directly related to the management of living marine resources.

25. It remains central to Japan's case, as we explained to the Court in the first round[11], that JARPA II falls within all of these categories and that it is therefore scientific research for the purposes of the Whaling Convention. [Slide 2 off]

26. Australia cannot get round Annex P. Even if it does not replace Annex Y and the older IWC Resolutions, as Australia claims, Annex P plainly adds to them, among other things, by setting out more clearly than before that research not related to conservation and management of whale stocks nevertheless falls legitimately within Article VIII[12].

27. ~~Now~~ Professor Walløe gave an excellent example in his oral testimony: he referred to Norwegian research on whale stocks that was directed not at the conservation and management of whales, but at the conservation and management of fish stocks eaten by the whales[13]. And it was to make the acceptability of that kind of programme transparently clear that Annex P was adopted.

28. In our view, the consistency of JARPA II with Article VIII should be reviewed according to today's standards. As we argued in the first round, those standards are set out in Annex P, and

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[11]CR 2013/15, pp. 58-59, paras. 52-56 (Boyle).

[12]CR 2013/15, p. 56, para. 44 (Boyle).

[13]CR 2013/14, p. 22 (Walløe); Lars Walløe, "Scientific review of issues raised by the Memorial of Australia including its two Appendices", 9 April 2013, p. 13. [Hereafter "Walløe, Expert Statement"]

JARPA II meets those standards. It would, we submit, be pointless to assess JARPA II on any other basis than the one on which it will be reviewed by the Scientific Committee in 2014. And Australia has not responded to that very obvious point.

29. But even if we are wrong in inviting you to disregard Annex Y and the earlier IWC Resolutions, we say that you could easily conclude on the evidence before you that JARPA II also meets the Annex Y Guidelines. For this purpose, the 2005 JARPA II Research Plan, in our submission, more than adequately defines the research to be undertaken, identifies the questions to be asked and explains the methodology. Our argument on those issues was set out in the first round and I do not need to repeat it.

30. Nor do I need to say any more about the impact on whale stocks. Australia has offered no evidence of any adverse effect resulting from JARPA II on the whale stocks and its own expert, Professor Mangel, agreed "that very small take of whales will not in any way endanger this stock"[14].

31. Basing his reading of Annex Y on IWC Resolution 1995-9[15], Professor Sands argued that you must ask the following questions with respect to the objectives of JARPA II.

32. First, he says, is it "for purposes of scientific research"? Well, for all the reasons already given, we say it is and I will not say more about that.

33. Second, is the proposal being made in "exceptional circumstances"[16]? But, Mr. President, Members of the Court, there is no reference to exceptional circumstances in Annex Y. We have already made the point this morning and earlier that it is wrong to take elements from highly contentious IWC Resolutions, adopted only by majority vote, against the opposition of Japan, that are not even referred to in Annex Y — and there may be a good reason why they are not referred to in Annex Y — and elements that are plainly inconsistent not only with Annex P but also with the text of Article VIII of the Convention.

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[14]CR 2013/9, p. 63 (Mangel).

[15]CR 2013/10, p. 35 (Sands).

[16]*Ibid.*, p. 36 (Sands).

34. Third, Professor Sands says the questions asked must address "critically important issues"[17]. I will show shortly that our evidence, supported by Professor Walløe, is that JARPA II does indeed meet critically important research needs. But that is not the point at the moment. If counsel had taken the trouble to read Annex Y he would see that addressing "critically important research needs" is merely one among several possible justifications for issuing a special permit under Article VIII. To suggest that it is the only one misrepresents the guidance given to the Scientific Committee.

35. Fourth, counsel for Australia says you must ask whether the questions that are being asked "can be answered by analysis of existing data"[18]. You will search the record in vain for any evidence from Australia proving that JARPA II can be addressed using existing data. The very nature of the objectives shows that it cannot rely on existing data alone, although it certainly does make use of the earlier JARPA data[19]. But, by its very nature existing data can only tell us what happened in the past. It cannot tell us what is happening now.

36. The final question, according to counsel for Australia, is whether the questions asked can be answered by non-lethal techniques[20]. I will return to that shortly.

37. But these are not the only questions that could be asked under Annex Y. It is worth looking at the others, because there are other matters listed in the text of the Annex. We could, for example, ask:

(a) Whether the research has any connection with "research needs identified by the Scientific Committee".

(b) Whether it is intended or structured to "contribute information essential for rational management of the stock".

(c) Whether it is "required for the purposes of management of the species or stock being researched".

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[17]CR 2013/10, p. 36 (Sands).

[18]*Ibid.*

[19]CR 2013/15, pp. 50-52 (Boyle).

[20]CR 2013/19, p. 38 (Sands).

38. What is obvious here is that lethal research does not have to be "exceptional" nor does it have to address critically important research needs. It can do other things. You will notice the difference between Annex Y and Annex P, but whichever Annex is relevant, there are self-evidently various potential justifications for special permit research, and they are not cumulative.

39. It would try the patience of the Court to take you through all of them. You will recall, however, that when the JARPA II research plan was reviewed by the Scientific Committee there was no suggestion that it did not fall within any of the parameters identified in Annex Y. Rightly so, because the Australian arguments in this respect are nonsense. Let me deal with a few of them briefly.

40. First, Japan rejects entirely the allegation that JARPA II is not required for the purposes of management of the species or stock being researched. Professor Sands stated last Wednesday that "killing whales and obtaining lethal data is *not* required for the RMP"[21]. The Solicitor-General argued that "any suggestion that JARPA is designed to obtain information to 'implement' the RMP lacks justification"[22], he said. But neither counsel made any reference to the relevant Scientific Committee documents that had been cited extensively by Professor Hamamoto in the first round[23]. There is, for example, the document entitled "Requirements and Guidelines for Implementations under the Revised Management Procedure (RMP)" that you can find in volume 13 of the *Journal of Cetacean Research and Management* published in 2012[24] and you will find that in the records of the first round~~(tab 17)~~.

41. This document clearly indicates that biological data are to be used in the RMP[25]. Moreover, such data *are* in fact used in the RMP implementation process with regard to minke whales in the Northwest Pacific[26]. Age data collected under special permit played a critical role in

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[21]CR 2013/19, p. 49, para. 65 (Sands).

[22]CR 2013/19, p. 22, para. 31 (Gleeson).

[23]CR 2013/13, pp. 25-29, paras. 47-51 (Hamamoto).

[24]Japan, judges' folder, first round, tab 25-16.

[25]"Requirements and Guidelines for Implementations under the Revised Management Procedure (RMP)", *J. Cetacean Res. Manage. 13 (Suppl.)*, 2012, p. 497, p. 504, App. 2, judges' folder of Japan, first round, tab 25-16; CR 2013/13, p. 28, para. 51 (Hamamoto).

[26]"Report of the Working Group on the *Pre-Implementation Assessment* of Western North Pacific Common Minke Whales", *J. Cetacean Res. Manage. 12 (Suppl.)*, 2011, p. 117, p. 118, p. 133 (App. 2).

this process for Northwest Pacific Bryde's whales[27]. In this respect Professor Walløe agrees with Japan: he said "both JARPA and JARPA II have given valuable information for the possible implementation of the current version of the RMP and for possible future improvements of the RMP"[28].

42. Secondly, we maintain that JARPA II directly addresses "research needs identified by the Scientific Committee" and "other critically important research needs". I made that point last week in reply to Judge Bhandari's very pertinent question. I can explain it more fully now. This is where research into the Antarctic ecosystem and multispecies modelling becomes critically important. You will recall Professor Walløe giving evidence that, for him, "even more important [he said], is that the programs [i.e. JARPA and JARPA II] are giving *critical information* about on-going changes in the Antarctic ecosystem"[29]. Those were his words.

43. The need to model competition between whale species for food is a broader part of the research aim of JARPA II to monitor the ecosystem in order to understand the impact of environmental changes on whales, on krill and on other species. The necessity of that objective is fully explained in the JARPA II research plan which points out, in a very short paragraph, it says:

> "Little can be achieved by using a single species management system for monitoring the whole ecosystem and identifying measures for the recovery of depleted cetaceans, in the context of changing cetacean population balance."[30]

44. The Solicitor-General for Australia suggested to the Court that: "Objective Two, which had aimed to build the grand overarching model of inter-species competition, is [he said] . . . rather illusory"[31]. "Illusory". I have four comments to make on this illusory attempt to dismiss that part of the research plan.

45. First, the importance of taking an ecosystem approach in monitoring it is identified by the IWC itself in consensus Resolution 2001-9, in which it acknowledges that:

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[27]*J. Cetacean Res. Manage.* 9 (Suppl.), 2007, pp. 407-423 (see particularly pp. 413-414) and *J. Cetacean Res. Manage, 10 (Suppl.)*, 2008, pp. 449-510 (see particularly p. 452).

[28]CR 2013/14, p. 22 (Walløe).

[29]CR 2013/14, p. 22 (Walløe); emphasis added.

[30]Government of Japan, "Plan for the Second Phase of the Japanese Whale Research, Program under Special Permit in the Antarctic (JARPA II) - Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources", 2005, IWC SC/57/O1; CMJ, Ann. 150, p. 11; hereafter "JARPA II Research Plan (2005) IWC SC/57/O1".

[31]CR 2013/19, p. 18, para. 15 (Gleeson).

> "a better understanding of marine ecosystems, including interactions between whales and fish stocks, would contribute to the conservation and management of living marine resources and is of interest to nations as well as to regional fisheries management organizations and international research organizations"[32].

The IWC itself has identified ecosystem research as a research need. You will find that resolution at tab 18 in your folder.

46. When considering the JARPA II proposal, several members of the Scientific Committee made the same point, they highlighted the importance of this objective:

> "Some members [the report says] stressed the importance of continued monitoring of biological parameters of Antarctic minke whales, not least in light of global environmental changes, but also to supplement other ongoing research into Antarctic ecosystem dynamics . . . [they went on to say that] JARPA II would provide a framework for multi-species modelling of the Antarctic ecosystem dynamics. Other members also stressed the need to develop an ecosystem-based approach to managing the Antarctic marine environment and commended the objectives of JARPA II in this respect."[33]

47. The objective is obviously a critically important one and it accords with the aim of achieving Ecosystem Based Fisheries Management, an approach endorsed by FAO[34] and by the Conference of the Parties to the Convention on Biological Diversity[35]. You will also find positive references to it in various other international instruments, I can mention only the 1995 FAO Code of Conduct on Responsible Fisheries[36], and the 2002 Johannesburg Plan of Implementation[37].

48. Secondly, when JARPA II is reviewed in 2014 in accordance with Annex P, one of the explicit criteria to be evaluated will be "the relationship of the research to relevant IWC resolutions and discussions, including those dealing with the respective marine ecosystem, environmental changes and their impacts on cetaceans"[38].

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[32]"Proposed Resolution on Interactions between whales and fish stocks", Resolution 2001-9, Ann. C, Chair's Report of the 53rd Annual Meeting, *Annual Report of the International Whaling Commission 2001*, p. 58.

[33]"Report of the Scientific Committee", *J. Cetacean Res. Manage. 8 (Suppl.)*, 2006, p. 50.

[34]Reykjavik Declaration on Responsible Fisheries in the Marine Environment (2001), noting the importance of advancing "the scientific basis for developing and implementing management strategies that incorporate ecosystem considerations and which will ensure sustainable yields while conserving stocks and maintaining the integrity of ecosystems and habitats on which they depend".

[35]Decision V/6: Ecosystem Approach, Fifth Meeting of the Conference of the Parties to the Convention on Biological Diversity, Nairobi, Kenya (2000), para. 12.

[36]FAO Code of Conduct on Responsible Fisheries (1995), paras. 12.4 and 12.5.

[37]United Nations World Summit on Sustainable Development, Plan of Implementation of the World Summit on Sustainable Development (2002), paras. 30 *(d)* and 32 *(c)*.

[38]"Revised Annex P, Process for the Review of Special Permit Proposals and Research Results from Existing and Completed Permits", attached to the Circular Communication to Members of the Scientific Committee IWC.SC.169, 11 Oct. 2012; hereafter "Revised Annex P (2012)".

49. Thirdly, Australia says this model is "illusory". This entirely misses the point of objective two, which is to "*construct* a model that will show the dynamics of competitive whale species to better allow the sustainable use of resources in the future"[39]. In other words, the model is the outcome of the process, not the starting-point. There is no point criticizing the model and describing it as "illusory" when we have not got there yet. The JARPA II research plan describes the concept and the hypotheses to be addressed by ecosystem modelling work and how that model will be developed[40]. An updated and more detailed proposal for the model was submitted to the Scientific Committee at its 2013 meeting[41].

50. Similar work is being carried out in the context of JARPN II research programme in the North Pacific that has already been submitted to a review panel established by the Scientific Committee in accordance with Annex P. That review panel has "welcomed" the work, while noting that the model is still at an "exploratory stage"[42]. Well it would be; it is still being developed. It is clear that developing such a model is ambitious and will take time, it is challenging, but it is simply offensive to those scientists involved in this process to describe their work as "illusory".

51. Finally, the fact that no humpback whales and only 18 fin whales have been taken under special permit since the commencement of JARPA II does not at all render the multispecies model or the ecosystem research "illusory" in any way. The under-take to date of these two species does not preclude existing ecosystem models — one of those referred to in the research is the Mori-Butterworth model — does not preclude them from being improved by use of data that JARPA II has collected in respect of these species by non-lethal means, and that is reflected in Japanese plans as advised to the Scientific Committee[43].

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[39]JARPA II Research Plan (2005) IWC SC/57/O1, p. 11; emphasis added.

[40]JARPA II Research Plan (2005) IWC SC/57/O1, p. 16.

[41]"Report of the IWC Scientific Committee Annual Meeting 2013", p. 60, http://iwc.int/cache/downloads/11wj9m9schus40kswskggk8cw/2013%20IWC%20SC%20report.pdf accessed 14 July 2013.

[42]"Report of the Scientific Committee", *J. Cetacean Res. Manage. 11 (Suppl. 2)*, 2010, p. 74.

