DISSENTING OPINION OF JUDGE ABRAHAM

[Traduction]

Agreement with Judgment's operative paragraph in its dismissal of Japan's objection to jurisdiction — Disagreement with Court's reasoning dismissing second limb of Australian reservation — Agreement with statement that Article VIII of the Convention must be interpreted neither restrictively nor expansively — Definition of "scientific research" given by Australia's expert rightly rejected — Disagreement with Court's objective standard, since the phrase "for purposes of" necessarily requires examination of aims pursued — Wrongful underlying unfavourable presumption against Japan — No manifest mismatch in this case between JARPA II's stated aims and means used — Similarly, sample size not manifestly excessive — Disagreement with finding in point 2 of operative paragraph that special permits granted by Japan in connection with JARPA II do not fall within the provisions of Article VIII, paragraph 1, of the Convention — Consequent disagreement with points 3, 4, 5 and 7 of operative paragraph.

1. I voted in favour of point 1 of the operative paragraph, in which the Court decides that it has jurisdiction to entertain the Application filed by Australia against Japan. But I voted against points 2 to 5, where the Court states that Japan has been in breach of various substantive obligations under the 1946 Convention for the Regulation of Whaling (hereinafter "the Convention"), in consequence of the fact that, according to the Judgment, the whaling programme known as "JARPA II", carried out by Japan in the Antarctic from 2005, was not genuinely conducted — notwithstanding the Respondent's assertions — "for purposes of scientific research" within the meaning of Article VIII of the Convention. As a result, I have also been unable to approve the measures which Japan is required to take under point 7 of the operative paragraph in order to make good the breaches found by the Court.

2. While I share the Judgment's conclusion on the issue of jurisdiction, I am not convinced by the reasoning followed in order to reach it. On this point, I would certainly describe my disagreement as minor. I will, however, explain the reasons for it below (I). On the merits, on the other hand, I regret to have to say that I am in profound disagreement with the overall approach adopted by the Court, and with the basic scheme of its reasoning: I believe that its approach is misconceived. I shall explain why (II).

I. Jurisdiction

3. Australia seised the Court on the basis of the declarations of acceptance of the latter's compulsory jurisdiction made by Australia and Japan on, respectively, 22 March 2002 and 9 July 2007. Japan has challenged the Court's jurisdiction in reliance on one of the reservations to Australia's declaration of acceptance, namely reservation *(b)*.

4. There was no discussion between the Parties — and there could not seriously have been one — regarding the well-established rule that the respondent in a case is entitled to rely on a reservation by the applicant in the instrument whereby the latter accepted the Court's jurisdiction, invoking that reservation against its author with a view to having the Court decline jurisdiction.

5. It was over the scope, in other words the interpretation, of the Australian reservation that the debate took place. The Court found that the reservation was not applicable in the present case. I agree. However, the Court reached its decision on the basis of an interpretation of the reservation which I find highly questionable.

6. In truth, the reservation is not a model of clarity. It has two limbs, linked by the conjunction "or". The first is relatively clear, seeking to exclude the Court's jurisdiction in respect of "any dispute concerning or relating to the delimitation of maritime zones including the territorial sea, the exclusive economic zone and the continental shelf" — which I would translate into French (only the English text is authentic) by: "tout différend concernant, ou se rapportant à, la délimitation de zones maritimes, y compris la mer territoriale, la zone économique exclusive et le plateau continental". The Parties agree: the dispute submitted to the Court did not concern, or relate to, the delimitation of maritime zones — meaning that such a delimitation did not constitute the actual subject-matter of the dispute, and no such delimitation was being requested of the Court. That is perfectly clear.

7. The second limb of the reservation is a lot less clear, and it is on this one that Japan relied.

It excludes from the Court's jurisdiction any maritime dispute "arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation", which could give in French: "[différend] découlant de, concernant, ou se rapportant à l'exploitation de tout espace disputé relevant d'une telle zone maritime ou adjacente à une telle zone dans l'attente de la délimitation de celle-ci".

