SEPARATE OPINION OF JUDGE GREENWOOD

Issue before the Court confined to whether JARPA II compatible with the International Convention for the Regulation of Whaling — Interpretation of the Convention — Object and purpose of the Convention — Resolutions of the International Whaling Commission — Relevance for interpretation of the Convention — Subsequent practice of the parties to the Convention — Withdrawal of Japan's objection to the commercial moratorium — Obligations under Article VIII of the Convention — Relationship between Article VIII of the Convention and paragraphs 7 (b)*, 10* (d) *and 10* (e) *of the Schedule — Relationship between JARPA and JARPA — JARPA II not within the exception in Article VIII, paragraph 1, of the Convention — Japan therefore in breach of its obligations under paragraphs 7* (b)*, 10* (d) *and 10* (e) *of the Schedule — Whether Japan has acted in bad faith — Whether Japan has breached paragraph 30 of the Schedule — The Court's decision not to order a second round of written argument.*

1. JARPA II, like Japan's other whaling programmes, has long been the subject of controversy. To many of its critics, whaling is intrinsically wrong and incompatible with contemporary ethical and environmental principles. For such critics, the adoption of the moratorium on commercial whaling by the International Whaling Commission ("the Commission") in 1986 was a vindication of those principles. Seen in that light, it is to be regarded less as a moratorium, in the true sense of the word, than as a comprehensive and indefinite ban on all forms of whaling. Defenders of Japan's whaling programmes, by contrast, point to the long-standing cultural traditions of whaling in Japan and the economic dependence of certain Japanese communities upon the continuation of whaling. These are large and important questions which arouse strong emotions but they are not the questions the Court is called upon to decide (see Judgment, para. 69). The issue before the Court is a narrower one, namely whether or not JARPA II is compatible with Japan's international legal obligations under the International Convention for the Regulation of Whaling ("ICRW") and it is that issue alone which the Court has determined in the present Judgment.

Different Approaches to the Interpretation of the International Convention for the Regulation of Whaling

2. The broader debate to which I have alluded is, however, reflected in a marked difference between the Parties regarding the approach which

should be taken to the interpretation of the Convention. For Australia, the Convention is — or, at least, has become — an agreement about the conservation of whales. Australia relies upon the references to conservation in the Preamble of the Convention and the approach taken in a series of resolutions adopted by the Commission which, Australia considers, show that "the legal regime for the regulation of whaling has evolved from a system primarily designed to manage the exploitation of a natural resource to an increasingly conservation-oriented regime" (Memorial of Australia, para. 2.125). On that basis, Australia argues that the ban on whaling introduced when the moratorium was adopted in 1986 is to be regarded as the general rule to which Article VIII of the Convention provides a very limited exception justifying whaling for purposes of scientific research, an exception which must be restrictively construed.

3. By contrast, Japan focuses on the final paragraph of the Preamble, which records the decision "to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry", from which Japan deduces that conservation was not intended to be an end in itself but only a means for securing the orderly development of the whaling industry. Japan emphatically rejects Australia's evolutionary argument, maintaining that the resolutions of the Commission on which Australia relies were frequently adopted by very narrow majorities and against the opposition of Japan. In that context, Japan suggests that the Commission has, in effect, been hijacked by those who are fundamentally opposed to all whaling. For Japan the adoption of the moratorium in 1986 was the product of that fundamentalism, rather than scientific assessment. When the Commission amended the Schedule to the Convention to incorporate the moratorium, Japan exercised its right under Article V, paragraph 3, of the Convention to object to that amendment, thus rendering it inapplicable to Japan, and withdrew its objection only because of pressure from the United States. Against that background, Japan argues for a broader interpretation of Article VIII of the Convention.

4. I do not find either of these approaches wholly persuasive. Australia's approach is difficult to reconcile with the language of the Preamble and, in particular, the passage quoted in the preceding paragraph. The language of the Convention and its *travaux préparatoires* make clear that an important objective of the Convention was to ensure a future for the whaling industry by making sustainable whaling possible. On the other hand, Japan's argument that the Convention treats conservation as wholly subordinate to the development of whaling is also untenable. The Preamble shows that both conservation and ensuring a future for sustainable whaling were considered to be purposes of the Convention.