[43]Kitakado, T., Murase, H., Tamura, T. and Yonezaki, S, "Plan for ecosystem modeling for species in Area IV in the Antarctic Ocean using JARPA and JARPA II data", doc. SC/65a/EM02 presented to the Scientific Committee, June 2013, p. 3, available at: http://events.iwc.int/index.php/scientific/SC65a/paper/viewFile/427/408/SC-65a-EM02, accessed 14 July 2013.

52. That point was confirmed by Professor Walloe in his oral evidence when he said that: "I think it is possible, even without sampling humpbacks, to get the information about changes in the ecosystem and perhaps about competition."[44]

53. But, while it is not essential for developing a multi-species model to catch either fin or humpback whales at this stage of the research, data from such catches significantly improves the reliability of the model and is crucially important for the research objective[45].

54. And the reasons for not catching the target sample of either species are simple to explain: as you heard this morning, in order to facilitate negotiations on the future of the IWC Japan decided to suspend catches of humpback whales[46]. The activities of *Sea Shepherd* have forced Japan to prioritize the taking of enough minke whales instead of taking fin whales. Both decisions will be reviewed in the 2014 Scientific Committee Review.

55. These points leave us in no doubt that the objectives pursued by JARPA II are essential for critically important research needs and the only illusion is the attempt by Australia to argue otherwise.

B. Lethal methods

56. That brings me to the use of lethal methods. Australia also continues to question the continued need for lethal methods in JARPA II. It does so in the face of all the evidence. The 2009 JARPN review report of the North Pacific program notes "at present, certain data, primarily stomach content data, are only available via lethal sampling"[47].

57. Far from confirming that "alternatives exist"[48], as counsel alleged, Professor Walløe gave clear evidence that he considered lethal take to be necessary, as he said:

> "Age [data] is important for at least three different types of investigations. The first is catch at age, which will show [why] abundance has changed . . . [And] [t]he second . . . is that it tells the age at sexual maturity, which gives important information about changes in the food availability for minke whales . . . [And] [t]he third use of

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[44]CR 2013/14, p. 47 (Walloe).

[45]JARPA II Research Plan (2005) IWC SC/57/O1, pp. 13-14.

[46]CMJ, para. 5.11.

[47]See "Report of the Scientific Committee", *J. Cetacean Res. Manage. 11 (Suppl. 2)*, 2010, p. 426.

[48]CR 2013/19, p. 53, para. 76 (Sands).

> the age data is that [it] makes it possible to [collect] information about cohort productivity and . . . mortality."[49]

All of these items are relevant to Objectives 1 and 4 of JARPA II. Australia has no answer to that evidence. [Tab 15-3 / slide 3 on]

58. And, you can see on the screen now a table which shows the data which can and cannot be collected by non-lethal means — and that is at tab 15-3 in your folder. I should perhaps say at this point that Professor Hamamoto will answer Judge Cançado Trindade's question about the extent to which the use of non-lethal methods would affect the objectives of the JARPA II programme, but I think this illustration fairly clearly indicates what can and cannot be done using non-lethal means. [Slide 3 off]

59. No doubt sensing the weakness of his case on non-lethal methods, counsel for Australia also asserted that Japan "has offered no scientific justification for killing any whales"[50]. He repeated what Dr. Gales told you in his testimony about the utility of age data in estimating natural mortality: that the matter was considered at the 2006 JARPA review meeting, and he then concluded "and this is a direct quote from the report, [he said] — that the 'parameter remains effectively unknown'"[51].

60. But what did Dr. Gales and Professor Sands omit to tell you when they quoted that sentence? Well, they admitted to tell you that this quotation reflected the results of only one method of age data estimation. The other method considered in the 2006 JARPA review — which is called "ADAPT-VPA" — successfully estimated natural mortality rates with an error of only some 15 per cent. The only reason for not accepting this at the time was that there were concerns about age readings from the commercial whaling period.

61. But, as I explained in our first round, and following a major study, the IWC Scientific Committee concluded in 2011 that all of these ageing issues had been resolved[52]. And the conclusion from that is that JARPA has indeed resulted in a successful and precise estimation of natural mortality[53].

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[49]CR 2013/14, p. 19 (Walloe).

[50]CR 2013/19, p. 45, para. 55 (Sands).

[51]CR 2013/10, p. 19 (Gales); *ibid.*, pp. 38-39 (Sands).

[52]"Report of the Scientific Committee", *J. Cetacean Res. Manage. 12 (Suppl.)*, 2011, p. 26.

[53]CMJ, paras. 4.118-4.124.

62. This is probably the point at which to answer Judge Cançado Trindade's question whether "a programme that utilizes lethal methods [can] be considered 'scientific research', in line with the object and purpose of the ICRW"[54].

63. The short answer is yes, the use of lethal methods can be considered as scientific research, and even Australia takes that view[55]. Article VIII specifically allows the issue of a special permit to "take and treat whales for purposes of scientific research" — translating that into plain English, you can use lethal methods for the purposes of that research. The object and purpose of the Convention expressly includes both conservation and development of whale stocks and their optimum utilization — again, translated into plain English, that means killing whales. Scientific research, including lethal research, facilitates all of those objectives.

64. Mr. President, Members of the Court, with your indulgence I would like also take you back to Judge Donoghue's questions about our analysis of the feasibility of non-lethal methods when setting sample sizes and how that analysis bore on those samples. In my previous answer I drew the Court's attention to the analysis carried out in 1997 and referred to in the JARPA II research plan[56]. Australia says Japan has conducted no analysis of the feasibility of non-lethal methods since then, since 1997 in effect[57].

65. Well, firstly, let me remind you that JARPA and JARPA II have routinely involved non-lethal methods. The results of non-lethal sampling have been reported annually through cruise reports submitted to the Scientific Committee. You will see extracts of those at tab 19 in your folder, and they show how many non-lethal samples have been taken by JARPA and by JARPA II. So, you can see quite clearly that Japanese scientists involved in these two programmes have made use of non-lethal methods and are open to further discussion of those methods in the Scientific Committee.

66. However, my second point, is that a further analysis of the use of lethal and non-lethal methods was carried out in 2007. In it, the authors compared the characteristics of those methods

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[54]CR 2013/17, pp. 49-50

[55]CR 2013/19, p.54, para. 79 (Sands).

[56]CR 2013/15, pp. 69-70, para. 96 (Boyle).

[57]CR 2013/19, p. 46, para. 56 (Sands).

and they concluded that a combination of both lethal and non-lethal methods was necessary when conducting effective population research on large whales. The full Scientific Committee document[58] — it is seven pages long — is at tab 20 in your folder.

67. This analysis was presented to the Scientific Committee at the same time as an Evaluation of the 2-year Feasibility Study for JARPA II which ended in 2007. It would have been available to any member of the Scientific Committee at that time. And it is clear to us, therefore, that a full and up-to-date assessment of the use of lethal and non-lethal methods was conducted by Japanese scientists prior to the commencement of the full-scale JARPA II research programme in 2008, and that it was made available to the Scientific Committee for comment and review during the feasibility stage.

C. Sample size

68. Mr. President, Members of the Court, I can now take you to sample sizes. Australia says that Japan "offered no scientifically justified rationale for why it needs to take and kill so many whales"[59]. None. This is completely unsubstantiated by the evidentiary record in this case. I asked our team of experts to come up with a better explanation of sample sizes, but they tried to give me more mathematical equations. ~~Now~~ I might be tempted to take up mathematics when I retire, but now is not the moment.

69. However, Australia made much of my apparent inability to explain the mathematics, but you will have noticed, as I couldn't help noticing, that they made no effort to explain the equation that I put on the screen, nor did they say it was wrong, nor did they offer you any alternative mathematics. They could talk about the messenger, but they couldn't talk about the message. In reality, they don't challenge the mathematical calculation, it follows a very well-established algorithm for the calculation of sample sizes: what they challenge is merely the assumptions on which that calculation was based, and I will come to those assumptions in a moment.

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[58]Ohsumi, S., Goto, M., and Otani, S., "Necessity of combining lethal and non-lethal methods for whale population research and their application in JARPA", doc. SC/59/O2 (2007), available at: http://www.icrwhale.org/pdf/SC-59-O2.pdf, accessed 14 July 2013.

[59]CR 2013/19, p. 45, para. 55 (Sands).

70. But they could not challenge the mathematics and they did not because the mathematics were right, and we have got confirmation of this from Professor Walløe. He didn't say that our calculation was wrong, he only said that at the time he did not understand it either. But when he did the calculation himself he came up with a figure almost the same as ours. And I quote from his evidence: "a catch of the order of 800-900 whales per year does not seem to be unreasonable, on the clear condition that there is absolutely no chance that this will result in overexploiting the minke whale stocks"[60].

71. As I said in the first round, the final sample size was a compromise. [Tab 15-4/slide 4 on] And you can see on the screen the table which clearly shows that. It lists the required minimum sample sizes to detect trends in each biological parameter, using the statistical method set out in the Research Plan. The calculations are all performed by the same statistical methods based on the same principles.

72. Now, because those various biological and other parameters for minke whales required minimum sample numbers typically in the range between 800 and 1,000, the sample size chosen for minke whales was 850. That number also took account of other considerations of practicality, including the maximum duration of cruises which precluded very large sample sizes. [Slide 4 off]

73. But the key issue in both cases is not the statistical calculation, it is the different assumptions on which the calculations were based: six years and 1.5 per cent yearly change rate for minke whales, 12 years and 3 per cent yearly change rate for fin and humpback whales. Australia, in its pleadings, effectively accused Japan of manipulating the two calculations in order to allow it to take more minke whales, and you will have remembered the illustration when they did so. But they were wrong.

74. Let me first deal with the choice of timeframe over which changes were to be detected. The simple explanation for choosing six years for minkes is that it coincides with the review period for the RMP[61]. I inadvertently referred, in the first round, to the JARPA II review period, rather than the RMP *Implementation* review period, but that is what I should have said[62]. And it is of

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[60]Walløe, Expert Statement, p. 10; see also CR 2013/14, pp. 41-42.

[61]CR 2013/14, p. 46 (Walløe); "The Revised Management Procedure (RMP) for Baleen Whales", 2012, *J. Cetacean Res. Manage. 13 (Suppl.)*, 2012, p. 489.

[62]CR 2013/15, p. 64, para. 74 (Boyle).

course the latter which is most relevant in this context given that one of the objectives of JARPA II is to "[improve] the management procedure for the Antarctic minke whale stocks"[63].

75. In contrast, the 12-year time frame for humpback and fin whales was chosen because Japan was not, and is not, thinking about the *Implementation* of the RMP with respect to either of these species. So there was no reason to link those numbers to the review period for the RMP.

76. But there was also a need for more caution with regard to fin and humpback whales, given that the six-year time frame leads to quite large sample sizes. Their populations are much smaller, although growing rapidly. In his evidence Professor Walløe did not have a scientific explanation for the different period, but that was only because he had not considered it, as he told counsel for Australia in his cross-examination[64].

77. Secondly, there are the figures for biological change to be detected during the JARPA II Programme. Again, Australia suggested that the figures had been chosen in order to manipulate the sample size. And, once again, there is a simple explanation. The figure of 1.5 per cent change in the case of minke whales was based on previous data obtained from JARPA and commercial whaling prior to the moratorium. Our scientists consider this to be a reasonable assumption and it is fully explained in the JARPA II research plan[65].

Similarly, the higher figure of 3 per cent change selected for humpback and fin whales, is also supported by existing data relating to changes in stock size, as I explained in the first round[66]. These species are growing strongly. But once again the need for caution with regard to these two species dictated a very conservative datum that was simply unnecessary for minke whales. [Tab 15-5/slide 5 on] And the table now showing explains how the final sample size for humpback and fin whales was chosen, based on those figures. As you can see, 3 per cent gives the smallest figure. Perhaps the 2005 Research Plan did not explain this very well, but I rather doubt whether any explanation would have satisfied Australia. [Slide 5 off]

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[63]JARPA II Research Plan (2005); IWC SC/57/O1, p. 12.

[64]CR 2013/14, p. 46 (Walløe).

[65]JARPA II Research Plan (2005) IWC SC/57/O1, p. 17.

[66]CR 2013/15, p. 63, para. 72 (Boyle).

78. Judge Greenwood asked a question that I have been asked to answer. He asked about the reason for the higher sample size for minke whales in JARPA II when compared to JARPA. The answer to that is again quite easy: JARPA II is not simply an extension of JARPA. It has new objectives — notably ecosystem research — and the monitoring of changes in the research parameters requires a larger sample size. And the reasons for the higher number — ~~it~~ the illustration is a little complicated ~~that~~, but it is at tab 15.6 in your folder — ~~but that~~ and it shows the differences in the research objectives and compares the two programmes. [Tab 15-6/slide 6 on]

79. You will see first that JARPA II is for six year research terms, while JARPA was for 18 years. This obviously affects the sample size. Secondly, you will see that JARPA was focused on a one-time estimation of different biological parameters for minke whales, but JARPA II is a much more ambitious programme which tries to model competition among whale species and to detect changes in various biological parameters and the ecosystem. [Slide 6 off]

80. Professor Walløe explained that in his view the JARPA sample size was too small[67]; in contrast, as you have heard, he endorsed the JARPA II figure for minke whales[68]. You will also notice that the JARPA programme did not include the taking of fin or humpback whales since it did not cover multi-species modelling, so there is no comparison therefore between the sample sizes for those species from one programme to the other.

81. Let me conclude on sample size by reiterating that it is not true to say, as alleged by Australia, that there is no evidence to show how the figure of an annual sample size of 850 minke whales was arrived at[69]. As I hope I have demonstrated, these figures were not plucked from thin air. To the contrary, the sample sizes were calculated on the basis of carefully selected parameters, using a standard scientific formula, whilst also taking into account the potential effects of research on whale populations; in effect taking a precautionary approach, as Japan was ~~required~~ expected to do by Annex P. ~~Now~~ All of this is set out in the 2005 JARPA II Research Plan and its appendices.