8. Japan has sought to persuade the Court to apply this second limb of the reservation in a strictly literal way.

It argues that the dispute between the Parties arises out of the implementation of a whaling programme, and hence of the "exploitation" of a specific maritime area — that where the activities authorized under JARPA II are being conducted. The word "exploitation" is said to be

peculiarly appropriate, given the view of the case taken by Australia (which maintains that these are activities carried out for commercial ends) — as opposed to the position taken by Japan, for whom this is indeed a scientific research programme.

Furthermore, at least part of the maritime areas in which JARPA II is being conducted is claimed by Australia as its exclusive economic zone, generated by the portion of Antarctic territory that it also claims. That claim is still pending, and no delimitation has been effected — nor can it be effected, thanks to the 1959 Antarctic Treaty, which freezes for an indefinite period all territorial claims over the Antarctic. The precise extent of Australia's maritime claims was not established during the debate, but Australia has never denied the existence of those claims, nor the fact that they encompass maritime areas which coincide, at least in part, with those where whaling activities under JARPA II are conducted.

In short, Japan claims that the dispute before the Court arises out of the exploitation of maritime zones which are the subject of a dispute as to whether they form part of Australia's exclusive economic zone, which has not yet been delimited in that area, and that the Australian reservation, taken literally, is accordingly applicable.

9. In order to reject that literal interpretation, in which, in my view, it was correct, the Court has relied on two grounds, one of which is presented as essential, while the other appears to be redundant.

As main ground, the Judgment finds that there are no overlapping claims by Australia and Japan in respect of the maritime areas covered by JARPA II. However, according to the Court, "[t]he existence of a dispute concerning maritime delimitation between the parties is required according to both parts of the reservation" (paragraph 37 of the Judgment). In other words, a necessary condition for the application of the second limb of the reservation, on which Japan relies, is that the Parties to the proceedings have overlapping claims on the maritime areas in which the "exploitation" underlying the dispute is taking place — and that condition is absent here.

Redundantly, the Judgment further finds that "[t]he nature and extent of the maritime zones are . . . immaterial to the present dispute" (para. 40), which means that, in order to decide the case, it is unnecessary for the Court to rule on the question of which State — if any — has sovereign rights over the maritime areas in question.

10. In my view the Court would have been better advised to rely solely on the second of these grounds, which is necessary and sufficient in this case to justify its jurisdiction.

11. The first ground relied on by the Court, and which is clearly presented as the main one, rests, in my view, on a highly questionable and unnecessarily restrictive interpretation of the Australian reservation.

That reservation, as we have seen, contains two distinct limbs, although these are to some extent interlinked.

12. The first limb, which relates to disputes concerning the delimitation of maritime zones, undoubtedly presupposes, in order to be applicable, the existence of overlapping claims by the parties in question over the same areas; the Court is denied jurisdiction to entertain a maritime delimitation dispute between Australia and another State.

13. On the other hand, nothing in the language of the second limb, or in its underlying logic, justifies the conclusion that it can only apply where there are overlapping claims in respect of the same maritime areas by two States parties to the proceedings.

This second limb may reasonably be understood as intended (also) to exclude from the jurisdiction of the Court disputes which, without being directly related to maritime delimitation, would require the Court to take a position — incidentally — on the nature and extent of Australia's maritime zones, since the subject-matter of such disputes would be the exploitation of a maritime area in respect of which there was a pending dispute as to whether it formed part of such a zone. In short, Australia does not wish the Court to rule either directly (first limb of the reservation) or indirectly (second limb), on the limits of its maritime zones.

However, unlike the first limb, there is no reason — either in the text or in terms of logic — that the second limb of the reservation could apply only if both Parties to the case had overlapping claims to the maritime areas concerned. Indeed, one can perfectly well conceive of a situation where settlement of a dispute between Australia and another State relating to the exploitation of a maritime zone claimed by Australia would incidentally lead the Court to determine whether the Australian claim was well-founded. In such a case, the second limb of the reservation would, in my view, be applicable.

14. I accordingly take the view that, while it is true that the two limbs of the reservation, which constitute a unity, must be read in conjunction with one another — the reason that the Court correctly rejected the strictly literal interpretation proposed by Japan — the Judgment pushes that unity too far when it holds that the second limb can, like the first, apply only in a case of overlapping maritime claims.