5. That balance between the two goals is not, in my opinion, altered by the resolutions of the Commission, at least not in the way, or to the extent, suggested by Australia. In this context, it is important to recall that the Convention makes provision for two very different types of resolutions. Article V, paragraph 1, provides that the Commission may adopt regulations which amend the Schedule. Since the Schedule is an integral part of the Convention (in accordance with Article I, paragraph 1, of the Convention), such regulations are, in effect, amendments to the Convention itself, although the Commission does not have the power to remove Article VIII or to negate the effects of that provision. Regulations require a three-fourths majority (Art. III, para. 2) and are binding on every State party to the Convention, unless that State raises and maintains an objection in accordance with the procedure laid down in Article V, paragraph 3. It has been the use made by the Commission of this power to adopt regulations that has been the main force in making the Convention "an evolving instrument" (Judgment, para. 45). The second type of resolution is one adopted under Article VI, by which the Commission may "make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention". The adoption of a recommendation requires only a simple majority. There is no dispute about the legal effect of regulations. The question is whether recommendations from the Commission assist in the interpretation of the Convention.

6. Where a treaty creates a body such as the International Whaling Commission in which all the member States are represented, resolutions adopted by that body form part of the subsequent practice of the parties to the treaty. As such, they are capable of constituting an aid to the interpretation of the treaty, in accordance with the principle set out in Article 31 (3) *(b)* of the 1969 Vienna Convention on the Law of Treaties. However, subsequent practice is valuable as an aid to the interpretation of a treaty only to the extent that it establishes the agreement of the parties. Australia referred to 40 resolutions of the Commission. Of those, ten were adopted by consensus (the last one in 1994) and should therefore be considered as establishing the agreement of the parties to the Convention. Of the remaining 30 resolutions cited by Australia, all were adopted by majority vote. In many cases, the vote was very close. For example, resolution 2003-3, on southern hemisphere minke whales and special permit whaling, was adopted by 24 votes to 20 with 1 abstention. Resolution 2005-1 criticizing JARPA II was adopted by 30 votes to 27 with one abstention. Even where the majorities were larger, the record frequently shows substantial dissent. For example, the resolution by which the Commission endorsed the Berlin Initiative of 2003 (resolution 2003-1), a resolution emphasized by counsel for Australia (see, e.g., CR 2013/8, p. 21,

para. 27), was adopted by only 25 votes to 20. In almost every one of these cases Japan was one of the dissenters. Far from establishing the agreement of the parties to the Convention, these resolutions demonstrate the absence of any agreement and cannot, therefore, be relied on to sustain an interpretation of the Convention which can bind Japan.

7. Moreover, any assessment of the potential relevance of recommendations as an aid to the interpretation of the Convention must take into account the relationship between recommendations, which (as their name suggests) are not mandatory, and regulations, which are legally binding. As explained in paragraph 5, above, the exercise of that power is subject to important safeguards in that it requires a three-fourths majority of those States voting and is subject to the objection procedure, which enables a State to opt out in whole or in part from the application of the new provision. It would be entirely at odds with that carefully constructed power to treat recommendations, adopted by simple majority and without any procedure for objection, as capable of producing effects similar to those of regulations. Since the power to amend the Schedule gives the Commission scope for adapting the Convention to changing circumstances, the need to interpret and apply the treaty as a "living instrument" has already been accommodated. There is thus less of a case for treating recommendations as having significant effects on the basis of an evolutionary interpretation of the provisions of the Convention. Moreover, it is evident that the Commission has frequently been divided over major issues and that changes which some member States would like to bring about have not commanded the degree of support necessary for the adoption of an amendment to the Schedule. To permit such changes to be introduced through the back door by means of recommendations would destroy the balance of the Convention.