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[67]Walløe, Expert Statement, p. 9; CR 2013/14, p. 46.

[68]Walløe, Expert Statement, p. 9; CR 2013/14, pp. 41-42.

[69]CR 2013/19, p. 56, para. 82 (Sands).

D. 2013 Scientific Committee Report

82. Mr. President, Members of the Court, I am within sight of the end, but first it may be helpful to take you back to the 2013 Scientific Committee Report. Australia relied last week on selected excerpts and creative interpretation of this document, so let me set the record straight. In several key respects it bears out much of what I have been saying this afternoon and it may be a far simpler way of understanding what I have been saying this afternoon. The first six pages — the only relevant ones — of Annex G of this report are at tab 21 in your bundle.

83. Now, if you were to turn to pages 5 and 6 of that Annex, you will see that there is discussion of a paper reporting results of non-lethal experiments on Antarctic minke whales. The discussion considers the merits of lethal and non-lethal sampling for those whales in the Antarctic. The author of the paper speaks first, then Japan's scientists give their view, then Australians respond. ~~Now, t~~The report gives an excellent summary of their differing views — they include those of Dr. Pastene, who is a member of Japan's delegation in this case, and Dr. Gales, the Australian Government scientist.

84. You will note that Japan's scientists welcomed, and were interested in, the new information about non-lethal techniques, but they did suggest that the best way to contribute to the assessment of Antarctic minke whales was a combination of lethal and non-lethal techniques. But if you read the report, you can see that these are not scientists who refuse to listen or engage in dialogue. And Dr. Gales is also open-minded. He acknowledges "some of the issues raised, such as difficult weather conditions, are of course limitations"[70]. He does not agree that lethal techniques are complementary to non-lethal techniques, as described in the paper, and at the end he says non-lethal techniques "offer a *new and exciting* opportunity"[71].

85. Of course, if the techniques are "new" it is hard to see how they could have been the subject of assessment in 2005. If they are "new", presumably in the best scientific tradition the experiments should be replicated by other scientists before they are accepted as tried and trusted. If they are new, they might even have to be independently peer-reviewed. Too soon, perhaps, to leap to conclusions.

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[70] "Report of the IWC Scientific Committee Annual Meeting 2013", Ann. G: Sub-Committee on In-depth Assessments, p. 6.

[71] *Ibid.*; emphasis added.

86. Indeed, in explaining the findings of the study, the author of the paper admits "the use of small boats [he says], operating close to the ice edge on groups that were feeding or seemed relaxed, had been a crucial factor; trying to deploy tags [he carries on] on solitary animals in the high seas would likely result in a low success rate"[72].

87. It requires quite a lot of imagination to see this as justifying the conclusion of Dr. Gales, or the argument of Australia's counsel, that alternative, equally effective, non-lethal techniques exist. To say that the Scientific Committee has commended the work of Dr. Gales[73] — as counsel did — does not mean that they consider it widely applicable in practice. I can easily commend Professor Sands for his skill as an advocate. But it does not mean I thereby express agreement with his techniques.

88. Something else is quite striking if you read the report carefully. It refers to JARPA II as "scientific whaling", contrasting it expressly with earlier Japanese commercial whaling: pre-JARPA, pre-moratorium. You can see that towards the bottom of page one.

89. It is also striking that the report notes the utility of data obtained from JARPA and JARPA II, at least four times on the first two pages. Now it is striking only because, if you believed Australia, the information would be utterly worthless. Surely the more persuasive conclusion is that JARPA and JARPA II are taken seriously as research programmes of direct relevance to the mandate of the IWC?

90. Finally, Mr. President, Members of the Court — at least finally on this point — we should have another look at one of Australia's more memorable illustrations — I am sure you have not forgotten this one [tab 15-7: slide 7 On] — the Statistical Catch at Age table. It was referred to this morning but I have undertaken to go through this in a little more detail. That table is shown at the bottom of page 2 of the 2013 Scientific Committee Report, Annex G; it is the report of the Sub-Committee on In-Depth Assessments[74]. No doubt that illustration with its yellow highlighting was meant to be striking. But it is only striking if you misrepresent what it illustrates. The Statistical Catch at Age Analysis is not part of JARPA; it is not part of JARPA II. It is a Scientific

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[72] *Ibid.*, p. 5.

[73] CR 2013/19, p. 53, para. 77 (Sands).

[74] CR 2013/19, p. 48, para. 62 (Sands).

Committee-funded programme that uses data from JARPA and JARPA II. The Statistical Catch at Age Analysis is a technique or model used by the Scientific Committee to analyse minke whale population dynamics, obtained through lethal research methods. And it is run by Professor Punt of the University of Washington.

91. The table shown by Professor Sands is taken from page 2 of that report. But what it illustrates is not any deficiency in the JARPA or JARPA II data on which Professor Punt relies. What it is, is an honest assessment — presumably by Professor Punt — of the current state of his own statistical catch at age analysis. It says nothing about JARPA or JARPA II. The report does indicate that the solution to those deficiencies may well be more research, using JARPA and JARPA II data. [Slide 7 off]

92. That all becomes really quite clear if you actually read the accompanying text on page two. As the report says, "the SCAA has received extensive scrutiny and improvement over the years of its development . . . and [it] appears to have stood up well."[75]. And when it comes to the table shown by Professor Sands, the report comments at the bottom of page two "Overall, some conclusions appear to be quite robustly supported, while others are more sensitive to details of the model formulation or data selection."[76] He sounds like a good scientist, Professor Punt; nice to meet him, perhaps. Consequently, an Inter-sessional Steering Group to handle this issue was established[77]. Now, if this analysis is as useless as Professor Sands claims, why then did the Scientific Committee establish an Inter-sessional Group to take the analysis forward? Why did it provide funding from its budget[78]? Ms Takashiba drew your attention to that point this morning.

93. So, far from showing, as Professor Sands so memorably claimed, that JARPA and JARPA II material is unreliable, this part of the report shows, on the contrary, that JARPA and JARPA II material is indispensable to this Scientific Committee analysis.

94. And to pick up another of his many distortions, Japan's counsel have never asserted that "the Scientific Committee has confirmed that all of the technical problems regarding age data have

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[75] "Report of the Sub-Committee on In-Depth Assessments", Ann. G, Report of the Scientific Committee, IWC/65a/Rep 1 (2013), p. 2, <http://iwc.int/cache/downloads/dfk3x3g3hy0ckww8k4ogw0kgo/AnnexG.pdf> accessed 14 July 2013.

[76] *Ibid.*

[77] *Ibid.*, p. 3

[78] *Ibid.*, "Report of the Scientific Committee", IWC/65a/Rep1 (2013), pp. 88-92.

been resolved"[79]. The Scientific Committee has made that assertion. They do so in their reports[80]. But I do appreciate the difficulty of keeping track of so many reports and documents. It is a challenge.

E. Periodic independent review

95. That brings me to — I have only got two points to go — let me say something about periodic independent review. Australia continues to argue strongly in favour of independent review of special permit proposals. But what it did not tell the Court is that such a process already exists. Again if you read Annex P, part 2 describes the process for periodic and final review of research results. When Annex P was being elaborated, it was accepted that the process should include "outside experts" and that is all explained in Annex P. And it was accepted that the role of scientists associated with the proposal should be restricted to presenting the proposal and answering points of clarification[81].

96. ~~Now,~~ There have been reports of two specialist workshops where Annex P has been applied, the JARPN II workshop on the North Pacific and also a review of Iceland's special permit research. And these reviews make it clear that Annex P provides a thorough peer review process. Japan's view of the JARPN II specialist workshop — which is the one it has experience of — is that it was objective and generally positive, despite criticism of aspects of the programme[82]. And you would expect criticism of some aspects of that programme, or any programme. That is what scientists are for. In his testimony on 27 June, Dr. Gales said he would prefer "a truly separate and independent process"[83].

97. Japan has no reason to be dissatisfied with the independent process we already have and it was not dissatisfied when the IWC Scientific Committee did appoint independent experts to

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[79]CR 2013/19, p. 49, para. 63 (Sands).

[80]"Report of the Scientific Committee", *J. Cetacean Res. Manage. 14 (Suppl.)*, 2012, p. 29.

[81]"Process for the Review of Special Permit Proposals and Research Results from Existing and Completed Permits", Ann. P, Report of the Scientific Committee, *J. Cetacean Res. Manage. 11 (Suppl.)*, 2009, p. 399.

[82]Pastene, L.A., Hatanaka, H., Fujise, Y., Kanda, N., Murase, H., Tamura, T., Mori, M., Yasunaga, G., Watanabe, H. and Miyashita, T. "Response to the 'Report of the Expert Workshop to Review the JARPN II Programme'" 2009. SC/61/JR1, pp. 1-21 presented to the Scientific Committee (May-June 2009) <http://www.icrwhale.org/pdf/SC-61-JR1.pdf> accessed 14 July 2013.

[83]CR 2013/10, pp. 32-33 (Gales).

conduct the first ten-year review of the Southern Ocean Sanctuary in 2004. You will see their conclusions on the screen [Tab 15-8 - slide 8 on] — I will not read all of it out but you will notice the conclusion they came to: The Southern Ocean Sanctuary — IWC Sanctuaries in general — are: "*not ecologically justified*"; they are "based on *vague goals*", "*objectives that are difficult to measure*"; there is a lack of "a rigorous approach to . . . design and operation"; do not "have an effective monitoring framework", "*little apparent rationale for the boundary selection and management prescriptions*"[84].

98. I could go on. It is clear they are not impressed with the ecological or conservation reasons for adopting the Southern Ocean Sanctuary. But, Mr. President, my point is simply this: the report shows the value of using genuinely independent outside experts to review the consistency of IWC conservation measures with Article V 2 of the Convention. It shows that an independent process exists. [Slide 8 off]

F. Errors in Australia's case

99. Let me then come to my final section — which is very brief — which is to deal with a number, a selected number of the more blatant errors in Australia's case. Our scientists — the same ones whose professional work has attracted such scorn from Australia — are particularly keen that I should do this.

100. Australia claimed last week that JARPA II and JARPA, had involved little collaboration with the National Research Institute of Far Seas Fisheries and that JARPA II put little effort into the krill study[85]. Australia made this claim when commenting on, I think, Judge Keith's question to Professor Walløe[86]. It is not true.

101. The Institute of Cetacean Research which carries out the JARPA II programme has been collaborating in a krill study with Japanese krill scientists in the National Research Institute of Far Seas Fisheries for more than 20 years, and the results of that collaboration have been submitted

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[84]Zacharias, M.A., Gerber, L.R. and Hyrenbach, K.D. "Incorporating the science of marine reserves into IWC Sanctuaries: The Southern Ocean Sanctuary", 2004, SC/56/SOS5 presented to the Scientific Committee (June-July 2004), p. 2; CMJ, Ann. 100; emphasis added.

[85]CR 2013/20, p. 19 (Crawford).

[86]CR 2013/14, pp. 57-58.

to the IWC's Scientific Committee and published in scientific journals[87] — you can see the record in the footnote. JARPA II conducted a krill survey in the Antarctic Ocean for four years, between 2005 and 2009, and the results of these surveys were submitted to the Scientific Committee through the cruise reports[88]. Because of sabotage activities by *Sea Shepherd*, the Institute was not able to conduct a krill survey from the 2009/2010 season.

102. Again, in relation to Judge Keith's question to Professor Walløe about the linkage of JARPA and JARPA II to other projects concerning the Antarctic ecosystem, I should perhaps tell you that, in pursuing JARPA and JARPA II, the Institute of Cetacean Research has also collaborated, again with the National Research Institute of Polar Research, the National Research Institute of Far Seas Fisheries, the University of Tokyo and with other domestic institutions[89]. Information obtained from JARPA has been submitted to the CCAMLR secretariat to contribute to discussions there on the Antarctic ecosystem[90].

103. We all remember that Australia placed special emphasis on biopsy sampling to allege that lethal methods used in JARPA II can be entirely replaced with non-lethal methods. In the second round, the Solicitor-General referred to a study on biopsy conducted by Japanese scientists from the Institute for Cetacean Research more than 20 years ago[91]. I am extremely grateful to the

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[87]Ichii, T. and Kato, H. (1991) Food and daily food-consumption of Southern minke whales in the Antarctic. *Polar Biol.* 11, pp. 479-487; Naganobu, M., Nishiwaki, S., Yasuma, H., Matsukura, R., Takao, Y., Taki, K., Hayashi, T., Watanabe, Y., Yabuki, T., Yoda, Y., Noiri, Y., Kuga, M., Yoshikawa, K., Kokubun, N., Murase, H., Matsuoka, K. and Ito, K. (2006); Tamura, T., Konishi, K., Nishiwaki, S., Taki, K., Hayashi, T. and Naganobu, M. (2006) "Comparison between stomach contents of Antarctic minke whale and krill sampled by RMT net in the Ross Sea and its adjacent waters", *Paper SC/D06/J20 presented to the JARPA Review Meeting, Dec. 2006.* Available at: http://www.icrwhale.org/pdf/SC-D06-J20.pdf; Accessed 14 July 2013.

[88]Cruise reports of JARPA II from 2005/06 to 2008/09. *Papers SC/58/O7, SC/59/O4, SC/60/O4, SC/61/O3 presented to the IWC Scientific Committee.* Available at: http://www.icrwhale.org/CruiseReportJARPA.html; Accessed 14 July 2013.

[89]Naganobu, M., Nishiwaki, S., Yasuma, H., Matsukura, R., Takao, Y., Taki, K., Hayashi, T., Watanabe, Y., Yabuki, T., Yoda, Y., Noiri, Y., Kuga, M., Yoshikawa, K., Kokubun, N., Murase, H., Matsuoka, K. and Ito, K. (2006) "Interactions between oceanography, krill and baleen whales in the Ross Sea and Adjacent Waters: An overview of Kaiyo Maru-JARPA joint survey in 2004/2005", *Paper SC/D06/J23 presented to the JARPA Review Meeting, Dec. 2006.* Available at: http://www.icrwhale.org/pdf/SC-D06-J23.pdf; Accessed 14 July 2013.