That is a restrictive interpretation which is all the more regrettable in that the Court could have avoided it by basing itself solely on its second ground, which is incontrovertible and sufficient for purposes of the present case, while leaving any other issue open — always assuming that the Court wished to remain cautious in its approach.

* * *

II. The Merits

15. On the merits, my disagreement with the Judgment is a great deal more fundamental.

16. The case presented itself to the Court in relatively simple terms.

The Court had to answer a basic question, which, to all intents and purposes, governed the solution of the case: were the special whaling permits granted by Japan from 2005 under the JARPA II programme issued "for purposes of scientific research" within the meaning Article VIII of the 1946 Convention?

If so — which, in my view, is the answer that the Court should have given — that would necessarily have resulted in the dismissal of virtually all of Australia's claims.

If not — which was the response that the Court felt was correct — then, on the contrary, the only result could be broad acceptance of the Australian claims.

17. The heart of this case thus hinged on the interpretation of the words "for purposes of scientific research", and it is primarily on this point that I part company with the majority of my colleagues.

18. However, it is not Article VIII of the Convention which lays down the rules that Japan was accused by Australia of having broken. In itself, Article VIII imposes no obligation on States parties (with the exception of the procedural obligations to inform the Commission and the body designated by it of the permits granted, and of the results of the scientific research conducted under those permits). The purpose of Article VIII is not to impose additional obligations on States but to exempt them, in respect of authorized whaling activities falling within its terms, from obligations under the other provisions of the Convention (including the Schedule annexed thereto). The substantive obligations which Australia alleges to have been breached by Japan are to be found in paragraph 10 *(e)* of the Schedule annexed to the Convention (which establishes a moratorium on "commercial" whaling), in paragraph 10 *(d)* of that same Schedule (which establishes a moratorium on the use of factory ships), and in paragraph 7 *(b)* (which prohibits commercial whaling within the Southern Ocean Sanctuary).

19. The reason why paragraph 1 of Article VIII plays such a decisive role in this case is that, if whaling permits granted by Japan under JARPA II are not for the purposes of scientific research, as Japan has repeatedly claimed that they are, then it follows inevitably that the activities conducted thereunder violate the three provisions (or prohibitions) cited above. It has indeed been established that whaling under JARPA II is conducted, *inter alia*, with factory ships, so that — if it is not covered by the general exemption in Article VIII — it breaches the prohibition in paragraph 10 *(d)* of the Schedule in respect of certain species of whale taken by Japanese whalers. Moreover, neither Australia nor Japan has argued that whaling authorized under JARPA II could be for a purpose which is neither of a scientific nor of a commercial nature; it follows that, if such activities are not genuinely conducted "for purposes of scientific

research" — as Australia has maintained — then they constitute a breach both of paragraph 10 *(e)* and of paragraph 7 *(b)*.

20. In paragraph 229 of the Judgment the Court accepts this postulate — which Japan itself has not disputed — and states, in paragraphs 231, 232 and 233, that "all whaling that does not fit within Article VIII of the Convention (other than aboriginal subsistence whaling) is subject to" paragraphs 10 *(e)*, 10 *(d)* and 7 *(b)* of the Schedule. I agree with this statement — if not in the general terms in which the Judgment expresses it, on the basis of a somewhat questionable interpretation of the Convention — at least in the circumstances of the present case, and thus, certainly, for purposes of resolving the dispute before the Court.

21. My view is that Australia has failed to show that Japan is not genuinely pursuing, under JARPA II, the scientific aims that it claims to be pursuing (from Australia's standpoint, one might even say: "that it pretends to be pursuing").

22. I will begin by setting out the points on which I am not in disagreement with the position taken by the Judgment, before going on to explain where I essentially disagree.

23. First, my position is not based on the existence of a purported "discretionary power" of the State granting special permits to determine whether the authorized activities are indeed "for purposes of scientific research". It is true that the actual language of paragraph 1 of Article VIII does appear to give the State in question a measure of discretion: it is never required to grant a permit, and is free (in any event from the standpoint of international law) to refuse any request from an individual or a body, irrespective of the interest of the research envisaged; if it does grant a permit, it may make it subject to such conditions as it thinks fit; it may "at any time" revoke a permit granted, and enjoys discretionary power in that regard — again from the standpoint of international law, for domestic law may place certain restraints upon it.