8. Finally, whatever criticisms Japan may have of the commercial moratorium, the fact remains that it withdrew its objection to that moratorium and has been legally bound by it for more than 25 years. It is not now open to Japan to come to the Court and seek to defend a broad interpretation of the principal exception to that moratorium by casting doubt upon the manner in which the moratorium was adopted. Whether there was a sound scientific basis for the adoption of the moratorium in 1986 and whether Japan was pressured into withdrawing its objection to the moratorium cannot influence the decision of the Court on whether the killing of whales as part of JARPA II is, or is not, "for purposes of scientific research" within Article VIII of the Convention. In my opinion, the Court was quite right to hold that this question has to be answered by examination of the terms of Article VIII without any predisposition towards a restrictive or an expansive interpretation of that provision (Judgment, para. 55).

THE STRUCTURE OF THE CONVENTION AND THE OBLIGATIONS OF JAPAN

9. While the interpretation of Article VIII is at the heart of the present case, it is not that provision which imposes the obligations Japan is accused of having violated. Both the text of Article VIII and the structure of the Convention make that clear. Article VIII provides that:

> "Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.
>
> Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.
>
> Each Contracting Government shall transmit to such body as may be designated by the Commission, in so far as practicable, and at intervals of not more than one year, scientific information available to that Government with respect to whales and whaling, including the results of research conducted pursuant to paragraph 1 of this Article and to Article IV.
>
> Recognizing that continuous collection and analysis of biological data in connection with the operations of factory ships and land stations are indispensable to sound and constructive management of the whale fisheries, the Contracting Governments will take all practicable measures to obtain such data." (ICRW, paras. 1-4.)

10. That provision imposes a number of obligations. Some are purely ancillary in character, in that they come into existence only as a consequence of a State's decision to issue a special permit. Thus, the penultimate sentence of Article VIII, paragraph 1, requires that any State issuing a special permit must report that fact to the Commission. Article VIII, paragraph 2, lays down an important obligation to ensure that, so far as practicable, whales taken under special permit shall be processed (presumably so that their meat is not wasted). On the other hand, Article VIII, paragraph 3, imposes an obligation upon all Contracting Governments to

communicate to a body designated by the Commission (which has designated the Scientific Committee for these purposes) scientific information regarding whales and whaling available to that Government irrespective of whether that information has been obtained pursuant to Article VIII, paragraph 1. Similarly, Article VIII, paragraph 4, imposes a general obligation to take practicable measures to collect data.

11. Important as these obligations are, none is in issue in the present case. Australia has not suggested that Japan has failed to comply with any of the obligations described in the preceding paragraph. These proceedings are about the provision in the first sentence of Article VIII, paragraph 1. That provision does not expressly impose an obligation; rather, it grants to a Contracting Government a power to authorize the killing, taking and treating of whales for the purposes of scientific research and provides that if any whale is killed, taken or treated in accordance with that provision, that action will "be exempt from the operation of this Convention". In other words, the first sentence of Article VIII, paragraph 1, is a shield, not a sword. So long as any killing, taking or treatment of whales is in accordance with the requirements of Article VIII, there will be no breach of any other provision of the Convention (including any provision of the Schedule). On the other hand, if a Contracting Government purports to exercise the power granted by Article VIII, paragraph 1, but in fact exceeds the scope of that power, then that exemption will not apply and the lawfulness of any killing, taking or treating of whales will have to be measured against the other provisions of the Convention. Of course, there is an implicit obligation upon a State which exercises the power to grant special permits to act in good faith but for the reasons given below (see para. 29), I do not accept that Japan has violated that obligation.

12. Australia's principal case is rather that, because JARPA II does not meet the requirements of Article VIII, paragraph 1, the killing, taking and treating of whales under JARPA II contravenes other provisions of the Convention, specifically paragraphs 7 *(b)*, 10 *(d)* and 10 *(e)* of the Schedule. Those paragraphs were added to the Schedule over the years by the International Whaling Commission in the exercise of its powers under Article V of the Convention. It is those three paragraphs (together with paragraph 30, the claim in respect of which has a somewhat different character) which constitute Australia's cause of action in the present proceedings. It is, therefore, necessary to examine each of those paragraphs in turn.

