SEPARATE OPINION OF JUDGE XUE

1. Although I concur with the Court's conclusion that special permits granted by Japan under JARPA II do not fall within the meaning of Article VIII, paragraph 1, of the International Convention for the Regulation of Whaling, much to my regret, I do not agree with all of the reasonings upon which the Judgment is based. My votes on paragraphs (3), (4) and (5) of the operative part are not based on the same legal considerations as those stated by the Court. As required by my judicial duty, I append this separate opinion to the Judgment with the explanation of my position.

I. Interpretation of Article VIII, Paragraph 1, of the Convention

2. The dispute between the Parties in the present case with regard to the issue whether or not Japan's granting of special permits to the JARPA II programme is in compliance with the International Convention for the Regulation of Whaling ("the Convention") essentially concerns the meaning of Article VIII, paragraph 1, of the Convention and its relationship with the rest of the treaty provisions. To adjudicate the dispute, the Court may arguably need to examine the scientific aspects of the case, but the legal aspects, in my opinion, should take the centre-stage of judicial review. In its reasoning, although the Court deals with each of the issues relating to treaty interpretation, these crucial issues do not receive sufficient consideration in relation to the legality of the JARPA II programme. Consequently its reasoning for the conclusions regarding alleged violations of the Schedule lacks some coherence.

3. Article VIII, paragraph 1, of the Convention states:

> "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."

In the pleadings, Japan insists on its right to grant special permits for JARPA II by adopting a strictly textual interpretation of this Article. Australia, on the other hand, challenges the legality of JARPA II's use of lethal sampling on the basis of the object and purpose of the Convention. Each Party underscores one side of the Convention.

4. Article VIII sets up a special category of whaling under the Convention, pursuant to which, a Contracting Party may issue special permits to its nationals to kill, take, and treat whales for purposes of scientific research (scientific whaling). In issuing such special permits, a Contracting Party may specify the number of killing and other conditions as it "thinks fit". Moreover, killing, taking and treating under special permits are exempt from the restrictions imposed on commercial whaling under the Convention, including the Schedule, which forms an integral part of the Convention.

5. It is clear that by these terms the Convention confers a discretionary power on the Contracting Parties with regard to scientific whaling. What is not clear from these terms, however, is to what extent a Contracting Party may exercise such discretion in granting special permits for scientific whaling. This is the very question that divides the Parties.

6. By its plain meaning, Article VIII, paragraph 1, of the Convention apparently leaves the matter of granting special permits in the hands of each Contracting Party. The term "thinks fit" implies a certain degree of appreciation by the authorizing State, given the fact that scientific programmes are designed and implemented at national level. In addition to the exemption from the operation of the Convention, procedural requirements under the Convention for reporting of such authorizations to the International Whaling Commission ("the Commission") and transmitting data and information to the designated organ of the Convention (Art. VIII, paras. 1 and 3) do not substantively affect or restrain this discretional power. Furthermore, review process in the Scientific Committee does not contain, apart from procedural formalities, any mandatory obligations on the authorizing State with respect to the granting of special permits; resolutions relating to scientific whaling are generally of a recommendatory nature. From that viewpoint, Japan's claim that the Contracting Parties enjoy an expansive right in issuing special permits, cannot be said to be untenable.

7. The weakness of Japan's interpretation of Article VIII, however, lies in the fact that the discretional power of the Contracting Parties is derived from the regulating régime of the Convention, therefore it cannot be deemed unlimited. The reason for this is threefold. First, in granting special permits for killing, taking and treating whales for scientific purposes, the Contracting Party must avoid any adverse effect on the stocks with a view to maintaining sustainable utilization and conservation of the resources, otherwise the very object and purpose of the Convention would be undermined, a point on which the Parties hold no different views.

8. Secondly, in assessing the state of the stocks for the consideration of scientific whaling, the Contracting Party inevitably has to pay attention to the situation of commercial whaling. Restrictions imposed thereof indicate the manageable level of the stocks. In other words, there is an intrinsic link between commercial whaling and scientific whaling, particularly when scientific whaling is purportedly to be carried out on a large scale and on a continuous basis. This aspect is borne out by the fact that prior to the moratorium on commercial whaling, such dispute as the current one with the JARPA II programme would not arise; lethal sampling did not pose an issue.