[90]Naganobu, M., Nishiwaki, S., Yasuma, H., Matsukura, R., Takao, Y., Taki, K., Hayashi, T., Watanabe, Y., Yabuki, T., Yoda, Y., Noiri, Y., Kuga, M., Yoshikawa, K., Kokubun, N., Murase, H., Matsuoka, K. and Ito, K. (2007) "Interactions between oceanography, krill and baleen whales in the Ross Sea and adjacent waters, Antarctica in 2004/2005", *13th CCAMLR/WG-EMM meeting, WG-EMM-07/7.*; Leaper, R., Bannister, J.L., Branch, T., Clapham, P., Donovan, G., Matsuoka, K., Reilly, S. and Zerbini, A. (2008) "A review of abundance, trends and foraging parameters of baleen whales in the Southern Hemisphere", *CCAMLR / IWC Workshop to review input data for Antarctic marine ecosystem models, CCAMLR-IWC-WS-08/04*; the following published paper used information from JARPA: Mori, M. and Butterworth, D.S. (2006) "A first step towards modelling the krill–predator dynamics of the Antarctic ecosystem", *CCAMLR Science* 13, 217-277.

[91]CR 2013/19, p. 22, para. 31 (Gleeson).

Solicitor-General for emphasizing that Japan has been carrying out work on biopsy for more than 20 years. So much for Professor Crawford's allegation that "Japan has ignored the development of non-lethal methods . . . including . . . biopsy"[92].

104. However, it seems that the Solicitor-General has not read the paper to which he was referring. This paper was delivered by a group headed by a Japanese scientist at the Institute of Cetacean Research, and it reports as follows:

> "this was an effective test of the limitations of the sampling system because of the difficulties in approaching minke whales to within the effective firing range of the biopsy darts, especially in Antarctic conditions and from large platforms [I think they mean big ships] . . . This [they go on] suggests that the larger, slow moving species such as right and humpback whales could be sampled more easily and efficiently than this sampling of minke whale."[93]

105. The Solicitor-General was actually quoting a paper that supports Japan's position that biopsy sampling on minke whales on the high seas is impracticable. And, as I have explained, Japan has continued its research on non-lethal methods. It has not come to a different conclusion.

106. The last blunder is perhaps more amusing. On Tuesday the Attorney-General told the Court that "Japan issues an annual statement at each IWC meeting refusing to participate in discussions on whale-watching"[94]. It is not obvious to me that there is anybody in Antarctica who could go whale-watching, but never mind. Had he read the documents, the Attorney-General would have known that a Japanese delegate not only attends the meetings of the sub-committee on whale-watching, but an eminent Japanese whale scientist, Professor Hidehiro Kato, served as the Chair of this body from its foundation in 1997 until 2010[95]. And he has continued to serve as a member since then. This is hardly the "unco-operative approach" portrayed by the

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[92]CR 2013/10 p. 46, para. 18 (Crawford).

[93]Nishiwaki, S., Joyce, G., Ensor, P., Mermoz, J., Sanperra, C. and Kasamatsu, F., "Report on the biopsy dart sampling feasibility study during the 12th IWC/IDCR Southern Hemisphere Minke Whale Assessment Cruise 1989/90", doc. SC/42/SHMi21, pp. 5-6.

[94]CR 2013/18, p. 19, para. 16 (Dreyfus).

[95]Professor Kato has continued to participate in meetings since he stepped down as the Chair in 2010. For reference, see RIWC 48, 1998, p. 249; *JCRM 1* (Suppl.), 1999, p. 227; *JCRM 2* (Suppl.), 2000, p. 265; *JCRM 3* (Suppl.), 2001, p. 297; *JCRM 4* (Suppl.), 2002, p. 339; *JCRM 5* (Suppl.), 2003, p. 382; *JCRM 6* (Suppl.), 2004, p. 335; *JCRM 7* (Suppl.), 2005, p. 327; *JCRM 8* (Suppl.), 2006, p. 241; *JCRM 9* (Suppl.), 2007, p. 326; *JCRM 10* (Suppl.), 2008, p. 322; *JCRM 11* (Suppl.), 2010, p. 334; *JCRM 11* (Suppl. 2), 2010, p. 332; *JCRM 12* (Suppl.), 2011, p. 296; *JCRM 13* (Suppl.), 2012, p. 292; *JCRM 14* (Suppl.), 2013, p. 318; IWC/65A/Rep 1, Ann. M, p.3.

Attorney-General[96]. Quite the reverse. But it does speak volumes about the reliability of Australia's pleadings.

G. Conclusions

107. Mr. President, Members of the Court, thankfully that brings me to my conclusions. It is for Australia to prove that JARPA II is not a programme of scientific research. That is its case. It must prove it clearly and convincingly[97]. It has not done so. All it has proved is that the scientists disagree about the value of JARPA II, about the methodology, or about the results. Much the same could be said about any scientific research.

108. Japan, on the contrary, has shown that JARPA II meets critically important research needs, that it is required for the management of whale stocks, that it does address research needs identified by the Scientific Committee. It has shown that age data is essential to an understanding of the structure of whale stocks and population dynamics, and it has shown that such data can only be obtained through the use of lethal means. It has shown how the sample size were determined and that they represent a reasonable and proportionate figure in the context of the research which JARPA II undertakes.

109. Mr. President, Members of the Court, if JARPA II is not scientific research then the implications are far-reaching, for Japan, for all States that do marine scientific research, for all States that do research on global environmental change. This Court should pause long and hard before it joins the ranks of those who seek to limit the freedom of scientific research on matters of this kind. Mr. President, thank you, that is all I have to say. I ask you to invite — we may wish to take a break at this point? Alternatively I think you could invite Professor Hamamoto to address you. Thank you.

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[96]CR 2013/18, p. 19, para. 16 (Dreyfus).

[97]*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*,p. 89, para. 225 ; p. 90, para. 228 ; pp. 97-98, para. 254 ; p. 99, para. 259 ; p. 100, para. 262 ; p. 101, paras. 264 and 265.

The PRESIDENT: Thank you, Professor Boyle. It seems like this might really be a good moment for a coffee break. The sitting is suspended for 15 minutes and then I will call on Monsieur Hamamoto. The meeting is suspended.

The Court adjourned from 4.10 p.m. to 4.30 p.m.

Le PRESIDENT : Veuillez vous asseoir. Je donne maintenant la parole au professeur Hamamoto. Vous avez la parole, Monsieur.

M. HAMAMOTO : Merci, Monsieur le président.

JARPA II EST UN PROGRAMME DE RECHERCHE SCIENTIFIQUE (DEUXIÈME PARTIE)

Introduction

1. Monsieur le président, Mesdames et Messieurs les juges, ma plaidoirie d'aujourd'hui se compose de deux parties. Dans un premier temps, je soumettrai à la Cour les réponses du Japon aux questions posées par les juges Greenwood, Cançado Trindade et Donoghue. Dans un deuxième temps, je répondrai à deux problèmes soulevés par le conseil de l'Australie, s'agissant des trajectoires prédéterminées que suivent les navires de recherche et des captures commerciales japonaises avant le début de JARPA en 1987.

I. Réponses du Japon aux questions relatives aux activités de recherche

A. Transition de JARPA à JARPA II : question posée par le juge Greenwood

2. Le juge Greenwood a posé deux questions au Japon le jeudi 4 juillet. Le professeur Boyle vient de soumettre notre réponse à la question relative à la taille des échantillons. Je vais, pour ma part, répondre à la question suivante : «Why did Japan proceed with the higher JARPA II sample size for Antarctic minke whales before the Scientific Committee had had the opportunity to study the final results from JARPA?»[98]

3. Pour répondre à cette question du juge Greenwood, je tiens d'abord à donner une précision. Le texte de la question parle du «higher JARPA II sample size». Grande ou petite, la

[98] CR 2013/16, p. 62 (juge Greenwood).

taille des échantillons est déterminée par les objectifs de recherche. Or, les objectifs de recherche de JARPA II sont différents et plus sophistiqués par rapport à ceux de JARPA. Il est inutile que je m'attarde sur la question de savoir comment la taille des échantillons est fixée dans JARPA II, puisque le professeur Boyle a fourni des explications détaillées à cet effet.

4. La question du juge Greenwood nous amène à appréhender les questions relatives à JARPA II dans son contexte historique. [Projection n° 1: onglet n° 15-9 du dossier des juges.] Voici la chronologie des événements importants avant et après le début du JARPA II en 2005.

5. L'ère d'avant-JARPA II. En 2004, le comité scientifique a convenu que l'évaluation finale de JARPA aurait lieu lorsque les résultats complets seraient rendus disponibles, c'est-à-dire après la réunion annuelle du comité de 2005[99]. Cela signifiait que, si l'on souhaitait qu'un nouveau programme de recherche suive immédiatement JARPA, qui se terminerait dans la saison de 2004/2005, il faudrait élaborer le nouveau programme, qui devrait commencer donc dans la saison de 2005/2006, avant l'évaluation finale de JARPA par le comité scientifique. Le Japon a donc annoncé qu'il organiserait au début de 2005 une réunion pour examiner les résultats de JARPA, dont les recommandations seraient prises en compte pour préparer le nouveau programme, qui deviendrait JARPA II[100]. Il a été également annoncé que cette réunion serait ouverte aux chercheurs de tous les pays[101].

6. La réunion d'examen s'est tenue en janvier 2005. Y ont participé 40 chercheurs qui venaient de huit pays, y compris le vice-président du comité scientifique[102]. A la suite de cette réunion, le projet du programme de recherche JARPA II a été rédigé sur la base des résultats de la réunion d'examen[103] et présenté au comité scientifique en mars 2005[104]. Il est à noter que le projet de JARPA II précisait que les deux premières saisons, c'est-à-dire celles de 2005/2006 et 2006/2007, seraient consacrées à des études de faisabilité[105]. Je reviendrai sur ce point.

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[99] «Report of the Scientific Committee» (2004), *J. Cetacean Res. Manag.*, vol. 7, 2005, p. 45.

[100] «Report of the Scientific Committee» (2004), *J. Cetacean Res. Manag.*, vol. 7, 2005, p. 45-46.

[101] «Chair's Report of the 56th Annual Meeting», *Rep. Int. Whaling Comm.* 2004, p. 39.

[102] CMJ, par. 4.99-4.101.

[103] The 2005 JARPA II Plan, p. 7-8.

[104] The 2005 JARPA II Plan (CMJ, annexe 150).

[105] The 2005 JARPA II Plan, p. 13.

7. A la réunion annuelle qui s'est tenue aux mois de mai et de juin 2005, le comité scientifique a examiné le projet de JARPA II conformément aux lignes directrices applicables[106]. C'est à cette réunion que 63 membres du comité scientifique ont refusé de participer à l'examen du projet de JARPA II en disant qu'ils ne pouvaient pas examiner le projet de JARPA II avant d'obtenir les résultats de l'évaluation de JARPA par le comité scientifique[107]. Si l'on met de côté la question de savoir si cette désertion était opportune[108], on constate que les autres 122 membres qui n'ont pas abandonné leur poste ont calmement procédé à l'examen du projet. Durant le premier tour de plaidoiries, et encore ce matin, Mme Takashiba a fait remarquer que le projet de JARPA II avait dûment fait l'objet d'examen et de commentaires par le comité scientifique.

8. Plusieurs semaines après, en juin 2005, s'est tenue la réunion annuelle de la commission baleinière internationale. A la réunion, le Japon a souligné la nécessité d'un suivi continu des changements dans l'écosystème de l'Antarctique[109]. La CBI a ensuite adopté le rapport du comité scientifique, qui comprenait l'examen du projet de JARPA II[110].

9. En novembre 2005, la première saison des études de faisabilité de JARPA II a été lancée[111]. A la suite de son achèvement et donc en 2006, le Japon a présenté au comité scientifique le rapport de mission de la première saison de recherche[112]. Le rapport du comité scientifique de cette année fait remarquer que les débats ont surtout porté sur la représentativité des échantillons[113], mais on n'y trouve aucune référence critique au fait que JARPA II a été lancé avant que les résultats de JARPA ne fussent examinés par le comité scientifique. En outre, le comité a examiné

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[106] «Report of the Scientific Committee» (2005), *J. Cetacean Res. Manage.*, vol. 8 (Suppl.), 2006, p. 48-52 ; CR 2013/15, p. 32-34, par. 16-19 (Takashiba).

[107] «Comments on the Government of Japan's proposal for a second phase of special permit whaling in Antarctica (JARPA II)», Appendix 2, «Report of the Standing Working Group on Scientific Permits», Annex O1, «Report of the Scientific Committee» (2005), *J. Cetacean Res. Manage.*, vol. 8 (Suppl.), 2006, p. 260-261.

[108] CR 2013/15, p. 33, par. 18 (Takashiba) ; CR 2013/16, p. 49, par. 30 (Pellet).

[109] «Opening Statement of Japan 57th Annual Meeting, International Whaling Commission», IWC/57/OS Japan.

[110] «Chair's Report of the 57th Annual Meeting», p. 61. <http://iwc.int/cache/downloads/8xit4w2bpascwowwwokc0kgw8/CHAIRS%20REPORT%202005.pdf>.

[111] The 2005 Plan, p. 13.

[112] Nishiwaki, S. *et al.* «Cruise Report of the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) in 2005/2006 – Feasibility Study», SC/58/O7, p. 1-21, presented to the Scientific Committee (mai-juin 2006).

[113] «Report of the Scientific Committee» (2006), *J. Cetacean Res. Manage.*, vol. 9 (Suppl.), 2007, p. 59.

le rapport de croisière de JARPA II sous le point de l'ordre du jour «Permis scientifiques»[114]. Il s'ensuit que le comité considérait que JARPA II était un programme de recherche scientifique conduit sur la base de l'article VIII de la convention baleinière.