13. Paragraph 7 *(b)* of the Schedule prohibits commercial whaling in the area designated as "the Southern Ocean Sanctuary" (see Judgment, para. 233). The prohibition applies to all species of whale but Japan is not bound by it with regard to minke whales, since Japan exercised its right to lodge an objection to this amendment of the Schedule in so far as it applied to minke whales. That objection has not been withdrawn. Since Japan has not, in fact, taken any humpback whales during JARPA II, the

only question which arises under paragraph 7 *(b)* is whether the killing, taking and treating of fin whales under JARPA II is contrary to Japan's obligations under this paragraph.

14. Paragraph 10 *(d)* of the Schedule prohibits "the taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships" (see Judgment, para. 232). Since minke whales are expressly excluded from the application of this provision and it applies only to actual taking, killing or treating, the only question is whether the taking, killing or treating of fin whales under JARPA II is contrary to Japan's obligations under paragraph 10 *(d)*.

15. Paragraph 10 *(e)* of the Schedule is more far-reaching. This provision creates what is known as "the moratorium on commercial whaling" (see Judgment, para. 231). The relevant part of the paragraph provides that "catch limits . . . for commercial purposes of whales from all stocks for the 1986 coastal and the 1985-1986 pelagic seasons and thereafter shall be zero". The obligation which this provision imposes applies to all three species of whales that are the subject of JARPA II. It is thus the only provision of the Schedule which is applicable to the killing of minke whales, the species which constitutes the overwhelming majority of whales killed in the course of JARPA II. In addition, it is not confined to the actual killing, taking and treating of whales but applies to the setting of a catch limit above zero. It is therefore capable of applying to Japan's act of setting a catch limit of 50 for humpback whales under the permits granted in each year of JARPA II, notwithstanding that no humpback whales have in fact been taken.

16. All three of these paragraphs impose obligations upon Japan. If JARPA II complies with the requirements of Article VIII, paragraph 1, then the killing, taking and treating of whales (and, by implication, the setting of a catch limit above zero) under JARPA II is exempt from the provisions of these three paragraphs and Japan cannot be in breach of the obligations which they impose. On the other hand, if JARPA II does not meet those requirements, then Article VIII, paragraph 1, provides Japan with no exemption and it becomes necessary to consider whether Japan has violated its obligations under any or all of the three paragraphs.

17. There is no room for doubt regarding paragraph 10 *(d)*. That prohibits any taking, killing or treating of fin whales by factory ships or vessels attached to factory ships. The principal vessel employed in JARPA II, the *Nisshin Maru*, is plainly a factory ship. Accordingly, the taking of fin whales by the *Nisshin Maru*, or the vessels attached to her, will entail a violation of Japan's obligations under this paragraph unless Japan is exempted from that obligation by the operation of Article VIII, paragraph 1.

18. The position as regards paragraphs 7 *(b)* and 10 *(e)* requires closer examination. Japan's obligation under paragraph 7 *(b)* is to refrain from "commercial whaling" of fin whales in the Southern Ocean Sanctuary. The obligation under paragraph 10 *(e)* is to refrain from setting catch limits above zero for the killing "for commercial purposes" of any of the three species of whale. Australia contends that the Convention recognizes only three types of whaling: subsistence whaling (under paragraph 13 of the Schedule), whaling for scientific purposes (under Article VIII of the Convention) and commercial whaling. Since Japan has never suggested that whaling carried out under JARPA II is subsistence whaling, Australia maintains that if JARPA II whaling does not fall within the provisions of Article VIII, then it must be classified as commercial whaling. Japan did not disagree with this analysis during the proceedings. Indeed, counsel for Japan commented that "[t]he [Commission] recognizes three categories of whaling: commercial, aboriginal subsistence, and special permit whaling" (CR 2013/12, p. 44, para. 14). Japan has not attempted to suggest that even if its whaling under JARPA II fell outside the exemption granted by Article VIII, paragraph 1, it might nevertheless avoid violating the prohibitions in paragraphs 7 *(b)* and 10 *(e)* on the basis that it was not to be regarded as commercial whaling.