9. Thirdly, as it is true with every right, discretion under Article VIII, paragraph 1, as a corollary, also means a duty on every authorizing party to exercise the power properly and reasonably by virtue of the principle of good faith under the law of treaties. For these reasons, it cannot be said that Article VIII has bestowed a self-defined right on the Contracting Parties.

10. On the issuance of special permits, the Court states that notwithstanding the discretion enjoyed by a Contracting Party, "whether the killing, taking and treating of whales pursuant to a requested special permit is for purposes of scientific research cannot depend simply on that State's perception" (Judgment, para. 61). This statement, however, is left unexplained. The Court's view may be taken as self-evident; such determination has to be based on objective scientific assessment, checked against by external review. However, Japan's claim that according to the rules of treaty interpretation the meaning of Article VIII must be given first and foremost by its express terms, and so long as the relevant treaty provision on the issuance of special permits is not revised to that effect, it is up to each authorizing party to determine the granting of special permits, is a relevant issue. Technically speaking, the granting of special permits and review of proposed programmes are two subject-matters under the Convention. In my view, the Court should, first of all, address the issue whether the authorizing party can or cannot, as asserted by Japan, freely determine, as it "thinks fit", the number of killing, taking and treating of whales for purposes of scientific research, an issue that bears on the relationship between Article VIII and the other provisions of the Convention.

11. In the course of its 68 years' operation since 1946, the Convention, as an evolving instrument, has undergone considerable change by way of its Schedule amendments. Although terms on scientific whaling under Article VIII remain intact, various restrictions on commercial whaling for purposes of conservation have indeed exerted a creeping effect on the way in which scientific research may be conducted, particularly with respect to methodology and scale of sample size. Notwithstanding policy differences between the anti-whaling group and the whaling parties, the parties have generally recognized the importance of conservation for the protection of whale resources. Moreover, revision of guidelines and reviews of special permits by the Scientific Committee also move in the direction of conservation. With these developments, it is hard to claim that scientific whaling is totally detached, freestanding, from the operation of the Convention and that the "margin of appreciation", if any, for the Contracting Parties in granting special permits stays the same as before.

12. That said, as the decision to grant special permits solely rests within the discretion of the authorizing party, there is no point in considering whether such a decision is subjectively taken or not; the authorizing party is obliged to use its best knowledge to determine, as it perceives proper, whether or not to grant special permits for proposed scientific research programmes. Once adopted, that decision nevertheless is subject to review, scientific or judicial. The assessment of the decision of course cannot simply rely on the perception of the authorizing party, but must be conducted on an objective basis. The authorizing party should justify its decision with scientific evidence and sound reasoning.

II. The Standard of Review

13. In light of the foregoing, it is apparent that the standard of review by the Court should focus on legal issues. In the Judgment, the Court states that

> "[w]hen reviewing the grant of a special permit authorizing killing, taking and treating of whales, the Court will assess, first, whether the programme under which these activities occur involves scientific research. Secondly, the Court will consider if the killing, taking and treating of whales is 'for purposes of' scientific research by examining whether, in the use of lethal methods, the programme's design and implementation are reasonable in relation to achieving its stated objectives" (Judgment, para. 67).

This approach poses a number of questions, as revealed in the subsequent reasoning.

14. First, in assessing Japan's exercise of its right under Article VIII, paragraph 1, in granting special permits, judicial review of the Court should link with treaty interpretation. The question whether activities under JARPA II involve scientific research is a matter of fact rather than a matter of law, therefore it should be subject to scientific review. I take the view that it is not for the Court to determine what elements a scientific research should or should not contain, nor is it for the Court to adjudicate what kind of activities involve scientific research. As special permits are granted by the authorizing party pursuant to Article VIII, paragraph 1, of the Convention to programmes for purposes of scientific research, it should be presumed that activities under such programmes involve scientific research. It is up to Australia to prove with convincing evidence to the Court that such is not the case with JARPA II, with Japan having the right to rebuttal. As the Court stated in the *Pulp Mills* case, that, in accordance with the well-established principle *onus probandi incumbit actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts. This principle has been consistently upheld by the Court (see case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 71, para. 162; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 86, para. 68; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 31, para. 45; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 128, para. 204; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). It is not necessary for the Court itself to go over the key elements of JARPA II as part of its judicial review and ascertain that JARPA II activities "can broadly be characterized as 'scientific research'" (Judgment, para. 127); its finding, on the basis of the evidence presented to the Court, that Australia has failed to prove that JARPA II activities, in order to be qualified as scientific research, must satisfy the four criteria as identified by Australia, could sufficiently lead to the conclusion that Australia's claim against JARPA II activities as not involving scientific research is unfounded.