On the other hand, in terms of characterizing a whaling programme as being "for purposes of scientific research" within the meaning of Article VIII — the essential condition to which that provision subjects the grant of special permits — one cannot speak of a discretionary power of the State. It is true that, when deciding on a request for a special permit, the State must necessarily make a determination as to the scientific value of the project for the implementation of which the permit is requested. But that power of determination is not a sovereign one: it is made subject not only to supervision by the bodies set up by the Convention, but also, if a dispute on the issue is brought before a judicial body having the relevant jurisdiction, to judicial oversight.

In that regard, I have no objection to what the Court states in paragraphs 59 to 61 of the present Judgment.

24. Nor does my disagreement relate to the cautious way in which the Court has addressed the notion of "scientific research" in the sense of Article VIII.

In my view the Court was correct in avoiding laying down a general, abstract definition of that notion. More particularly, it was correct in refusing to accept the four criteria proposed by Australia on the basis of the report by one of the experts retained by it, Professor Mangel: scientific research must have defined objectives based *inter alia* on verifiable hypotheses; it may only, in the context of the Convention, include the use of lethal methods if its objectives cannot be achieved by any other means; it must be periodically subject to peer review, and if necessary be modified in light of that review; it should endeavour to avoid adverse effects on the stocks studied.

As paragraph 86 of the Judgment quite correctly states, "[t]hese criteria appear largely to reflect what one expert regards as well-conceived scientific research, rather than serving as an interpretation of the term as used in the Convention".

25. Furthermore, I essentially approve of the way in which the Court has analysed the objective and purpose of the Convention, in the light of which Article VIII must be interpreted, and the conclusion which it draws, namely that "neither a restrictive nor an expansive interpretation of Article VIII is justified", since the aim of the Convention is both to ensure the conservation of whale stocks and to make possible the orderly development of the whaling industry (paras. 56 to 58).

26. Finally, I agree with the Judgment when it points out that "a State often seeks to accomplish more than one goal when it pursues a particular policy", and that, "[a]ccordingly . . . whether particular government officials may have motivations that go beyond scientific research does not preclude a conclusion that a programme is for purposes of scientific research within the meaning of Article VIII" (para. 97). In other words, it is possible that Japan, in designing JARPA II, was also sensitive to the possible positive fall-out of the programme for industrial and commercial activities: that does not suffice to disqualify it under Article VIII as a scientific research programme. On the other hand, if the scale of the programme was manifestly unreasonable, that would tend to show that — in part at least — it is not pursuing exclusively scientific objectives, and — to that extent in any event — is not covered by Article VIII (I will return later to this latter point).

27. I now come to the statement of the reasons why I cannot subscribe to the essential elements of the reasoning followed by the Court and, hence, to its final conclusion.

28. First of all, I believe that, in a case like the present one, the Respondent should enjoy a quite strong presumption in its favour.

I am not, as a rule, in favour of excessively rigid rules in relation to the burden of proof, and I have never taken the view that the burden of proof should, in principle, be borne exclusively by the applicant. But there are instances where the Court is entitled to take a particularly demanding stance in relation to a party putting forward certain allegations. That is particularly so where one of the parties claims that the other is acting in bad faith, since there is a generally accepted presumption of good faith. However, in the present case, it is clear that the accusations levelled by Australia at Japan are fundamentally based on the notion that, in designing and implementing JARPA II, Japan acted in bad faith, in that it concealed the pursuit of commercial interests behind the outward appearances of a scientific research programme.

It is true that the Judgment refrains from ruling on the issue of good faith, and even states that this is an issue that it need not address, like all "other arguments invoked by Australia" on an alternative basis (para. 243).

However, while bad faith is expressly pleaded in Australia's alternative arguments, it is also present, implicitly but necessarily, in the argument developed by it as principal claim.