19. The position taken by the Parties in the present proceedings is in accordance with what appears to be the understanding of other States parties to the Convention and of the Commission itself. Thus, when the adoption of the commercial moratorium was under consideration in the Commission in the mid-1980s, it seems to have been accepted by all concerned that if the moratorium was adopted, the effect would be to ban all whaling for States bound by the moratorium with the exception only of subsistence whaling and scientific whaling which complied with Article VIII. The intention behind paragraph 10 *(e)* was a comprehensive ban on whaling, subject only to the two exceptions just mentioned. Moreover, since the adoption of the moratorium, there appears to have been no suggestion by any State that the scope of paragraph 10 *(e)* was more limited.

20. An examination of what actually takes place in the course of JARPA II also supports the conclusion that, if whaling under JARPA II does not fall within the provisions of Article VIII and thus benefit from the exemption granted by paragraph 1 of that Article, then it must be regarded as whaling for commercial purposes and, therefore, thus as contrary to paragraph 10 *(e)*. The meat from whales taken under JARPA II is sold, so far as practicable and so far as there is a market for it, to customers in Japan. The sale of whale meat is a commercial activity and if whales are taken with a view to their meat being sold, then one of the purposes of that whaling is a commercial purpose. So long as JARPA II

whaling is in conformity with the provisions of Article VIII, paragraph 1, the existence of that commercial purpose raises no legal issue. On the contrary, paragraph 2 of Article VIII expressly permits (and indeed requires) that whales taken under special permits should be processed and the proceeds dealt with in accordance with the directions of the appropriate government. However, paragraph 2 is relevant only if whaling under JARPA II is in conformity with Article VIII, paragraph 1. If that is not the case, then that whaling falls to be assessed by reference to the provisions of paragraph 10 *(e)* (and, to the more limited extent that it is relevant, paragraph 7 *(b)*). At that point, the fact that meat from whales taken is intended for sale is sufficient to make the whaling activity one conducted for commercial purposes and thus a breach of the moratorium.

21. Demand for whale meat in Japan has been falling in recent years and significant quantities of whale meat acquired as a result of JARPA II whaling remain unsold. Yet that fact does not mean that the sale of whale meat ceases to be a commercial activity, or that the taking of whales whose meat is to be sold is not commercial whaling. An activity does not lose its commercial character simply because the commerce is unprofitable any more than, in the field of sovereign immunity, an activity has to be characterized as sovereign rather than commercial because the State engaging in it is making a loss.

22. That the supply of whale meat from JARPA II for Japanese consumers remains an important part of Japan's thinking regarding JARPA II is demonstrated by a statement made by the Director of the Japan Fisheries Agency, Mr. Kazuyoshi Honkawa, in the Japanese Diet in October 2012. That statement was made after the written pleadings in the present proceedings had closed, so it must be assumed that all concerned would have been aware of the significance of what he was saying. The statement is sufficiently important that it deserves to be quoted at some length.

> "Before the earthquake, Japan's scientific whaling programme supplied approximately 3,700 or 3,800 tonnes of whale meat. 2,000 tonnes of that was from the Southern Ocean. Most of that was minke whale. Minke whale meat is prized because it is said to have a very good flavour and aroma when eaten as sashimi and the like.
>
> Another 1,700 tonnes came from the North West Pacific Ocean in 2010, 120 tonnes of which was from coastal scientific whaling. So, just over 1,500 tonnes was from whales taken by the ICR [the Institute for Cetacean Research]. Most of this was from sei whales and Bryde's whales.

> In addition, 470 tonnes was from whales caught by small-type coastal whalers in 2010. These were Baird's beaked whales, which are whales that are very similar to dolphins. Meat from Baird's beaked whales is processed into a dried meat something like jerky. When you went to Ayukawa recently, the whalers from Ayukawa were engaged in taking Baird's beaked whales, and I believe it would be most unlikely that they would be handling minke whales from the Southern Ocean.
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> Consequently, we have said that the scientific whaling programme in the Southern Ocean was necessary to achieve a stable supply of minke whale meat." (Minutes of the Meeting of the Sub-committee of the House of Representatives Committee on Audit and Oversight of Administration, 23 October 2012; translation provided by Australia.)

