DECLARATION OF JUDGE KEITH

1. As my votes indicate, I agree with the conclusions the Court has reached. I also agree generally with the reasons it has given in reaching those conclusions. My purpose in this declaration is to address three matters in support of those reasons:

(a) the broader context in which the case is to be seen;
(b) the extent of the power of a Contracting Government to grant a special permit under Article VIII of the Convention and the related issue of the standard of review to be applied by the Court in the event of a dispute about the grant of particular permits;
(c) the application of that standard of review to the facts of the present case.

A. The Broader Context

2. In the 65 years the International Convention for the Regulation of Whaling (hereinafter "the Convention") has been in force, there have been massive changes both in the operation of the whaling industry and in attitudes and policies towards whaling. Under the Schedule, as in effect at the outset, the total allowable annual catch in the waters south of 40 degrees south latitude was 16,000 blue whales, or 32,000 fin whales or 40,000 humpback whales. (No provision was originally made in respect of minke whales.) By 1965 the taking of blue whales had been prohibited, and by 1972 the limit for Antarctic minke whales had been set at 5,000. These limits are two of the many manifestations of the exercise by the International Whaling Commission of its powers of regulation. Such binding action could be taken, if the necessary majority was available, subject to the power of a Contracting Government to object, with the consequence that it would not be bound by the new regulation.

3. In 1972, the year the 5,000 limit on the take of minke whales was introduced, the United Nations Conference on the Human Environment, held in Stockholm, recommended a ten-year moratorium on commercial whaling. As some of the nine original members of the Commission, which were all whaling nations at the outset, abandoned whaling and new mem-

bers, with extensive NGO support, joined the Commission, the votes favouring a moratorium grew. As the Judgment recounts, the moratorium was adopted in 1982. Many factors, commercial, scientific, technological, environmental, political and others, no doubt lay behind that decision. Those factors are also manifested in the very many zero catch limits now to be found in the tables in the Schedule. Today's Schedule is in very sharp contrast to that which operated 65 years ago. It is hard to imagine that those who in 1946 proposed and adopted the new "effective administrative machinery" anticipated it being used in such dramatic ways. They might think it strange that a power established to regulate an ongoing industry had been used virtually to prohibit it; compare, e.g., *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)* (*Judgment, I.C.J. Reports 2009*, p. 249, para. 87 (1)).

4. Those Contracting Governments which engaged in whaling and took that view had a number of options open to them. They could withdraw from the Convention by giving notice under its terms, as some did. They could exercise their right to object to the measures, as, again, a number of States, including Japan, did. They could seek to amend the Convention, but that possibility has not been pursued. Or they could challenge the lawfulness of a particular measure, again a course not taken.

5. Over the last 30 years, the membership of the Commission has again changed, with an increase of those Contracting Governments which support whaling, as well as of those which are opposed. It has been possible for those on each side of the argument about whaling to complain that the Commission has become over politicized. One consequence has been that the Commission has become deadlocked and has recently decided to meet only every second year.

6. I conclude this introductory passage by putting the current dispute, brought before the Court for decision in accordance with international law, in the broader context of methods of peaceful settlement of international disputes. From 2007 until 2010 there were extensive attempts through *The Future of the IWC Process* to resolve through negotiations a range of matters, including the dispute which is now before the Court. That process however failed. It ended just days after Australia filed its Application in this case. The Chair of the Support Group, when reviewing the process, particularly paid tribute to the United States of America for its energy and leadership during the negotiating process, and to Japan for its huge commitment and its willingness for compromise. Japan

referred to this assessment several times during the written and oral pleadings. Australia said nothing at all about it.

B. The Extent of the Power to Grant a Special Permit and the Standard of Review

7. I see the extent of the power of the Contracting Government to grant a special permit and the extent of the power of the Court to review the grant as being essentially interrelated. The wider the power of the Contracting Government the more limited the power of the Court to review. For me, three features of the power conferred on Contracting Governments by Article VIII (I) of the Convention are significant. The first is that the wording of the provision at its core is not subjective. It does not say that a Contracting Government may grant a special permit for "what it considers to be" scientific research. The non-appearance of those words is emphasized by the subjective wording appearing at the end of that sentence — "as the Contracting Government thinks fit". Such wording was, for instance, in issue in the *Certain Questions of Mutual Assistance in Criminal Matters* case, where the Court nevertheless considered that it had some power of review (*(Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 229, para. 145). That case is helpful in a second and more important way since the assessment there by the relevant State authority was based on that State's own assessment of prejudice to its "essential interests". The assessment here, by contrast, relates to a much more concrete matter — a programme for the purposes of scientific research relating to whales and associated matters. A third feature is the common interest of all the Contracting Governments in the operation of the Convention with the related roles of the IWC and its Scientific Committee. Those features all indicate for me real limits on the power of the Contracting Government to grant a special permit. A fourth significant matter bearing directly on the Court's exercise of its power of review in this case is the extensive body of information in the record before it about the process which led to the range of decisions to establish the JARPA II programme and about its implementation.