10. En décembre 2006 s'est tenu le groupe de travail chargé de l'évaluation finale de JARPA[115]. Le rapport du groupe de travail a été adopté par le comité scientifique, lors de sa réunion annuelle de 2007[116]. A cette réunion, le comité a examiné deux rapports présentés par le Japon, c'est-à-dire l'évaluation des deux saisons d'études de faisabilité de JARPA II (2005/2006 et 2006/2007)[117] ainsi que le rapport de mission de la saison 2006/2007[118]. Le groupe de travail sur les permis scientifiques a discuté les résultats des études de faisabilité de JARPA II à la lumière de l'évaluation finale de JARPA[119]. Certains membres du groupe de travail ont critiqué les études de faisabilité de JARPA II et suggéré que le programme de recherche JARPA II devrait être modifié en tenant compte de l'évaluation finale de JARPA[120]. Pourtant, aucune revision ou modification n'a été recommandée par le comité lui-même[121].

11. En décembre 2007, la recherche «à pleine échelle» de JARPA II a été lancée[122]. Le rapport de mission de cette saison a été discuté à la réunion annuelle du comité scientifique de 2008, toujours sous le point de l'ordre du jour «Permis scientifiques». Sans surprise, certains commentaires critiques ont été adressés à certaines méthodes de recherche ou analyses de

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[114] «Report of the Scientific Committee» (2006), *J. Cetacean Res. Manage.*, vol. 9 (Suppl.), 2007, p. 57-59.

[115] «Report of the Intersessional Workshop to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic, Tokyo, 4-8 December 2006», *J. Cetacean Res. Manage.*, vol. 10 (Suppl.), 2008, p. 411.

[116] «Report of the Scientific Committee» (2007), *J. Cetacean Res. Manage.*, vol. 10 (Suppl.), 2008, p. 57.

[117] Government of Japan. «Evaluation of 2005/06 and 2006/07 Feasibility Study of the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II)», SC/59/O3, mai 2007 (CMJ, annexe 153).

[118] Shigetoshi Nishiwaki *et al.*, «Cruise report of the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) in 2006/2007 - Feasibility Study», SC/59/O4, mai 2007, <http://www.icrwhale.org/pdf/SC-59-O3.pdf>.

[119] «Report of the Standing Working Group on Scientific Permits», «Report of the Scientific Committee» (2007), Annex O, *J. Cetacean Res. Manage.*, vol. 10 (Suppl.), 2008, p. 343-345.

[120] «Report of the Standing Working Group on Scientific Permits», «Report of the Scientific Committee» (2007), Annex O, *J. Cetacean Res. Manage.*, vol. 10 (Suppl.), 2008, p. 344-345.

[121] «Report of the Scientific Committee» (2007), *J. Cetacean Res. Manage.*, vol. 10 (Suppl.), 2008, p. 59-60; «Report of the Standing Working Group on Scientific Permits», «Report of the Scientific Committee» (2007), Annex O, *J. Cetacean Res. Manage.*, vol. 10 (Suppl.), 2008, p. 343-345.

[122] Ishikawa, H. *et al.* «Cruise Report of the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) in 2007/2008», SC/60/O4 presented to the Scientific Committee (juin 2008).

données[123]. Depuis lors, JARPA II est toujours placé sous le point de l'ordre du jour «Permis scientifiques» à chaque réunion annuelle du comité scientifique[124].

12. Monsieur le président, au terme de cette brève analyse de la chronologie, certains constats émergent au sujet du timing du lancement de JARPA II. Ils sont au nombre de cinq.

1) En 2005, le projet de JARPA II a dûment fait l'objet d'examen et de commentaires par le comité scientifique. Si 63 membres se sont retirés, les autres 122 y sont restés et ont examiné le projet de JARPA II.
2) Depuis 2006, le comité scientifique n'a jamais critiqué le fait que JARPA II a été lancé avant l'évaluation finale de JARPA par le comité.
3) A la suite de l'adoption par le comité scientifique du rapport du groupe de travail chargé de l'évaluation finale de JARPA, le comité a discuté la question de savoir si et comment JARPA II prenait en considération les résultats de l'évaluation finale de JARPA.
4) Certains membres du comité considéraient que les résultats de l'évaluation finale de JARPA n'avaient pas été suffisamment pris en considération, tandis que d'autres ne partageaient pas cette manière de voir. Aucune recommandation de reviser ou modifier le projet de JARPA II n'a été adoptée par le comité.
5) Le comité place toujours JARPA II sous le point de l'ordre du jour «Permis scientifiques».

13. Sur la base de cette analyse de la chronologie, on peut entrer dans le vif de la question posée par le juge Greenwood. Si un nouveau programme de recherche, JARPA II, a dû être lancé en 2005, c'était pour assurer la cohérence et la continuité des données obtenues dans la zone de recherche, comme l'a fait remarquer le Japon lors de la réunion annuelle de la CBI de 2005. Le contre-mémoire du Japon souligne également que si l'on avait attendu l'évaluation finale de JARPA, aucune recherche n'aurait été conduite pendant un ou deux ans[125]. JARPA avait déjà fait l'objet d'un examen à mi-parcours en 1997 par le comité scientifique, qui avait constaté des

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[123] «Report of the Scientific Committee» (2008), *J. Cetacean Res. Manage.*, vol. 11 (Suppl.), 2009, p. 62-63.

[124] «Report of the Scientific Committee» (2009), *J. Cetacean Res. Manage.*, vol. 11 (Suppl. 2), 2010, p. 78 ; «Report of the Scientific Committee» (2010), *J. Cetacean Res. Manage.*, vol. 12 (Suppl.), 2011, p. 57 ; «"Report of the Scientific Committee» (2011). *J. Cetacean Res. Manage.*, vol. 13 (Suppl.), 2012, p. 54-55 ; «Report of the Scientific Committee» (2012), *J. Cetacean Res. Manage.*, vol. 14 (Suppl. 2), 2013, p. 67 ; «Report of the Scientific Committee» (2013), p. 79 <http://iwc.int/scientifc-committee-reports>.

[125] CMJ, p. 230, note 623.

contributions considérables de JARPA à la gestion des ressources baleinières[126]. Les contributions de JARPA ont été confirmées par la réunion d'évaluation de 2005. Il s'est ainsi avéré nécessaire d'assurer la cohérence et la continuité des données, en lançant un nouveau programme de recherche qui suivrait JARPA sans interruption.

14. Le Japon était certes conscient que le nouveau programme de recherche JARPA II débuterait avant que le comité scientifique ne conduise l'évaluation finale de JARPA. Le Japon a donc organisé en 2005 ladite réunion d'évaluation de JARPA, à laquelle tout scientifique intéressé pouvait participer, pour que les résultats de JARPA puissent être pris en compte dans le processus de l'élaboration du nouveau programme JARPA II. Le projet de JARPA II indique explicitement que les résultats de la réunion d'évaluation de 2005 ont été dûment pris en considération. De plus, le projet de JARPA II prévoyait deux années d'études de faisabilité. Cela signifiait que les résultats de l'évaluation finale de JARPA par le comité scientifique seraient pris en considération avant la fin des études de faisabilité. Le terme même de «faisabilité» montre que la possibilité d'une modification éventuelle du projet de JARPA II était envisagée par les auteurs du projet. Le Japon a présenté en 2007 les résultats des études de faisabilité au comité scientifique, qui n'a recommandé aucune modification du projet de JARPA II. Et pourtant, comme nous l'avons fait remarquer à plusieurs reprises, le Japon est prêt à modifier JARPA II si les considérations scientifiques l'y amènent, et on sait très bien que le comité scientifique va organiser la première réunion d'évaluation périodique de JARPA II l'année prochaine[127]. Comme le montre ma brève analyse de la chronologie, le Japon collabore toujours et pleinement avec le comité scientifique, qui examine d'ailleurs le rapport de mission de JARPA II chaque année sous le point de l'ordre du jour «Permis scientifiques».

15. Monsieur le président, ceci termine la réponse du Japon à la question posée par le juge Greenwood.

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[126] CMJ, par. 4.158-4.159 ; CR 2013/13, p. 31-34, par. 56-59 (Hamamoto).

[127] CMJ, par. 5.44 ; CR 2013/13, p. 17, par. 16 (Hamamoto).

B. Et si les méthodes létales sont remplacées par celles non létales ? — Question posée par le juge Cançado Trindade

16. Ensuite, je voudrais soumettre à la Cour la réponse du Japon à deux des questions posées par le juge Cançado Trindade. La première est celle que le juge a posée le lundi 8 juillet : «To what extent would the use of alternative non-lethal methods affect the objectives of the JARPA-II programme?»[128]

17. Comme le contre-mémoire l'explique, ce sont les objectifs de recherche qui dictent les méthodes, et non pas l'inverse[129]. En outre, il n'existe pas de méthode non létale «alternative» puisque certaines données indispensables ne peuvent être obtenues que par des méthodes létales. C'est ce qu'a fait remarquer le professeur Boyle[130].

18. L'objectif n° 1 de JARPA II est le suivi de l'écosystème de l'Antarctique. Pour atteindre cet objectif, on observe et examine un éventail d'éléments comme le taux de conception, l'âge de la maturité sexuelle, les changements annuels de la quantité des proies consommées, l'épaisseur de graisse ou l'accumulation des polluants. Les données relatives à ces éléments ne peuvent pas être obtenues au moyen des méthodes non létales, comme le professeur Boyle vient de le faire remarquer. L'observation visuelle ne donne que les informations relatives à l'abondance. La biopsie ne donne que des informations extrêmement limitées et biaisées pour des raisons déjà indiquées par le professeur Boyle et par moi-même au premier tour de plaidoiries[131]. Il en résulte que, si les méthodes létales sont remplacées par des méthodes non létales, cet objectif — l'objectif n° 1 de JARPA II — sera affecté dans une telle mesure que la recherche serait alors de peu de valeur.

19. L'objectif n° 2 de JARPA II est la modélisation de la compétition entre les espèces baleinières et l'élaboration de nouveaux objectifs de gestion. Le contre-mémoire montre que les données relatives aux tendances des contenus stomacaux, en particulier de leurs quantités, sont indispensables pour atteindre cet objectif et ne peuvent être obtenues qu'au moyen de méthodes

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[128] CR 2013/17, p. 49 (juge Cançado Trindade).

[129] CMJ, par. 4.56.

[130] CR 2013/15, p. 61, par. 65 (Boyle) ; CMJ, par. 4.61-4.65.

[131] CR 2013/15, p. 61, par. 65 (Boyle) ; CR 2013/13, p. 18-20, par. 24-27 (Hamamoto).

létales[132]. Il s'ensuit que si les méthodes létales sont remplacées par des méthodes non létales, le deuxième objectif sera affecté dans une telle mesure que la recherche serait alors de peu de valeur.

20. L'objectif n° 3 de JARPA II est de permettre une meilleure compréhension de l'évolution spatio-temporelle de la structure des stocks. Les données génétiques et morphométriques sont indispensables pour atteindre ce troisième objectif, comme le montre le contre-mémoire du Japon[133]. Certes, la biopsie pourrait donner des données génétiques et on pourrait obtenir, par marquage ~~et~~ balise pour le suivi satellite, des informations utiles pour interpréter la structure des stocks. Cependant, pour répéter ce qui a été dit dans le contre-mémoire par le professeur Boyle et par moi-même[134], ces méthodes non létales ne sont pas applicables dans des zones offshore, ne donnent pas toutes les données nécessaires, ne fournissent pas la quantité de données requise pour des analyses statistiques utiles et ne reposent pas sur des échantillons prélevés de manière suffisamment aléatoire pour effectuer des analyses statistiques fiables. L'objectif n° 3 de JARPA II sera donc affecté dans une telle mesure que les analyses effectuées ne seraient ni utiles, ni fiables pour la mise en œuvre de la RMP.

21. L'objectif n° 4 de JARPA II est l'amélioration de la procédure de gestion des populations de petits rorquals de l'Antarctique. Si l'on n'accomplit pas les objectifs n^{os} 1, 2 et 3, on ne peut pas atteindre l'objectif n° 4. Par exemple, le projet de JARPA II de 2005 indique que des données biologiques, y compris celles relatives à l'âge, sont nécessaires pour améliorer les estimations du taux de rendement maximum de renouvellement, qui est essentiel à la *mise en œuvre* de la RMP[135]. Il s'ensuit que l'objectif n° 4 de JARPA II sera affecté dans une telle mesure que toute analyse effectuée serait de peu de valeur, si les méthodes létales sont remplacées par celles non létales.

22. Monsieur président, ceci termine la réponse du Japon à la question posé par le juge Cançado Trindade sur la remplaçabilité des méthodes létales.

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[132] CMJ, par. 4.71-4.76, 5.48.

[133] CMJ, par. 4.82.

[134] CMJ, par. 4.55-4.81, 5.45-5.52 ; CR 2013/15, p. 61, par. 65 (Boyle) ; CR 2013/13, p. 18-20, par. 24-27 (Hamamoto).

[135] The 2005 JARPA II Plan, p. 8-9, 12.

C. Et si de nombreux Etats parties procèdent à la chasse à la baleine au titre de permis spéciaux ? — Question posée par le juge Cançado Trindade

23. Ensuite, je voudrais donner la réponse du Japon à une autre question posée par le juge Cançado Trindade : «What would happen to whale stocks if many, or even all States Parties to the International Convention for the Regulation of Whaling, decide to undertake «scientific research» using lethal methods, upon their own initiative, similarly to the modus operandi of JARPA-II?»[136]

24. Si de nombreux ou tous les Etats parties à la convention procèdent à la chasse à la baleine au titre de permis spéciaux, tous les programmes de recherche devraient se soumettre aux conditions que le Japon a explicitées dans son contre-mémoire et au cours des audiences. La plus significative de ces conditions dans ce contexte est celle selon laquelle chaque Etat doit déterminer la taille des échantillons pour que le total n'en produise pas d'effets préjudiciables sur les populations de baleines.