This statement and, in particular, the final paragraph, clearly shows that the supply of whale meat from JARPA II to Japanese consumers has not ceased. So long as JARPA II whaling falls within the exemption granted by Article VIII, paragraph 1, of the Convention, this commercial aspect of JARPA II is perfectly lawful. If, however, JARPA II is not in conformity with Article VIII, paragraph 1, then this commercial aspect shows that Japan is in breach of its obligations under paragraphs 7 *(b)* and 10 *(e)* of the Schedule.

23. The critical question before the Court is, therefore, whether JARPA II whaling is in conformity with Article VIII, paragraph 1. If the conclusion is that it is not in conformity with Article VIII, paragraph 1, however, the result is not that Japan has violated its obligations under Article VIII. The question is critical because the answer will determine whether or not Japan has violated its obligations under paragraphs 7 *(b)*, 10 *(d)* and 10 *(e)* of the Schedule.

Whether JARPA II Whaling Falls within Article VIII, Paragraph 1

24. I agree with the reasoning in the Judgment that JARPA II whaling does not meet the requirements of Article VIII, paragraph 1, of the Convention. The principal reason why Japan is unable to rely upon the exemption conferred by Article VIII, paragraph 1, is that the numbers of whales authorized to be killed under JARPA II are not objectively reasonable in the light of the objectives of JARPA II. As explained above, the effect of Article VIII, paragraph 1, is to exempt the killing, taking and treating of whales from the other provisions of the Convention. Accordingly, it cannot be sufficient to establish that a research project like JARPA II has scientific objectives. To take advantage of the exemption contained in Article VIII, paragraph 1, it is necessary that the numbers of

whales to be killed are sufficiently related to the achievement of those objectives. That is where, in my opinion, Japan's case breaks down.

25. To see why, it is important to consider the relationship between JARPA II and the earlier JARPA programme. JARPA II shares certain objectives with JARPA and Japan has insisted upon the need for continuity between the two programmes. Thus, Japan has sought to explain its decision to embark upon the feasibility study for JARPA II before it received the results of the Scientific Committee's review of JARPA by maintaining that the need for continuity in the provision of data justified such a step. In addition, in designing JARPA II, Japan relied heavily upon work done in the course of JARPA. An important example is that, when it was asked by a Member of the Court what assessment it had made of the potential for using non-lethal methods in JARPA II, Japan referred only to a study carried out some years earlier in the course of JARPA; there was no suggestion that a fresh assessment had been carried out in respect of JARPA II. Yet JARPA II involved a dramatic increase in the number of whales to be killed. Under JARPA only minke whales were to be killed and the sample size for that species was initially set at 300, with numbers rising to 400 in the latter years of the programme. By contrast, the sample size for minke whales under JARPA II was set at more than double that for JARPA (850 whales with the possibility of going to a maximum of 935 a year). JARPA II also envisaged an annual take of 50 fin whales and 50 humpback whales. While Japan acceded to a request from the then Chair of the Commission not to kill any humpback whales and has not taken any during the lifetime of JARPA II, the permits issued each year under JARPA II continue to provide for the taking of up to 50 humpback whales. Japan maintains that this substantial increase in killing is justified by the more extensive research goals of JARPA II.