15. In its reasoning, the Court draws the distinction between the term "scientific research" and the phrase "for purposes of" in Article VIII, paragraph 1, of the Convention, which to a certain extent, dictates the standard of review as articulated by the Court. Accepting Australia's interpretation that these two terms are cumulative, the Court actually sets up two conditions for review: the programme activities must first be characterized as scientific research and additionally, they must serve purposes

of scientific research. As is stated above, determination of scientific research is primarily a matter of fact subject to scientific scrutiny. The phrase "for purposes of" cannot stand on its own without the modifier "scientific research". When the Court is tasked to determine whether, in the use of lethal sampling, the elements of JARPA II's design and implementation are reasonable in relation to its stated scientific objectives, it is actually set to assess the scientific merit of the programme. In that case the term "for purposes of" would mean to evaluate the design and implementation of JARPA II so as to see whether they are justifiable for achieving the objectives of the research programme. This interpretation, in my opinion, unduly complicates the meaning of the phrase "for purposes of scientific research" in Article VIII, paragraph 1, rendering the Court's role beyond its judicial purview.

16. Notwithstanding the above, I agree with the majority that in order to ascertain whether special permits for JARPA II genuinely serve purposes of scientific research, the Court may have to examine some relevant aspects of the design and implementation of JARPA II in the light of its stated objectives. As the case hinges on the legality of Japan's determination to grant special permits to JARPA II, the Court, in my view, should focus its review on the question whether Japan's issuance of special permits to JARPA II satisfies the requirement under Article VIII, paragraph 1, namely, for purposes of scientific research. The standard of review as agreed by the Parties that tests whether a State's decision to grant special permits is objectively reasonable, supported by coherent reasoning and respectable scientific evidence, should therefore primarily relate to special permits rather than the programme in general.

III. The JARPA II Programme in Light of Article VIII, Paragraph 1, of the Convention

17. In the Court's review, a few of its findings pertaining to Japan's determination to grant special permits to the JARPA II programme are important.

18. First, the Court finds that Japan does not prove that it has duly conducted feasibility studies on the use of non-lethal methods with an effort to reduce lethal sampling, thus failing its obligation to give due regard to the resolutions and Guidelines adopted by the Commission. It concludes that,

> "the papers to which Japan directed [the Court] reveal little analysis of the feasibility of using non-lethal methods to achieve the JARPA II research objectives. Nor do they point to consideration of the possibility of making more extensive use of non-lethal methods in order to reduce or eliminate the need for lethal sampling, either when JARPA II was proposed or in subsequent years. Given the expanded use of lethal methods in JARPA II, as compared to JARPA, this is difficult to reconcile with Japan's obligation to give due regard to IWC resolutions and Guidelines and its statement that JARPA II uses lethal methods only to the extent necessary to meet its scientific objectives." (Judgment, para. 144.)

19. Secondly, two pieces of probative evidence support the Court's finding that Japan's determination of sample sizes is influenced by its funding consideration. One is the 2007 document referred to by Japan to prove that it has given necessary consideration to the use of non-lethal methods in JARPA II. The document explains why certain biological parameters require lethal sampling, but it also suggests that lethal sampling be preferred because it provides a source of funding to offset the cost of the research. Secondly, Dr. Walløe, the expert called by Japan, also testifies in the oral proceedings before the Court that "Japanese scientists have not always given completely transparent and clear explanations of how sample sizes were calculated or determined". He admits that he is under the impression that JARPA II sample sizes had been "influenced by funding consideration", although he does not find that objectionable.

20. Thirdly, the Court finds that the JARPA II Research Plan lacks transparency in the reasons for selecting particular sample sizes for individual research items, a point agreed by the experts called by both Parties. The shortcomings in the design of the Research Plan are not explained by Japan with supporting evidence, which casts doubt on the reasonableness of the sample sizes in relation to achieving its objectives.