25. Dans une situation où sont conduits plusieurs programmes de recherche au titre de permis spéciaux, la coopération entre les programmes devra être envisagée. Selon l'annexe P, chaque Etat qui soumet un projet de recherche au titre de permis spécial est invité à rendre publique une évaluation de la question de savoir pourquoi les analyses existantes des données, y compris celles obtenues dans la chasse commerciale ou dans d'autres programmes de recherche au titre de permis spéciaux, ne sont pas suffisantes[137]. Il s'ensuit que chaque Etat, en procédant à un programme de recherche en vertu d'un permis spécial, est censé prendre en considération des données qui sont obtenues et qui seront obtenues dans d'autres programmes de recherche conduits de manière parallèle.

26. Monsieur président, ceci termine la réponse du Japon à la question posée par le juge Cançado Trindade.

D. Les captures commerciales japonaises avant JARPA — Question posée par la juge Donoghue

27. Maintenant, je voudrais donner la réponse du Japon à la question posée par la juge Donoghue le mardi 4 juillet : «For the ten years before the commercial moratorium took effect for

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[136] CR 2013/17, p. 49 (juge Cançado Trindade).

[137] «Revised Annex P, Process for the Review of Special Permit Proposals and Research Results from Existing and Completed Permits», 2012, (2)(a)(iii), <http://iwc.int/cache/downloads/u25vr6ymdaso0o8w404oc4go/annex%20P%20updated.pdf>.

Japan, what was the annual commercial catch of each of the three JARPA II target species (minke whales, fin whales and humpback whales) by Japanese vessels in the JARPA and JARPA II research areas ?»[138]

28. La question se réfère au graphique que le Japon a présenté lors du premier tour[139] [projection n° 2 : onglet n° 15-10 du dossier des juges.] Ce graphique montre les captures japonaises dans l'hémisphère Sud depuis 1945.

29. [Projection n° 3 : onglet n° 15-11 du dossier des juges.] Le graphique qui est projeté à l'écran maintenant montre le nombre des petits rorquals de l'Antarctique capturés après 1977, c'est-à-dire dix ans avant l'entrée en vigueur pour le Japon du moratoire sur la chasse commerciale. Pendant la période en question, entre 1977/1978 et 1986/1987, aucun rorqual commun ni baleine à bosse n'a été capturé.

30. La question est donc combien de ces petits rorquals de l'Antarctique ont été capturés dans les zones de recherche JARPA et JARPA II. Le secrétariat de la CBI nous a fourni les informations relatives aux positions de capture. Si l'on dresse un tableau à partir de ces informations, cela donne ce que vous avez à l'onglet n° 22 du dossier des juges. Pour faciliter la comparaison, je me permets de tracer trois lignes sur le graphique projeté à l'écran. [Projection n° 4 : onglet n° 15-12 du dossier des juges.] Pour répondre à la question de la juge Donoghue, il faut se concentrer sur les captures effectuées pendant les dix ans qui précèdent JARPA.

31. Comme le fait remarquer le contre-mémoire, la zone de recherche de JARPA s'est élargie à partir de la saison 1995/1996. En d'autres termes, JARPA avait deux zones de recherche, une plus petite jusqu'à la saison 1994/1995 et une plus grande à partir de la saison 1995/1996. Les captures annuelles des petits rorquals de l'Antarctique par les navires japonais dans la zone de JARPA, la petite, sont indiquées en rose, celles dans la zone élargie en bleu clair et celles dans la zone de recherche de JARPA II en vert.

32. Monsieur le président, ceci termine la réponse du Japon à la question posée par la juge Donoghue.

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[138] CR 2013/16, p. 62 (juge Donoghue).

[139] CR 2013/16, p. 28, par. 40 (Iwasawa).

II. Problèmes soulevés par l'Australie au cours de la plaidoirie orale

33. Maintenant, il me faut encore répondre à deux questions, ou plutôt il faut dissiper deux malentendus. Ces malentendus ont été manifestés par l'autre côté de la barre au deuxième tour des plaidoiries. Le premier concerne les trajectoires prédéterminées que suivent les navires de recherche, et le second porte sur le niveau des captures commerciales japonaises avant le début de JARPA en 1987.

A. Trajectoires prédéterminées

34. Je commence avec le malentendu manifesté par le conseil de l'Australie à l'égard des trajectoires prédéterminées. JARPA II est conçu et conduit pour obtenir des données et des informations utiles au point de vue scientifique. Les activités de recherche sont donc conduites conformément aux règles strictes et précises établies sur la base des considérations scientifiques. J'ai expliqué, lors du premier tour, comment les activités de recherche sont conduites dans le cadre de JARPA II[140]. Un des éléments importants est la trajectoire prédéterminée pour les navires de recherche[141]. Cette image projetée à l'écran, montrée par le professeur Iwasawa au premier tour des plaidoiries, offre une illustration schématique. [Projection n° 5 : onglet n° 15-13 du dossier des juges.] Comme l'a fait remarquer le professeur Iwasawa, les navires de recherche ne se dirigent pas directement vers les zones de haute densité, où on trouve beaucoup de baleines, mais suivent fidèlement la trajectoire prédéterminée, que l'on trouve des baleines ou non autour de la trajectoire. Mon collègue a indiqué également que les navires de recherche passent approximativement 20 % du temps dans les zones de haute densité qui seraient convenables pour la chasse commerciale[142].

35. Le professeur Crawford s'est plaint du fait que le professeur Iwasawa n'avait pas indiqué la source d'informations ou le document sur la base duquel mon collègue avait établi le chiffre de 20 %[143]. Je suis très reconnaissant au professeur Crawford de m'avoir ainsi donné l'occasion d'expliquer en détail comment le Japon a établi ce chiffre de 20 %. En fait, le Japon a bien indiqué la source d'informations à l'index du dossier du juge [projection n° 6 : onglet n° 15-14 du dossier

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[140] CR 2013/13, p. 15-23, par. 9-40 (Hamamoto).

[141] CR 2013/13, p. 17-18, par. 18-20 (Hamamoto).

[142] CR 2013/16, p. 26, par. 34 (Iwasawa).

[143] CR 2013/20, p. 25, par. 62 (Crawford).

des juges.] A la page 2 de l'index [projection n° 7 : onglet n° 15-15 du dossier des juges] sous «58-7. Trackline», on trouve l'URL ou plus banalement, l'adresse du site Internet de l'Institut de recherche des cétacés[144].

36. Que peut-on trouver à cette adresse Internet ? [Projection n° 8 : onglet n^{os} 15-16 du dossier des juges.] Ce que vous voyez à l'écran est le tableau du taux de l'observation visuelle de petits rorquals de l'Antarctique. Il montre le nombre des petits rorquals observés par chaque mille marin. Si l'on établit un graphique à partir de ces données, cela donne ce qui apparaît à l'écran. [Projection n° 9 : onglet n^{os} 15-17 du dossier des juges.]

37. Ce graphique montre le taux quotidien de l'observation et indique sur l'axe des abscisses le nombre des petits rorquals observés par 10 milles marins et la proportion des jours sur l'axe des ordonnées. Par exemple, pendant presque 50 % de la période de recherche, moins de 0,5 rorqual sont repérés à partir d'un navire d'observation et d'échantillonnage par 10 milles marins. Selon un document publié dans la revue de la CBI — et donc facilement accessible —, les données obtenues dans la chasse commerciale de l'avant-JARPA indiquent qu'un navire de capture avait besoin de capturer huit petits rorquals de l'Antarctique chaque jour, afin de mener des opérations rentables[145]. D'après le même document, le bateau de capture parcourait approximativement 30 milles marins chaque jour pour chercher des petits rorquals pendant la saison de la chasse baleinière[146]. Il en résulte que le navire de capture avait besoin de naviguer dans une zone où on pouvait trouver 2,5 petits rorquals ou encore plus par 10 milles marins. Si l'on applique ces informations à ce graphique projeté à l'écran, on peut tracer le seuil de rentabilité ici. [Projection n° 10 : onglet n^{os} 15-17 du dossier des juges.] En fait, c'est excessivement conservateur. Comme le professeur Iwasawa l'a fait remarquer, les navires de capture engagés dans les opérations de la chasse commerciale ne capturaient pas de petits rorquals de petite taille[147]. Il s'ensuit qu'ils avaient besoin de trouver encore plus de petits rorquals dans la mer. Mais, pour prendre le risque de pêcher par excès de prudence, je trace le seuil de rentabilité ici. Pour combien de jours les navires de

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[144] http://www.icrwhale.org/DataSet.html.

[145] Ohsumi, S., «Population assessment of the Antarctic minke whale», 29 *Rep. Int'l Whal. Comm'n* (1979), p. 407.

[146] Ohsumi, S., «Population assessment of the Antarctic minke whale», 29 *Rep. Int'l Whal. Comm'n* (1979), p. 407, voir tableau 3.

[147] CR 2013/16, p. 26, par. 36 (Iwasawa) ; CMJ, par. 5.134.

recherche restent-ils dans les zones dans lesquelles on trouve suffisamment de petits rorquals pour mener des opérations commerciales ? Il faut faire la somme des colonnes rouges et cela donne 23 %. Voici le fondement empirique sur lequel le professeur Iwasawa a affirmé que les navires de recherche de JARPA et de JARPA II passent à peu près 20 % du temps dans les zones de haute densité, dans lesquelles on pourrait mener des opérations commerciales de manière rentable.

B. Captures commerciales avant 1987

38. Monsieur le président, ma dernière tâche porte sur les commentaires délivrés par le professeur Crawford au sujet des captures commerciales japonaises à l'époque de l'avant-JARPA, donc avant 1987[148]. Ses commentaires ne sont pas corrects mais trompeurs. Deux choses à dire.

39. D'abord, je relève une erreur ou un malentendu de la part du professeur Crawford. [Projection n° 11 : onglet n^{os} 15-18 du dossier des juges.] En se référant à ce graphique qu'avait montré le professeur Iwasawa, le conseil de l'Australie a déclaré que «the graphic [Prof. Iwasawa] showed you all pre-moratorium commercial whaling for the whole world» et que «[t]he presentation of graphics which are as misleading as this one do not assist the Court in reaching the correct decision»[149]. Ce n'est pas exact. Je viens de dire que ce graphique représente le nombre des petits rorquals de l'Antarctique capturés dans l'hémisphère Sud et non pas sur la planète entière. Le professeur Iwasawa, lorsqu'il a montré ce graphique au premier tour, n'a pas oublié d'indiquer la source des informations. La déclaration du professeur Crawford donne à penser que l'équipe australienne n'avait pas vérifié ou examiné la source des informations, pourtant indiquée par le professeur Iwasawa et facilement accessible. Et c'est sur la base de ces informations erronées ou plutôt d'un manque d'informations que le professeur Crawford a critiqué le Japon pour avoir montré un graphique trompeur. C'est difficilement acceptable.

40. Le deuxième problème est encore plus grave et porte sur le graphique qu'a montré le professeur Crawford mercredi dernier. Immédiatement à la suite de l'accusation non fondée dont je viens de parler, il a dit que «[l]et me show you something more credible»[150] et ce graphique est alors apparu à l'écran. [Projection n° 12 : onglet n^{os} 15-19 du dossier des juges.]

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[148] CR 2013/20, p. 23-24, par. 59-61.

[149] CR 2013/20, p. 24, par. 60 (Crawford).

[150] CR 2013/20, p. 24, par. 61 (Crawford).

41. Ce graphique est purement et simplement erroné. Il est en plus trompeur. Ce graphique en colonnes représente les captures commerciales japonaises dans la zone de recherche de JARPA II d'aujourd'hui pendant les dix années qui précédaient JARPA. Très bien. Pas de problème. Mais je vois un problème grave à la ligne horizontale tracée au niveau de capture 935. On peut accepter le chiffre 935, c'est-à-dire 850, la taille des échantillons de JARPA II, plus 10 % de marge. Le problème est que dans JARPA II, des petits rorquals de l'Antarctique sont en fait capturés chaque année dans une de ces deux zones, définies par l'Australie comme «Area A and Area B» et «Area B and Area C». Donc, à la saison au cours de laquelle les activités de recherche sont menées dans la première zone, il n'y a aucun petit rorqual capturé dans la seconde. Il s'ensuit que, si l'on reprend le graphique du professeur Crawford, la ligne horizontale doit être tracée comme ceci. [Projection n° 13 : onglet n^{os} 15-20 du dossier des juges.]

42. Par exemple, si l'on applique le chiffre 935 à la zone désignée par l'Australie comme «Area A and Area B» pour la saison 1977/1978, c'est le chiffre 0, la taille des échantillons 0 qui doit être attribué aux «Area B and Area C» pour la même saison. Dans la saison suivante, c'est l'inverse. Pas de capture dans «Area A and Area B».

43. On voit facilement que ce n'est pas facile à comprendre. Il y a deux moyens pour montrer ces informations de manière à la fois correcte et compréhensible. Le premier consiste à faire la somme des captures commerciales réalisées dans la zone entière dans laquelle les activités de recherche de JARPA II sont conduites aujourd'hui. Pour prendre la terminologie australienne, il faut combiner les «Areas» A, B, et C. Voici le résultat. [Projection n° 14 : onglet n^{os} 15-21 du dossier des juges.] Ce graphique représente le nombre des captures commerciales réalisées par les navires japonais dans l'ère d'avant-JARPA dans la zone dans laquelle les activités de recherche sont conduites aujourd'hui dans le cadre de JARPA II. On peut tracer la ligne horizontale au niveau de 850, la taille des échantillons adoptée par JARPA II, ou, si vous voulez, au niveau de 935. [Projection n° 15 : onglet n^{os} 15-21 du dossier des juges.] Ceci représente la réalité de manière fidèle. Vous voyez que le niveau des échantillons de JARPA II est bien au-dessous de celui des captures commerciales de l'époque de l'avant-JARPA.

44. Il y a une autre méthode pour représenter les données de manière correcte et compréhensible. Voici, encore une fois, le graphique du professeur Crawford. [Projection n° 16 :

onglet n[os] 15-22 du dossier des juges.] J'ai dit que les captures sont réalisées dans une des deux zones chaque année. Dans «Area A and Area B» pour une année, dans «Area B and Area C» pour l'année suivante. Donc, le chiffre 935 n'a pas de sens dans ce graphique, et il faut prendre la moyenne annuelle pour chaque zone. [Projection n° 17 : onglet n[os] 15-23 du dossier des juges.] La ligne horizontale doit donc être placée ici.