26. The objectives of JARPA II are set out at paragraphs 113-118 of the Judgment. A key difference from JARPA lies in the second objective, which is described as "modelling competition among whale species and future management objectives" (see Judgment, par. 115). That clearly requires research into more than one species of whale and was the principal reason for adding a sample size for fin whales and humpback whales. Yet, from the outset Japan has taken no humpback whales and the number of fin whales taken has been very small, falling far short of the sample size provided in JARPA II. It is noticeable that the independent expert called by Japan, Professor Walløe, stated, in answer to a question from a Member of the Court, that the fin whale sample size was unjustifiable and would not have yielded any useful data. Japan did not attempt to refute his answer. Japan is certainly not to be criticized for not having killed more fin whales and it deserves more credit than it has perhaps received for its decision to accede to the request from the Chair of the Commission

not to go ahead with its plan to take humpback whales. Nevertheless, there is no sign that Japan has made any adaptation to JARPA II as a result of these changed circumstances. It still maintains the sample size of 850 minke whales a year (though it has actually taken significantly fewer). Yet that figure was initially justified on the basis that it was necessary for modelling competition. It is not possible to model competition by the study of only one species. Japan maintains that it is obtaining data in respect of other species by the use of non-lethal methods but that merely begs the question why, if such methods supply the relevant information in respect of fin and humpback whales, can such methods not be employed more extensively in respect of minke whales.

27. If one sets aside the objective of modelling competition between whale species, the dramatic increase in the number of minke whales to be taken under JARPA II from those taken under JARPA becomes extremely difficult to justify. The other research objectives of JARPA II are sufficiently close to those of JARPA that it is difficult to see how they could justify more than doubling the sample size of minke whales. Moreover, there is no evidence that Japan has engaged in any serious attempt to assess what sample size is required in light of the changed circumstances resulting from the actual implementation of JARPA II.

28. That is just one aspect of the weakness of Japan's case but it is one which I found particularly significant. For that and for the other reasons given in the Judgment, I consider that JARPA II whaling cannot be brought within the provisions of Article VIII, paragraph 1. Consequently, in my view, that whaling entails a breach by Japan of its obligations under paragraphs 7 *(b)* and 10 *(d)*, in respect of fin whales, and paragraph 10 *(e)* in respect of all three species.

29. I do not consider, however, that Japan has been shown to have acted in bad faith. In advancing its case for a finding of bad faith, Australia quoted a number of statements by serving or retired Japanese officials which, it maintained, demonstrated that Japan's true purpose in launching its programmes of scientific whaling in the Antarctic (JARPA and then JARPA II) was a desire to keep its whaling industry alive. Australia particularly highlighted three such statements (CR 2013/7, pp. 27-28). The first was a statement to the Diet by the then Director-General of the Japan Fisheries Agency in 1984 (20 years before the start of JARPA II and at a time when Japan still maintained an objection to the commercial moratorium) that

> "after the moratorium commences, the path to ensure the continuation of whaling would be, for Southern Ocean whaling, to position it

> as a research whaling activity which has a scientific nature . . . the continuation of whaling ought to be planned for . . .".

The second was an extract from a memoir by a retired Director-General about how "scientific whaling was viewed as the only method available to carry on with the traditions of whaling", a statement which is even less persuasive as evidence of bad faith if, as Australia now accepts, the correct translation should have been "pass on the traditions of whaling". The third was a 2013 statement by a minister that "I don't think there will be any kind of an end for whaling by Japan". These statements, like the others cited in the Memorial (and the statement quoted at paragraph 22, above) suggest that science was not the only consideration for Japan, but that is not enough in itself to take JARPA II outside the scope of Article VIII, paragraph 1. It certainly does not suffice to make out a case of bad faith.

Japan's Procedural Obligations

30. I have voted in favour of the finding, in operative paragraph 6 of the Judgment, that Japan has not breached its obligations under paragraph 30 of the Schedule, because I consider that Australia has not made out its case that Japan failed to give the Scientific Committee the information regarding JARPA II permits required by that paragraph. Paragraph 30 requires the submission of certain information regarding proposed special permits to the Scientific Committee in sufficient time for the Committee to consider those permits and report to the Commission. Paragraph 30 gives the Committee a power of review, it does not confer upon it a power of approval (a point made clear by the late Sir Derek Bowett in his advice to the Commission regarding the proposal to insert what became paragraph 30 in the Schedule). While the JARPA II permits themselves are uninformative, the information required was nonetheless contained in the JARPA II research plan, which was shown to the Committee in good time.