21. Lastly, in view of the evidence regarding the gap between the target sample sizes and the actual take in the implementation of the programme, the Court draws the conclusion that the target sample sizes are larger than reasonable for achieving JARPA II's objectives. The Court notes that the sample sizes for fin and humpback whales and review periods chosen cast doubt on the centrality of the objectives that Japan highlights as the rationale for the annual number of minke whale samples that it sets up.

22. These findings, among others, are decisive for the Court's ruling on Japan's decision to issue special permits for JARPA II. Important as they

are, in relation to the purposes of JARPA II, I think the Court should have given further consideration to the question of funding, as it bears directly on the pivotal issue of the case — the size of lethal sampling.

23. In its pleadings, Japan does not deny that funding consideration is involved in the determination of granting special permits, but asserts that such practice is normal in fishery research. Dr. Walløe does not deem it questionable either. Besides, Japan's explanation that for certain scientific research and data collection, non-lethal methods are "impractical, cost-ineffective and prohibitively expensive" does not appear a mere excuse for its lethal sampling, as this kind of situation often exists elsewhere in scientific research.

24. It is apparent that the use of lethal sampling in JARPA II per se does not pose an issue under the Convention; Article VIII clearly confers that discretion on the Contracting Parties. The Court agrees that under Article VIII, paragraph 2, the fact that a programme involves the sale of meat and the use of proceeds to fund research is not sufficient, taken alone, to cause a special permit to fall outside Article VIII. What remains at issue is whether the scale of lethal sampling for JARPA II is reasonable.

25. In my view, Japan fails to explain to the satisfaction of the Court how the sample sizes are calculated and determined with the aim of achieving the objectives of the programme. Technical complexity of the matter does not release it of the burden of proof, as the issue lies at the core of the dispute. Moreover, Japan does not succeed in refuting with solid evidence Australia's allegation that the funding consideration actually dictates its sample sizes and in proving that fundraising is just incidental and derivative from the research activities. It could have explained how JARPA II activities are funded and whether there are other financial sources that support the programme.

26. Furthermore, in response to Australia's claim that Japan's real intention in conducting JARPA II is to maintain its whaling operation and that the programme is commercial whaling in disguise, Japan's rebuttal is weak and unpersuasive. Even if fundraising through commercial means may not necessarily render the programme as commercial whaling, or commercial whaling in disguise, given the scale of lethal sampling and the unlimited duration of JARPA II, the cumulative effect of its lethal take on the conservation of whale resources is not insignificant and negligible, which gives all the more reason for requiring Japan to justify its decision on special permits.

27. Prior to the moratorium on commercial whaling, use of proceeds from the sale of whale meat to fund scientific research might be an acceptable practice among the Contracting Parties, insomuch as the stocks were not affected. Such "margin of appreciation" enjoyed by the parties, if any, however, becomes questionable when the moratorium on commercial whaling is imposed, because excessive scientific whaling would unavoidably undermine the collective effort of the Contracting Parties in the conservation measures. The term "for purposes of scientific research" under Article VIII, paragraph 1, should thus be strictly interpreted; sample sizes that are dictated by fundraising consideration, therefore, cannot be considered as "objectively reasonable", or "for purposes of scientific research".

28. It is based on these considerations that I agree with the Court's conclusion that JARPA II does not fall with the meaning of Article VIII, paragraph 1, of the Convention.

IV. Relationship between Article VIII, Paragraph 1, and the Schedule

29. Having reached the above conclusion, the Court turns to examine Australia's contention that Japan has breached three provisions of the Schedule by conducting JARPA II. The three provisions of the Schedule include: the obligation to respect zero catch limits for the killing, for commercial purposes, of whales from all stocks (paragraph 10 *(e)* of the Schedule); the factory ship moratorium (para. 10 *(d)*); and the prohibition on commercial whaling in the Southern Ocean Sanctuary (para. 7 *(b)*).

30. Under the Convention, there are basically three types of whaling involved: commercial whaling, scientific whaling and aboriginal subsistence whaling. Pursuant to Article 1, paragraph 1, of the Convention, the Schedule constitutes an integral part thereof. "All references to 'Convention' shall be understood as including the said Schedule either in its present terms or as amended in accordance with the provision of Article V." At the same time, Article VIII, paragraph 1, also provides that scientific whaling shall be exempt from the operation of this Convention, which means that restrictions and conditions relating to the granting of special permits for purposes of scientific research are not subject to the Schedule. Therefore, before addressing Australia's contention, the Court has to first determine the applicability of these three paragraphs to JARPA II.