45. Le professeur Crawford a soutenu, sur la base d'un graphique erroné et trompeur, que le niveau de captures dans la chasse scientifique n'était pas très différent de celui dans la chasse commerciale[151]. Ce n'est pas correct. L'écart entre le niveau des captures commerciales et celui des captures scientifiques est considérable, comme le montre ce graphique rectifié.

46. Monsieur le président, Mesdames et Messieurs les juges, ceci termine ma plaidoirie et je vous remercie pour votre écoute attentive. Monsieur le président, je vous prie de bien vouloir donner la parole au professeur Vaughan Lowe.

The PRESIDENT: Merci, Monsieur le professeur. I now call on Professor Vaughan Lowe. You have the floor, Sir.

Mr. LOWE:

STANDARD OF REVIEW

1. Mr. President, Members of the Court, my task this afternoon is to make Japan's submissions on the question of the standard of review and the allegations of bad faith. And after some preliminary remarks on the role of expert evidence and on the standard of review in this case, I shall address Australia's central arguments. Australia asserts that Japan violated its duties under international law by issuing special permits for JARPA II and — first — that Japan cannot justify its conduct under Article VIII of the Whaling Convention as properly interpreted, and — second — that even if the issue of the special permits is superficially consistent with Article VIII, Japan acted in bad faith or in abuse of right and so cannot benefit from the right that it has under Article VIII. And I shall deal with each in turn.

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[151] CR 2013/20, p. 24, para. 61 (Crawford).

The role of the standard of review

2. First, my preliminary remarks on expert evidence. You have heard a great deal, Sir, on the facts from Australia and from Japan; and Australia made considerable play of the fact that Japan put up a solitary expert witness, whose report contained no footnotes[152].

3. Well, you will recall that Australia used a "solitary" expert in the written phase of this case, only doubling the number after it had seen that Japan was calling Professor Walløe; and that Japan made clear, in its letter to the Court dated 26 December 2012, that in its view scientific evidence was not of primary importance in this case.

4. Professor Walløe was asked to draft a report addressed to non-scientists. It may be that Members of the Court looked up the footnote references in the reports of Professor Mangel and Dr. Gales to see if they supported what was said in the text; it may be that they did not. But in any event Japan has consistently taken the position that their reports, along with that of Professor Walløe, are of interest as the considered views of distinguished scientists with expert knowledge of various aspects of the factual and scientific background to this case. And we would have thought no less of Professor Mangel or Dr. Gales if they had used fewer footnotes.

5. The expert witnesses were presented so that you could judge if they held their views honestly and that their views were considered. And we think that it is evident that they did give honest statements of their considered views. What comes across clearly from their reports is that they have different views on some of the scientific questions. But that is hardly a startling revelation in this case. Japan's basic point is that the central question in this case is not, which scientist is correct, but rather, what does one do when scientists disagree?

6. Well, Australia said that we did not ask as many questions as we could have done in cross-examination[153]. That is because we had the answers that we thought necessary. Professor Mangel confirmed that his reports were providing "a general assessment of what it means to do a program for purposes of scientific research and then by reference to the IWC's writings, the activity of the Commission and the Scientific Committee, to try to make it in some sense more operational for the context of conservation and management of whales"[154]. He had not focused on

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[152]For example, CR 2013/9, p. 19, para. 23 (Sands).

[153]CR 2013/19, p. 14, para. 2 (Gleeson) and p. 39, para. 39 (Sands).

[154]CR 2013/9, p. 53 (Mangel).

the question of the meaning of the words "for purposes of scientific research" in Article VIII of the Whaling Convention[155]. He also confirmed that his view on the need for a hypothesis was less fetishistic than might have been thought: it is enough that research addresses an identified set of questions developed within a conceptual framework[156].

7. We could have asked them to confirm other facts; but Japan thinks that the key facts in this case are already evident from the documents.

8. The question before you is, did Japan violate its duties under international law by issuing special permits for JARPA II? Is that a question for expert evidence, as for example the meaning of a term such as "best available technology" in a specific context, or the determination of the actual "optimum sustainable yield" of a fish stock at a particular time might be? If so, is the Court simply to choose which expert evidence it prefers, or should it try to identify which (if either) represents the scientific mainstream, or whether each of them enjoys a measure of support in the scientific community? Or is it for the Court to decide itself what is the correct meaning of the term? Or should the Court ask whether or not Japan's view is reasonable, or whether it is a view that no reasonable State could hold — and then hope that no one on the bench dissents and qualifies for the label of irrationality?

9. We pointed out, in paragraphs 9.6 and 9.7 of our Counter-Memorial, the importance of this issue and the fact that Australia's written pleadings had not addressed it. We made the same point again in our first round pleadings[157]. We had expected some legal argument on the point from Australia or New Zealand. But Australia and New Zealand seem not to regard this as a problem on which they needed to address the Court. They say that the Court can approach it as a straightforward question of treaty interpretation[158]. Well that sits rather awkwardly with the time that we spent on the discussion of the expert evidence in this case; but so be it.

10. Australia and New Zealand seem to think that it is Japan's responsibility to set out the law on this aspect of their case. With respect, it is not. Japan did not seek this case. Australia,

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[155]CR 2013/9, pp. 53-54 (Mangel).

[156]CR 2013/9, pp. 58-59 (Mangel) and CR 2013/9, p. 70, responding to the question from Judge Keith.

[157]CR 2013/15, p. 17, paras. 16-17 (Lowe).

[158]CR 2013/19 p. 66, para. 25 (Crawford); p. 67, para. 27 (Crawford). CR 2013/17, p. 24, para. 31 (Finlayson); p. 25, para. 34 (Finlayson); p. 26, para. 26 (Finlayson).

and, it seemed last week, also New Zealand, allege that JARPA II is not a scientific research program under Article VIII. Japan put in 1,600 pages of written pleadings explaining why it *is* scientific research. Australia and New Zealand disagree. But if they think that Japan's evidence is insufficient to meet the requirements which international law imposes when the Court is asked to review Japan's exercise of its rights under the Whaling Convention, it is surely for *them* to explain what they consider those requirements to be.

The standard of review in this case

11. Please let me next make some remarks on the standard of review.

12. In fact, the positions of the Parties seem not to be very far apart on this question. In its heavily-footnoted Counter-Memorial, in footnote 1099 on page 412, Japan quoted a WTO decision in which the key question was formulated as being not whether a State's decision was "correct", but whether it was "supported by coherent reasoning and respectable scientific evidence and is, in this sense, objectively justifiable"[159].

13. Similarly, Australia framed the key question as whether JARPA II is "demonstrably undertaken on an objectively determined scientific basis"[160], saying that the Court's task is to "determine objectively whether JARPA II is a program for the purpose of scientific research pursuant to Article VIII"[161], and referring frequently to the standard of reasonableness[162]. New Zealand stated that "whether a programme of whaling is 'for purposes of scientific research' is a factual question to be objectively determined by the Court"[163], noting that Japan's "discretion must be exercised reasonably"[164].

14. Judge Charlesworth asked if it is Japan's view that there are any objective elements in the phrase "for purposes of scientific research" or whether the definition of scientific research is

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[159] *Hormones Case*, WTO Doc. WT/DS320/AB/R (16 Oct. 2008), para. 590.

[160] CR 2013/20, p. 44, para. 5 (Dreyfus).

[161] CR 2013/18, p. 16, para. 9 (Dreyfus).

[162] CR 2013/8, p. 31, para. 19 (Crawford); CR 2013/11, p. 38, para. 43 (Gleeson); CR 2013/20, p. 34, para. 3 (Gleeson); CR 2013/20, p. 42, para. 33 (Gleeson).

[163] CR 2013/17, p. 27, para. 39 *(b)* (Finlayson); p. 28, paras. 44-45 (Finlayson).

[164] CR 2013/17, p. 41 (Ridings).

solely a matter for the determination of Contracting Governments[165]. Yes: Japan thinks that there are objective elements. They are the obvious ones: that the whaling needs to be designed to collect samples and data that are necessary to yield, after analysis in accordance with scientific techniques, knowledge and information about questions or areas of inquiry that are defined within a scientific conceptual framework.

15. There is no particular magic in that formulation. It does not seek to list the essential indicia, in the way that one might list the indicia of legal personality, or the essential characteristics that distinguish sheep from goats. Australia criticizes Japan for not offering its own formula to define scientific research[166]. But that misses the very point that we are making: there is no uniquely correct formula. As Professor Mangel said,

> "Physicists will look at all sorts of biology and ecology, and say that it is not science. Molecular biologists will look at biology often, and say that it is not science. Within ecology there will be individuals who will sometimes have disputes about whether something is properly formed or not . . ."[167]

16. We have in fact mentioned a number of different formulae, including a number that were considered for inclusion in the Law of the Sea Convention before the drafters of that treaty wisely decided that it was not necessary to define the term[168]. There are certainly other definitions abroad in the intellectual universe. But the one thing that is absent from that universe is a single agreed definition of what constitutes scientific research.

17. Japan's view is that while the definition of scientific research is *not* solely a matter for the determination of each Contracting Government or State, neither is there one uniquely correct definition, so that the slightest divergence from that definition means that the characterization of a program as "scientific" puts the State in violation of international law.

18. There comes a point where reasonableness must be given a role. Is a hypothesis essential? Well JARPA II clearly has hypotheses; but that is a matter of the drafting, the phraseology of the research plan. One could say that the objective is to test the hypothesis that

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[165]CR 2013/17, p. 50 (Charlesworth).

[166]For example, CR 2013/19, p. 39, para. 39 (Sands).

[167]CR 2013/9, p. 59 (Mangel).

[168]See George K. Walker (ed.), *Definitions for the Law of the Sea. Terms Not Defined by the 1982 Convention*, Nijhoff, 2012, pp. 241-244. Those definitions were referred to at CR 2013/9, pp. 56-57 (Lowe).

blubber thickness is declining for reasons related to changes in the abundance of krill. Or one could say that the objective is to look at what is happening to blubber thickness. But surely it cannot seriously be suggested that the first formulation is scientific research and lawful, and that the second is not scientific research and is not lawful.

19. Views may differ over the size of the sample that is needed, over whether priority should be given to the determination of simple abundance numbers or to the detailed understanding of changes in sexual maturity, pregnancy rates and stock structures. But these are not debates as to whether the questions are or are not scientific. These are debates about scientific questions. And Japan's view is that there is no uniquely correct answer to such questions. Uniquely correct answers to such questions do not exist, so there is no point in the Court looking for them.

20. Yes: the Court can ask, could a reasonable State regard this as a properly-framed scientific inquiry. But it can no more impose a line separating science from non-science than it could decide what is and what is not "Art". In Japan's view, the correct question is, could a State reasonably regard this as scientific research?

21. That is why Japan agrees with Australia and New Zealand in regarding the test as being whether a State's decision is objectively reasonable, or "supported by coherent reasoning and respectable scientific evidence and . . ., in this sense, objectively justifiable".

22. Australia put the question in very clear terms: is JARPA II a scientific program, or is it commercial whaling[169]? Japan is quite content to accept that approach for the purposes of this case, although it is of course a matter for the Court, and not for the Parties, to decide what the proper standard of review is.

Australia's first argument: Article VIII

23. So please let me turn now to the first of Australia's arguments in this case, addressing the question whether Japan can justify its conduct under Article VIII of the Whaling Convention as properly interpreted.

24. Is Japan's view that JARPA II is whaling "for purposes of scientific research" a view that is "supported by coherent reasoning and respectable scientific evidence", even if it is not in some

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[169]CR 2013/18, p. 21, para. 21 (Dreyfus).

metaphysical sense "correct"? Or is it inconsistent with Japan's obligations under international law?

The evidence

25. Well, consider the evidence. My colleagues have referred you to many aspects of the evidence already. And please let me refer to just three of the indications before you.

26. First, there are the 100 pages of the JARPA II research plan and its accompanying appendices, put to the IWC Scientific Committee. It is in tabs 4 to 13 of Japan's day bundle, given to the Court two weeks ago. And we would invite you not simply to look at the JARPA II plan, but to read it. In our submission, there are only two views that you could take. Either this is a plan for a scientific research program, or it is an elaborate hoax. The third possibility, that it is so hopeless, so misguided and deluded as not to count as science at all, would not merit a moment's consideration had it not been brought up in this case.

27. Second, the evidence of Professor Walløe. Yes, he is a solitary expert. Yes, he was speaking about research that he is himself involved in. But he is not a fantasist pottering away in his garden shed trying to build a perpetual motion machine. We invited him to act as our expert witness because he knew the scientific field, he knew the IWC, and as President of the Academia Europaea his standing in the international community of scientists is manifest. Of course we knew that he was critical of aspects of JARPA I, and even of some aspects of JARPA II. That is not the point. He was not put there to put forward Japan's case: that is the role of counsel. He was there to answer the question, whatever the disagreements within the scientific community, is it reasonable to regard JARPA II as a genuine scientific program. And his answer was, yes[170].

28. Third, despite all of the criticism of the lethal take, in all the years that the Scientific Committee has been considering JARPA II it has never — categorically, never — said that JARPA II is not "scientific research". Certain members have criticized its design, questioned the need for certain data, and in particular opposed the use of lethal rather than non-lethal methods to obtain the data that is sought. But they have not suggested that it does not even qualify as "scientific research". By contrast, the Scientific Committee has in the past found that a permit

[170] "JARPA II is definitely a scientific research program", CR 2013/14, p. 22 (Walløe).

proposal from another State did not satisfy its criteria, and has adopted a recommendation not to issue the proposed special permits[171].

29. What is the argument against this evidence? It seems to come down first to the imaginative use of the distinction between a hypothesis and a topic of scientific inquiry, wielded like a scalpel to cut JARPA II from the body of scientific research, despite the fact that Professor Mangel's position was rather more subtle and accommodating[172]; and second, that there are strongly-voiced criticisms from some scientists of the sample size and the inadequate use of non-lethal sampling methods.