8. As the Judgment indicates, the positions of the Parties and the Intervener on the standard of review have evolved over the course of the proceedings (paras. 62-69). While in general I agree with the test stated by

the Court, I formulate it in this way: Is the Contracting Government's decision to award a special permit objectively justifiable in the sense that the decision is supported by coherent scientific reasoning? The test does not require that the programme be "justified", rather, that on the record it is justifiable. Nor is it for the Court to decide on the scientific merit of the programme's objectives nor whether its design and implementation are the best possible means of achieving those objectives. But it does have the role of assessing, in the light of the features of the power mentioned in the previous paragraph, the evidence to see whether it demonstrates coherent scientific reasoning supporting central features of the programme. Such tests, like that stated by the Court, become clearer as they are applied to the facts in issue.

C. The Application of the Standard of Review to the Facts

9. Subject to one matter of emphasis, I have nothing to add to the reasons given in support of the conclusions reached by the Court relating to the decisions taken by the Japanese authorities regarding the use of lethal methods as opposed to non-lethal ones (paras. 128-144) and the determination of the sample sizes (paras. 147-198); and relating to the comparison of the sample size to the actual take (paras. 199-212). The matter of emphasis is that for me the evidence demonstrates a failure by the Japanese authorities even to address central matters involved in the initial design and ongoing implementation of the programme.

10. In respect of the decisions regarding the use of lethal methods and non-lethal ones, I see as critical the failure of Japan to provide any evidence of any studies which it undertook of the use of non-lethal methods through the long period running from the planning of the programme to the present day (see in particular paragraphs 136-141). The Court did, by contrast, receive evidence from the two experts called by Australia about the enhancement and wider use over that time of non-lethal methods which were capable of being used for at least some of the objectives of the programme.

11. So far as the determination of the sample sizes is concerned, the lack of any clear explanation in the record for the choices of a 12-year research period for two of the species and of six years for the other means, as I see the matter, that those aspects of the decision which are critical for the sizes of the samples of the different species are not supported by coherent scientific reasoning. Among the objectives of the programme are inter-species competition and ecosystem research (paras. 176-178). A similar lack of explanation appears in respect of the choice of annual sample sizes of 50 for each of the humpback and fin species when the Research

Plan for the programme called for a take of at least 131 of each species for the purpose of one of the objectives (para. 179).

12. I next see as significant the essential failure of Japan to explain in a persuasive manner the big increase in the target for minke whales from JARPA to JARPA II. On the one hand, it said that the new objectives were a major reason, when they do not appear to be clearly distinct from the objectives of JARPA as they existed in the last part of that programme; but, on the other, it emphasized the need for continuity in moving from the first to the second programme (paras. 147-156). It does not appear to me to be scientifically credible to maintain both of those arguments at one and the same time.

13. Finally, I consider the difference between the sample size and the actual take. I see it as significant that, while Japan has continued to issue special permits for the taking of the same numbers of the three species throughout the programme, except for 2005 and 2006 in respect of fin and humpback whales, it has never reported to the IWC and in particular to the Scientific Committee on the consequences of the much reduced takes of minke whales and fin whales and the nil take of humpback whales for the design and implementation of the programme (paras. 209-212). The Annexes to Japan's Counter-Memorial in the part concerned with documents which it issued (Anns. 133-159) include only three possibly relevant documents submitted to the IWC or its Scientific Committee (Anns. 152, 153 and 156) and none on its face addresses those changes and the possible consequences for the research. Only one of them dates from the time of the full-scale operation of JARPA II and does no more than list publications arising from JARPA II as well as from JARPA. That failure is to be seen in the context of the requirements of paragraph 30 of the Schedule and the duty of co-operation with the IWC and its Scientific Committee which, as the Court notes, both Parties and the intervening State recognize (paras. 83 and 240).

14. To summarize, the evidence before the Court, as I read it, does not show that the Japanese authorities in planning and implementing the programme have given any real consideration or indeed any consideration at all to the central elements of the programme discussed above. Accordingly, and for the reasons also given by the Court, I conclude that the programme does not fall within the scope of Article VIII (1) and that, as a consequence, the actions of Japan, taken in terms of the programme, for the killing, taking and treating of whales under it, breach paragraph 10 *(e)*, paragraph 10 *(d)* and paragraph 7 *(b)* of the Schedule.

(Signed) Kenneth KEITH.