I do not see how one can conclude that a whaling programme presented as being of a scientific nature, proposing scientific objectives and implemented with scientific methods, and which has duly been communicated as such to the Scientific Committee set up by the International Whaling Commission, and whose results have been published, has not been implemented "for purposes of scientific research", but "for commercial purposes", which is the Australian thesis as endorsed by the Court, without at least casting doubt — if only implicitly — on the good faith of the Respondents. When the Court states that it need not address Australia's charge of bad faith against Japan, it seems to me that this is more a matter of formal presentation than of the reality.

29. Admittedly, since the presumption of good faith is not irrebuttable, what I have just said is not sufficient to show that the Court is wrong in its conclusion that special permits granted by Japan under JARPA II were not issued "for purposes of scientific research".

However, in order seriously to support such a finding, the Court would, in my view, have needed particularly solid evidence, which was not apparent from the debate, and it was by contrast on the basis of weak arguments, and sometimes mere doubts, suppositions or approximations, that the Court felt able to accept Australia's claims.

30. The truth is that the Court's final conclusion was favoured by two aspects of its approach which strike me as particularly open to criticism.

31. First, far from placing the burden of proof on Australia, the Court consistently showed itself particularly demanding towards Japan, as if it was the Respondent that had to prove that it was in the right. From start to finish, the Judgment gives the impression that it is from Japan that explanations, proofs and justifications are expected.

Thus, for example, on the essential issue of sample size, the Judgment states that the task of the Court is

> "to examine *whether Japan*, in light of JARPA II's stated research objectives, *has demonstrated* a reasonable basis for annual sample sizes pertaining to particular research items, leading to the overall sample size of 850 (plus or minus 10 per cent) for minke whales" (para. 185; emphasis added),

before going on to conclude (para. 198) that the evidence — meaning, of course, that put forward by Japan — "provides scant analysis and justification for the underlying decisions that generate the overall sample size", which "raises further concerns about whether the design of JARPA II can be said to demonstrate on an objectively reasonable basis that it is a project for purposes of scientific research". In other words, it is Japan that is expected to show that the sample size (the authorized whale take) is proportionate to the stated objectives, and any doubt in this regard is held against it.

32. Secondly, and still more fundamentally, the Court has adopted a methodology which, to say the least, is unconvincing.

Explaining the method which it intends to follow in order to determine whether or not a programme is "for purposes of scientific research" within the meaning of paragraph 1 of Article VIII, the Court indicates that the main issue in this case relates to the expression "for purposes of". It is not sufficient that a programme includes elements of scientific research; it must also be designed and implemented "for purposes of" such research. So far, I can follow, and find nothing to object to. But the Judgment then goes on to gives this phrase ("for purposes of") a meaning and scope which seem to me to depart from the ordinary sense of the words.

In my view, "for purposes of" relates to the intention, the ends sought, the aims really pursued (which may be different from those stated). Not according to the Judgment. The Court insists, on the contrary, that its standard is an "objective" one (para. 67), in other words that it is not setting out to discover Japan's real intentions, to ascertain the reality of the aims pursued behind the outward appearances. And it explains — in paragraph 88, which is an essential link in its reasoning — that a programme can only be regarded as "for purposes of" scientific research if "the elements of [its] design and implementation are reasonable in relation to its stated scientific objectives"; it adds that, in order to determine whether these are reasonable, several elements need to be taken into account, including the scale of lethal sampling, the methodology used to select sample size, a comparison of target sample sizes and actual take, the time frame, and the programme's scientific output, as well as the extent of co-ordination with related search projects.

33. At this point, I really have difficulty in following.

The extent to which the methods used match the aims pursued is certainly of assistance in assessing the quality of a scientific research programme. In this regard, all of the elements mentioned in paragraph 88 are doubtless relevant. But I do not see how one could conclude, from the fact that a programme might be criticized in terms of the appropriateness of the methods specified in light of its stated objectives, that such a programme is not conducted "for purposes of" scientific research — particularly if one has been at pains to make it clear that it is not the subjective intentions of the State in question that it is being sought to ascertain, and that a strictly "objective" approach is being applied. Even though the Court states that it is confining its examination to what is "reasonable", it is launching itself, at this stage of its reasoning, on a path which leads it to depart from its role and to assess the scientific value of JARPA II, rather than seeking to ascertain the latter's nature — and the rest of the Judgment amply confirms this.