31. The Court takes the view that all killing, taking and treating of whales that fall within neither scientific whaling under Article VIII, nor aboriginal subsistence whaling under paragraph 13 of the Schedule, will

be considered subject to the same restrictions as laid down in the three paragraphs. That is to say, since the Court reaches the conclusion that JARPA II does not fall within the meaning of Article VIII, paragraph 1, of the Convention, it would be regarded as commercial whaling. This is because, the Court says,

> "[t]he reference to 'commercial' whaling in paragraphs 7 *(b)* and 10 *(e)* of the Schedule can be explained by the fact that in nearly all cases this would be the most appropriate characterization of the whaling activity concerned. The language of the two provisions cannot be taken as implying that there exist categories of whaling which do not come within the provisions of either Article VIII, paragraph 1, of the Convention or paragraph 13 of the Schedule but which nevertheless fall outside the scope of the prohibitions in paragraphs 7 *(b)* and 10 *(e)* of the Schedule. Any such interpretation would leave certain undefined categories of whaling activity beyond the scope of the Convention and thus would undermine its object and purpose." (Judgment, para. 229.)

Paragraph 10 *(d)*, although without an explicit reference to commercial whaling in its terms, should equally apply to all the cases with regard to the prohibition of the use of factory ships except in scientific and aboriginal subsistence whaling.

32. Based upon the above reasoning, the Court finds that since the special permits under JARPA II do not fall within the meaning of Article VIII, paragraph 1, of the Convention, Japan thereby has not acted in conformity with its obligations under paragraphs 10 *(e)*, *(d)* and 7 *(b)* of the Schedule. With due respect, I find this line of reasoning quite confusing.

33. In the first place, the premise for the application of paragraphs 10 *(e)*, *(d)*, and paragraph 7 *(b)* to JARPA II is that the Court has determined that JARPA II is in fact a commercial whaling operation rather than a programme for purposes of scientific research. There is no evidence identified by the Court that supports this conclusion. On the contrary, in the Judgment, the Court ascertains that the programme has scientific objectives and its use of lethal methods per se is not objectionable. Moreover, it concludes that Japan has complied with its obligations under paragraph 30 of the Schedule in submitting in time proposed special permits to the Scientific Committee for review and comments.

34. Moreover, most of the shortcomings in JARPA II as analysed by the Court are, by and large, technical flaws associated with the design and implementation of the programme, which do not by themselves transform JARPA II into a commercial whaling operation. Fundraising, albeit by market sale of whale meat, does not necessarily alter the scientific nature of the programme, unless the Court finds bad faith on the part of Japan.

The conclusion of the Court that JARPA II activities do not fall within the meaning of Article VIII, paragraph 1, cannot be understood to mean that JARPA II activities thereby do not involve scientific research. That is to say, scientific whaling, even if with flaws, remains scientific in nature. It does not fall outside that category.

35. Furthermore, from a legal point of view, consequences of breach of Article VIII and that of the Schedule paragraphs can be different. In the former case, the conditions and the number of special permits may be revised or revoked upon the review and comments by the Scientific Committee. To put it in another way, as a technical matter, when the granting of special permits by Japan for JARPA II is found not within the meaning of Article VIII, paragraph 1, Japan is not prohibited to issue special permits for the programme, provided such issuance is brought in line with the requirement of Article VIII, paragraph 1. In this regard, JARPA II continues to fall within the purview of the Scientific Committee for periodical reviews. In the latter situation, however, as Japan is deemed breaching its international obligation under the Schedule of the Convention by violating the moratorium on commercial whaling, its international responsibility shall be invoked. Consequently, under the rules of State responsibility, Japan shall be obliged to revoke all the extant special permits and refrain from granting further for JARPA II, which would apparently forestall the Scientific Committee's review.

36. I vote with the majority on paragraphs (3), (4) and (5) of the operative clause because I am of the view that Japan's granting of special permits for JARPA II has been unduly excessive in relation to achieving its stated objectives, which may arguably have adverse impact on the effectiveness of the moratorium on commercial whaling. Nevertheless, JARPA II remains a programme for scientific research, in my opinion. Japan should be given the opportunity to address the shortcomings in the design and implementation of the programme in the Scientific Committee during the upcoming periodical review.

(Signed) XUE Hanqin.