31. Nevertheless, I must express my disquiet about one aspect of Japan's behaviour in this respect. Paragraph 30 of the Schedule has to be understood in the context of the broader duty of co-operation to which all Contracting Governments are subject. Japan did not contest the existence of that obligation. In my opinion, that duty means that a State is not free to adopt a formalistic approach to paragraph 30. On the contrary, the information which it gives must be such as to enable a meaningful review and the State must take account of the outcome of that review, even though it is not obliged to implement any recommendations that the Committee might make or to agree with the Committee's assessment of

the proposed permits. The Judgment demonstrates that — for whatever reason — Japan has not been able to implement the JARPA II research plan; it has abandoned the attempt to take humpback whales and its actual take of fin and minke whales has fallen far short of the sample sizes identified in the plan. Yet, the record shows that Japan has continued to submit special permits in identical terms throughout the years of JARPA II. It has not provided any information regarding whether, or how, the plan has been adapted to take account of the changed circumstances. It must, therefore, be open to question whether there has been a full compliance with the duty of co-operation.

The Decision not to Order a Second Round of Written Argument

32. Paragraph 6 of the Judgment records the fact that Japan requested, but Australia opposed, a second round of written argument in this case. The Court did not order a second round but decided instead to proceed straight to the oral phase. Since Japan made clear its disappointment with this decision and since the Judgment says almost nothing about it, I want briefly to explain why I consider the Court's decision to be justified.

33. The Rules of Court make clear that a second round of written pleadings is by no means automatic. Article 45, paragraph 2, provides that the Court *may* authorize a second round if the parties are so agreed or if the Court decides, *proprio motu*, or at the request of one of the parties, that a second round is necessary. In other words, unless the parties are agreed, the Court has a discretion to decide whether or not to order a second round if it considers that further pleadings are necessary.

34. Three considerations seem to me to be important in this regard. First, it must always be open to the Court to order a second round of written pleadings if the Court decides that this is necessary, for example because the Court considers it does not have sufficient information on a particular matter.

35. Secondly, the number of cases now being brought before the Court means that the Court has an obligation to ensure that proceedings do not become unnecessarily protracted. The Rules of Court make clear that the Applicant should set out the entirety of its case in the Memorial and the Respondent in the Counter-Memorial (Art. 49, paras. 1 and 2). A State should never hold part of its case — whether argument or evidence — in reserve for a second round.

36. Lastly, there is, in my view, a distinction between the Applicant and the Respondent when the Court comes to consider whether to accede to a request for a second round made by one party but opposed by the

other. The first round of written pleadings closes with the Counter-Memorial. That document will usually be the first indication which the Applicant receives of the Respondent's case. It may raise matters which the Applicant has not considered, or evidence which the Applicant needs the opportunity to refute. There is, therefore, a strong case for ordering a second round of written pleadings when the Applicant so requests; not to do so may occasion serious injustice if the Applicant is denied the opportunity to respond to evidence or argument raised by the Respondent in the Counter-Memorial. By contrast, when the Respondent prepares its Counter-Memorial, it has the benefit of having seen both the Application and the Memorial. It has a duty to set out its case in response in full in the Counter-Memorial. If, having seen the Counter-Memorial, the Applicant considers that it does not need a second round of written pleading, it is difficult to see on what grounds the Respondent can claim to need such a second round. It has already had the last word and no injustice is done by denying it the opportunity to rehearse or add to its case.

37. The one consideration in favour of ordering such a second round in the present case was that Japan had raised an objection to jurisdiction (though not as a preliminary objection) and wished to have an idea of the response it could expect from Australia. I accept that in some cases the nature of the jurisdictional objection might be such that a second round of written argument became necessary but I do not think that such was the case here. Japan's objection was based upon the interpretation of Australia's declaration under Article 36 (2) of the Statute. Consideration of that objection required no documents or other evidence beyond what had been submitted by Japan and what was already freely and publicly available and Japan, represented by very experienced counsel, can have been in little doubt what form Australia's response would take.

38. Accordingly, I think the Court was right to refuse the request for a second round of written argument.

(Signed) Christopher GREENWOOD.