34. In my view, the Court should have adopted an altogether different approach.

JARPA II is presented as a scientific research programme approved by Japan. It has objectives, which are set out by the Judgment in paragraphs 109 ff., and whose value is nowhere challenged by the Court; it involves the implementation of methods which are of a scientific nature — as the Judgment recognizes, when it states that "the JARPA II activities involving the lethal sampling of whales can broadly be characterized as 'scientific research'" (para. 127); it was properly submitted for examination to the Scientific Committee before the issue of the first permit, as the Court recognizes in that part of the Judgment in which it rejects Australia's request for a finding that Japan failed to comply with its obligations under paragraph 30 of the Schedule (see paragraph 238).

Accordingly, I believe that the permits granted under JARPA II should have been presumed to have been issued "for purposes of scientific research" — for a State's word cannot lightly be challenged, and its good faith must be presumed until proof of the contrary — and only very strong evidence could have justified a finding unfavourable to the Respondent.

35. I consider that the Judgment does not demonstrate the existence of such evidence.

In my view, there are only two scenarios which could justify a finding that a programme, officially presented as being "for purposes of scientific research", and which has at least every appearance of such a programme, does not fall within the terms of Article VIII. The first scenario is where it is apparent that there is clearly no reasonable relationship between the stated objectives and the means used, such that those means are manifestly unsuitable for achieving those objectives — from which it may be concluded that the programme is not genuinely seeking to achieve its stated objectives. The second scenario is where the sample size set by the programme is manifestly excessive in light of research needs, having regard to the programme's stated objectives, from which it may be

concluded that, in respect of at least a proportion thereof, the authorized whale take was set for reasons, or for purposes, that are non-scientific (and thus, in all probability, commercial ones).

36. In my view the Court has failed to show that either of these scenarios is present here.

It is clear that the Court has taken a particularly demanding line towards the Respondent, since it appears to have raised a negative presumption against it, deriving from what might be termed "suspicion", and has relied on grounds which in my view are too weak, and has at times expressed itself more as a scientific committee would, rather than as a judicial body should have done.

37. Between paragraphs 128 and 222, the Court sets out a number of reasons which lead it to conclude, in paragraph 227, that "the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II" are not issued "'for purposes of scientific research' pursuant to Article VIII, paragraph 1, of the Convention".

None of these reasons is truly convincing in itself, and, while, cumulatively, they may give an impression of weight, that is ultimately not convincing either.

38. Japan is criticized (paras. 141 and 144) for not having carried out studies of the feasibility of non-lethal methods, which might — to some extent — have replaced lethal methods under JARPA II, or rather for not having proved to the Court that it had done so. That is possibly so, but, in the first place, in paragraph 83 the Court rejects Australia's contention that a scientific research programme requires a State systematically to give preference to non-lethal methods, and to have recourse to lethal methods only when other methods are not available; and furthermore, I cannot see how the fact that, when designing a scientific research programme, a State may have failed to carry out a study of a particular issue (even if that issue were relevant) would deprive that programme of its scientific character. At most, such a failure would justify an observation by the Scientific Committee. But it is not the function of the Court to decide whether JARPA II was designed as well as it might have been (that is a matter for the Scientific Committee to look into), but only to decide if this is indeed a programme pursuing scientific aims. As to the duty of States parties to "give due regard to recommendations" of the International Whaling Commission, which called upon States "to take into account whether research objectives can . . . be achieved by using non-lethal research methods" (para. 83), it cannot have the effect — which would be to confuse legal categories — of transforming those recommendations into binding decisions.

39. The Judgment further criticizes Japan for having set the sample size at a level higher than that necessary for the requirements of scientific research, in order to secure additional financial resources to finance that

research, an approach which, according to the Court, does not fall within the terms of Article VIII. That is a weak argument. First, it is based on a very questionable restrictive interpretation of the Convention; secondly, and in any event, it has not been shown that Japan did adopt such an approach. In reality, the Judgment relies solely on a document produced by Japan the language of which is ambiguous, but in which, in any event, no clear admission can be found that the sample size was increased for financial reasons (para. 143). If Japan is reproached with having, to a certain extent, favoured lethal methods because they are less expensive — *inter alia* because they enable some of the whale catch to be sold — such criticism may well be justified in factual terms, but certainly not in law: there is no rule — and the Judgment itself fails to identify one — which prevents a State from having regard to a consideration of this kind in designing a research programme.