30. Is there opposition to JARPA II? Yes. Is there criticism of the way in which JARPA II is framed? Yes. Do some scientists take the view that some of the objectives of JARPA II could be substantially achieved by using non-lethal methods? Yes. Do some scientists think that some of the questions addressed by JARPA II are not worth asking? Probably yes.

31. But where does that get us? There is a long, deep and sometimes acrimonious debate within the scientific community about JARPA II: but it is a scientific debate. It is a debate over methodologies, over sample sizes, over the statistical significance of results. These questions are self-evidently part of a debate about the scientific merits and demerits of JARPA II: they do not go to the question whether it could reasonably be regarded as scientific research at all — unless (and this is Australia's point) Japan is acting in bad faith or in abuse of its rights.

32. JARPA II is not run by charlatans: it is not a program for research into perpetual motion machines, or faster-than-light travel, or, some might add, cold fusion as a source of energy. It is a program that involves the collection of biological samples, taken in accordance with established statistical techniques for the determination of sample sizes, for the abstraction of a range of biological data that is analysed in accordance with established scientific methodologies by trained and experienced scientists, including scientists working in universities and publicly-funded research institutes. Some may think it is bad science, or unnecessary science; but in our submission it is an absurd exaggeration to say that this is not scientific research at all.

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[171] *Rep. Int. Whal. Commn.* 37, 1987, p. 29; *Rep. Int. Whal. Commn.* 38, 1988, p. 54.

[172] CR 2013/9, pp. 57-59 (Mangel).

33. To say that no reasonable person could regard JARPA II as a program for the purposes of scientific research is, at best, hyperbole. That is our answer to Australia's argument based on treaty interpretation.

Bad faith and abuse of rights

34. Australia's alternative argument is that Japan has been acting in bad faith in operating JARPA II. In the course of a memorable intervention, Professor Crawford counselled strongly against basing judicial review wholly or "primarily on the basis of such fluctuating and subjective notions as bad faith"[173]. That warning did not, however, wholly deter the Solicitor-General, who went on to make a submission entitled "Japan's lack of good faith and abuse of right"[174]. It is not wholly clear what Australia's position is on this alternative argument. Perhaps, as in the Scientific Committee, some experts take one view, while others take a different view.

35. Japan vigorously denies that it has acted in bad faith or in a manner that constitutes an abuse of right. The allegation is untrue as a matter of fact. But before I remind you of the facts in the record, please let me briefly address the law in relation to this Australian submission.

36. The usual focus of the Court and other international tribunals is upon the public face of the actions of a State or of some other actor. If a State's actual conduct is in accordance with international law, the *reason* why the State conducts itself as it does — the *motive* of the State — is of no concern.

37. In *Barcelona Traction*[175] the Court looked at the nationalities of the shareholders and the place of registration of the companies: it did not ask why the shareholders wanted to hold shares in a foreign company or why the registration of the company in Canada was permitted. The motives of those concerned were not relevant, any more than they were in the *Constitution of IMCO*[176] case. Similarly, in *Corfu Channel*[177], when ruling on the lawfulness of the exercise of the right of

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[173]CR 2013/19, p. 65, para. 22 (Crawford).

[174]CR 2013/20, p. 33 (Gleeson).

[175]*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 3.

[176]*Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, p. 150.

[177]*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 4.

innocent passage, the Court said that it was the manner, and not the purpose, of the passage that was the relevant focus. And in *Anglo-Norwegian Fisheries*[178], when considering the lawfulness of baselines drawn by Norway, the Court was not concerned with the reasons why Norway drew the lines where it did.

38. There are many other examples. The exercise of a right of self-defence in a particular instance, for example, might serve all sorts of political and military purposes: but as long as the exercise of the right stays within the limits set by the law, the Court will not say to a State, you must tell us why you chose to exercise the right when you did and when you could have chosen not to exercise it.

39. It is not clear why Australia does not regard the present case as falling within the approach evident in those cases. It is not clear why, if JARPA II on its face meets all the requirements of Article VIII, the Court should go further and inquire into the motivation behind JARPA II.

40. Australia has referred in rather general terms to "good faith" and "abuse of right". That suggests a possible starting-point for a legal argument; but no argument came from Australia. It just fizzled out. Paragraphs 4.59-4.60, and 5.122-5.128 of Australia's Memorial are devoted to the topic; but the legal analysis is practically non-existent — one Latin tag, and a reference to a dictionary[179]. Given the seriousness of the allegation of bad faith, one might have expected Australia to have made some effort to set out its thinking on the law on this point. But it did not. Nor — perhaps in deference to Professor Crawford's admonition — did it develop the point in its oral submissions.

41. Perhaps the strongest argument that it might have developed is that Article VIII gives a right to be exercised for a specific purpose.

42. Well, we have explained that Article VIII gives nothing that Japan did not have before it acceded to the Convention[180]. Under customary international law Japan, along with all other States, had the right to engage in whaling for scientific purposes, for commercial purposes and for

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[178] *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 116.

[179] CR 2013/11, p. 39 (Gleeson).

[180] CR 2013/15, p. 15, paras. 7-8 (Lowe).

any other purposes; and the question is what limitations has Japan accepted upon the exercise of that right.

43. Australia and New Zealand reject that position. They consider that the effect of Article VIII is that only exercises of the right to authorize special permit whaling that are *solely* motivated by scientific research are permissible, and that JARPA II is tainted by an ancillary "commercial" motive. The Solicitor-General based his argument upon the proposition that there was evidence "pointing to commerce as a substantial driver for JARPA and JARPA II", and "the intrusion into the exercise of the Article VIII power of considerations so extraneous to that Article and so pervasive as to justify the conclusion of lack of good faith"[181].

44. Japan does not accept that the sale of whale meat under JARPA II evidences a commercial motive: it is a common practice to fund fisheries research in this way, as Article VIII, paragraph 2, recognizes. But, even supposing that it did evidence a commercial motive, *quod non*, where would that get Australia? It would take us straight to Judge Gaja's question. How do we treat mixed motives?

45. Some rules of international law do refer to the motive or purpose for which a power is given or for which an existing power may be exercised. For example, rules concerning the expropriation of property require that it be asked if the property was taken into State ownership "for a public purpose"[182]. But where is the evidence that, once a "public purpose" is indeed established, courts or tribunals must go further, and check that there was no ancillary motive that accompanied it? We have not found any such evidence; and the fact that there is, in addition to the "public purpose" requirement, an explicit prohibition in international law on "discriminatory" expropriations rather suggests that further requirements such as a "sole purpose" requirement should not be read into the "public purpose" requirement.

46. I note also that where the Whaling Convention does wish to confine States to one sole purpose, it says so — as, for example, in paragraphs 2.3 and 21 *(a)* of the Schedule, which refer to

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[181]CR 2013/20, p. 35, para. 6 (Gleeson).

[182]For example, *Libyan American Oil Company (Liamco)* v. *Libya*, 7 *International Legal Materials* (*ILM*) 3 (1978), 4 *Y.B. Com. Arb.* 177 (1979).

ships that have been used "solely" for the purpose of freezing or salting whale meat intended for human food or feeding animals.

47. Neither Australia nor New Zealand has shown any legal or logical basis for supposing that there is a "sole purpose" principle in international law — much less, for writing it in to Article VIII. In our submission international law contains no such principle.

48. The passage that they quoted from the *Costa Rica* case does not show it[183]. That says no more than that "expressly stating the purpose for which a right may be exercised implies in principle the exclusion of all other purposes and, consequently, imposes the limitation thus defined on the field of application of the right in question". A right given for purpose *A* cannot be exercised for purpose *B*. But that says nothing about the situation where the right *is* exercised for purpose *A* and purpose *B* is an additional, ancillary motive.

49. And one more point on the law. The Solicitor-General, with his usual, admirable clarity, noted that I had not referred to a duty to consider the Resolutions issued by the IWC as an aspect of the duty of good faith[184]. So let me correct that point immediately. Japan accepts that the duty to implement its obligations under the Whaling Convention in good faith includes a duty to "have regard to resolutions expressed by the Commission under Article VI", as the Solicitor-General put it. It accepts that duty, and it has complied with that duty.

50. Well, so much for the law. But what of the facts? Where is the evidence from Australia of bad faith? The Solicitor-General suggested that it was "by never opening up its mind to a consideration of making the slightest change to the core aspects of its lethal methodology, scale, continuity and indefinite period have never been the subject of reconsideration by Japan"[185].

51. As my colleagues have indicated, JARPA II does not have an indefinite period. As the research plan says, it is to be reviewed after six years. Any changes considered to be necessary or appropriate will be made then. No doubt any special permits issued subsequently will continue to look much like photocopies of their predecessors — they are simply the bottom line, the result of the processes of consideration and decision on each of the matters that bears on the fact the final

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[183] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 241, para. 61: cited by New Zealand at CR 2013/17, p. 41, para. 20 (Ridings).

[184] CR 2013/20, pp. 36-37, para. 12 (Gleeson).

[185] CR 2013/20, p. 37, para. 13 (Gleeson).

decision to authorize a certain size of lethal take. But they will be considered. JARPA II is not running on an automatic pilot powered by everlasting batteries.

52. That has been and will be Japan's practice. Continuity — or discontinuity — is the product of those decisions.

53. It really does beggar belief that Australia can think that Japan has not considered changing the scale of JARPA II, for example by abandoning or scaling down some research goals and relying in greater measure upon non-lethal methods. In the face of *Sea Shepherd* attacks, continuous criticism from groups within the IWC, publicity campaigns by groups who have deeply-rooted and well-articulated positions opposed to whaling, and the many other political costs that come in the wake of the continuation of Japan's whaling research, no rational Government could simply press ahead unthinkingly.

54. Australia interprets the fact that Japan has not altered JARPA II as Australia wishes as proof that Japan has not opened its mind to genuine reconsideration. But that is not so. These matters *are* reviewed; in 2007, following the two-year feasibility study of JARPA II, a paper was submitted to the Scientific Committee with the express objective of considering "changes for the full JARPA II research program, if necessary"[186]. And these matters will be comprehensively reviewed in the 2014 review of JARPA II, perhaps before the judgment in this case is issued. The fact that Japan has decided not to abandon its lethal take is not a sign that it is acting in bad faith in exercising its rights under the Convention. One can give full consideration to comments, and still decide not to alter one's position.

55. Indeed, Australia understands this well. The Solicitor-General said last week that:

> "The submission, if I may repeat it, was that Japan never opened its mind to a consideration of making the slightest change to the core aspects of its lethal methodology, scale, continuity and indefinite period have never been the subject of reconsideration by Japan. And so it was that last Thursday Professor Lowe politely but firmly invited Australia to re-phrase, as in withdraw, that claim. May I tell you [said the Solicitor-General] that after reconsideration, Australia does not do so."[187]

Well, quite so.

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[186]Government of Japan (Compiled by Fujise, Y., Pastene, L.A., Hatanaka, H., Ohsumi, S. and Miyashita, T.) (2007). Evaluation of 2005/2006 and 2006/2007 feasibility study of the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II), p. 1; paper SC/59/O3 presented to the IWC Scientific Committee, May 2007.

[187]CR 2013/20, p. 37, para. 13 (Gleeson).

56. Please let me draw your attention to one set of statistics, about which I think there is no disagreement. They are taken from the cruise report of the 2005/2006 feasibility study for JARPA II, which is reproduced as Australia's Annex 57; and they relate to the size of the minke whale sample. The target is 850. But it is likely that around half of them will be males, and of the other, female half, around 40 per cent will be immature females. In fact, of the 2005/2006 feasibility study, from a full sample of 853, only 391 were females; and of them, only 242 were mature. Pregnancy rates, trends in age at sexual maturity of females, and so on can be determined only by lethal means; and data on some of those matters were accordingly based in that survey on a sample of 242, out of a population of over half a million. But to get that sample of 242 mature females, one needed an overall sample size of 850. That is simple mathematics.

57. This age and pregnancy data cannot be obtained by non-lethal means. But, having sampled the stock in order to get *this* data, one can also gather much other valuable information from the entire sample, including the immature females and the males; a good part of this additional information could, admittedly, be obtained by non-lethal means. Yes: non-lethal sampling is practicable in certain places, in certain sea conditions, and it can provide valuable data. But the idea that lethal sampling can simply be replaced by non-lethal methods is naïve.

58. Japan is perfectly open about its thinking. It wishes to resume commercial whaling with reference to the sound scientific basis for lifting the moratorium. JARPA II is one of Japan's major research projects aimed at providing that scientific basis. A key element of the scientific evidence will relate to productivity rates, and those rates can best be determined only with knowledge of the age structure, the age of sexual maturity, and the pregnancy rates of the whales. That data cannot be obtained by non-lethal means. Yes: there is a serious scientific debate to be had. But at the moment Japan does not consider that there is a scientific case for the abandonment of its lethal sampling of minke whales on a scale that — as Professor Mangel accepted[188] — can have no adverse effect upon the condition of that whale stock.

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[188]CR 2013/9, p. 63 (Mangel).

Concluding remarks

59. Mr. President, Members of the Court, in our submission Australia has not made out its case on the facts or on the law. It does not show — to use its own test — that it is unreasonable to regard JARPA II as a scientific research program, whatever the criticisms there might be of its methodology; and it has not shown that Japan had any motive beyond its declared motive of gaining the data necessary to provide a basis for the science-based consideration of the possibility of resuming commercial whaling, and of gaining that data through a research program that is conducted in essentially the same way as fisheries research is conducted the world over.

60. Mr. President, unless I can be of further assistance to you, I should say that that is the end of my submission. I thank the Court for its attention. I would ask you to call on Professor Pellet next, but you may feel that we need a good night's sleep before you do that.

The PRESIDENT: Unless ten minutes would be sufficient for Professor Pellet, we will postpone his pleading for tomorrow morning. Thank you, Professor Lowe.

The Court will meet tomorrow morning from 10.00 a.m. to 11.30 a.m. to hear the conclusion of Japan's second round of oral argument and the presentation of final submissions. Thank you. The Court is adjourned.

The Court rose at 5.55 p.m.