40. The Judgment then goes on to examine the general question of the setting of sample sizes under JARPA II.

However, the Court was unable to reach a finding that the size of the sample was manifestly excessive in light of research needs, since there was no support for such a conclusion in the evidence before it. It is rather on the basis of its doubt as to the justification for the choices made by Japan and the methods adopted by it that the Judgment addresses the matter. However, even if a certain doubt is permissible, that cannot suffice to show that the aims pursued by JARPA II are unscientific, whether wholly or even in part.

41. In this regard, the Judgment queries the significant difference between the catch totals set under JARPA, the programme preceding that in issue here, and the sample sizes set under JARPA II. For minke whales in particular, the difference is substantial, increasing from an annual take of 400 to 850. The Court expresses its scepticism on the explanations given by Japan, namely that JARPA II had more ambitious aims than its predecessor. However, according to the Court, there is "considerable overlap . . . rather than dissimilarity" between the two programmes (para. 151). An additional reason cited "to question whether the increased minke whale sample size . . . is accounted for by differences between the two programmes " is that Japan launched JARPA II without waiting for the results of the Scientific Committee's final review of JARPA (para. 154). Here again we are dealing with queries, doubts, suppositions. Nothing truly solid.

42. The Court then goes on to discuss at some length ways of calculating the sample size necessary to achieve the research targets. It conducts a series of particularly complex calculations, which it presents, *inter alia*, in the form of a table and a graphic (see paragraphs 165 and 182).

But however sophisticated, such calculations do not suffice to enable the Court to reach the clear conclusion that the sample size was set at a

manifestly excessive level. All they can do is to raise doubts, uncertainties and suspicions. It is true that the explanations provided by Japan lack clarity and transparency, and that a certain vagueness remains as to how the sample size was fixed. The expert called by Japan, Professor Walløe from Norway, himself admitted to the Court that "the Japanese [had] not always given completely transparent and clear explanations of how sample sizes were calculated or determined". However, he then indicated that, on the basis of his own calculations, the minke whale sample size (that being by far the largest) was "of the right magnitude".

As for the Court, the only finding that it was able to reach (in paragraph 198), after a lengthy discussion of the matter, was that "the evidence relating to . . . sample size . . . provides scant analysis and justification for the underlying decisions that generate the overall sample size", and that this "raises further concerns" about "whether the design of JARPA II can be said to demonstrate on an objectively reasonable basis that it is a project for purposes of scientific research". Further concerns, deriving from a finding of certain flaws or weaknesses, but nothing to provide solid support for the conclusion that JARPA II is not genuinely pursuing its purported research aims.

43. The Judgment then highlights the discrepancy between the targets set under JARPA II and the actual number of whales taken, which is far below the target totals. Strangely, the Court regards this as a further reason to find that JARPA II is not a programme conducted "for purposes of scientific research".

The reasons for this discrepancy are known, and the Judgment refers to them (para. 206). Japan agreed to give up catching humpback whales following a request by the Chair of the International Whaling Commission, as a mark of goodwill. As regards the other two species, the discrepancy between target and actual catches can be largely attributed to the choice of vessels, which were unsuitable for taking minke whales, and to acts of organized sabotage by certain groups opposed to whaling, which prevented the target take for minke whales from being achieved.

44. It is difficult to see, however, how the fact that, in recent years, Japan has failed to achieve the target takes under JARPA II can justify the finding that the programme has ceased to be a scientific one, and still less that it has never been a scientific programme.

The Court's reasoning (in paragraphs 209-211) is, in substance, as follows. First, because JARPA II has continued despite actual catches being far smaller than the original targets, that tends to show that those targets had been fixed at an excessively high level and not in accordance with the requirements of need and proportionality, which "adds force to Australia's contention that the target sample size for minke whales was set for non-scientific reasons". Secondly, the zero or negligible take for two of

the three species concerned casts doubt on Japan's argument that the significant increase in the target take for the third species of whale (minke whales) under JARPA II can be explained by the introduction into that programme of research on inter-species competition, which was absent from the preceding one.

The Court summarizes its position as follows:

> "Japan's continued reliance on the first two JARPA II objectives to justify the target sample sizes, despite the discrepancy between the actual take and those targets, coupled with its statement that JARPA II can obtain meaningful scientific results based on the far more limited actual take, cast further doubt on the characterization of JARPA II as a programme for purposes of scientific research." (Para. 212.)

Once again, doubt. But is a doubt, or even an accumulation of doubts, sufficient to constitute proof? In my view, in any event in the present instance, that is very far from being the case. What is more, it seems to me hardly disputable that the fact that a research programme has been only partially achieved does not deprive it of the ability to produce scientifically significant results, and I can see nothing here that could provide support for such grave suspicions.

45. It is true that the Court completes its demonstration with three concluding arguments, under the head of "additional aspects", but which I have to say that I do not find any stronger than the preceding ones: JARPA II has an open-ended time frame — but I cannot see where anyone might get the idea that a research programme can only be "scientific" if it is for a fixed period; publication of research results from JARPA II in scientific journals has been extremely limited — but that does not suffice to justify a finding that the programme is not being conducted for purposes of scientific research, at most it could be an indication of weaknesses or flaws in its design; Japan has given few examples of co-operation between the institution responsible for JARPA II and other research institutions, which, according to the Court, "could have been expected" — but we are still dealing here with criticism of the way the research has been conducted, rather than a convincing challenge to its scientific character.

46. Even taken together, the Court's criticisms of Japan are very far, in my view, from justifying a finding that JARPA II was not designed and implemented "for purposes of scientific research", which is the conclusion that the Court reaches in paragraph 227.

And I believe this to be the case for two basic reasons: doubts are not proof; methodological flaws in the design of a scientific programme do not deprive it of its scientific character, nor do they stamp it with a commercial purpose.

47. I particularly regret the stance that the Court has chosen to adopt, inasmuch as, in so doing, it has ignored the contribution — in my view, a remarkable one — from the expert called by Japan, the internationally renowned Norwegian professor, Lars Walløe. Professor Walløe demonstrated his independence in openly criticizing certain aspects — albeit minor ones — of the JARPA II programme; and indeed the Judgment has cited these several times in support of its argument against the Respondent. That, in my view, only serves to enhance the overall credibility of his evidence. Professor Walløe stated that "both JARPA and JARPA II have given valuable information for the possible implementation of the current version of RMP [the Revised Management Procedure, the stock management tool used by the International Whaling Commission] and for possible future improvements of RMP", and that "the programmes are giving critical information about the ongoing changes in the Antarctic ecosystem".

As regards sample size, Professor Walløe stated at the hearings that he did not really know how the Japanese scientists had calculated them, but that, on the basis of his own calculations to determine, *inter alia*, the necessary sample size to assess changes in age and sexual maturity — which were parameters of particular interest — over a period of six years, he found that "to get any detectable you would need in the order of magnitude [of] 900 whales".

48. I am well aware that, since Professor Walløe was an expert called by one of the Parties, the Court could not simply accept the truth, without further enquiry, of everything he said, when other experts, called by the opposing Party, expressed differing views.

However, I believe that the fact that a scientist of this renown unequivocally expresses his positive view of the scientific value of the research carried out under JARPA II, and of the reasonableness of the sample sizes set (with the exception, as he stated, of fin whales, for which the sample size was too small to give significant results) ought to have carried substantial weight in the Court's assessment of the true nature of JARPA II.

That would certainly have been the case if the Court, instead of attempting to function as a sort of scientific committee, seeking to enquire in detail into what aspects of JARPA II could be regarded as design or implementation flaws or deficiencies, had confined itself simply to answering the question of whether the activities concerned were conducted for purposes of scientific research — regardless of whether they were brilliantly or poorly designed. And if the Court had not applied an underlying negative preconception in its treatment of the Respondent.

(Signed) Ronny Abraham.