Australian Government

Attorney-General's Department

Office of International Law

5 June 2013

His Excellency
Mr Philippe Couvreur
Registrar
International Court of Justice
Peace Palace
Carnegieplein 2
2517 KJ The Hague
NETHERLANDS

Dear Mr Couvreur

Whaling in the Antarctic (*Australia v. Japan: New Zealand Intervening*)

I have the honour to refer to your letter of 31 May 2013 enclosing a letter with an enclosure from the Agent of Japan dated 31 May 2013. That enclosure consists of a detailed analysis of the statements made by the two expert witnesses to be called on behalf of Australia by a scientist, Professor Judy E Zeh of the University of Washington, whom Japan describes as 'a former Chair of the IWC Scientific Committee'. The Agent of Japan states further that 'the main points of technical criticism [of Australia's experts' statements] in addition to those already set out in Japan's Counter-Memorial are reflected in the notes prepared by Professor Judy Zeh ... in preparation for Japan's responses to Australia's expert statements'. Japan has not offered Professor Zeh as an expert or witness.

Australia is concerned that Japan should not be permitted to undermine the process that the Court has put in place in this case for receiving scientific evidence, by submitting such evidence in a form which is new, untestable and comes late in the proceedings, just three weeks before the hearings. It circumvents all the timeframes established by the Court for notification of expert witnesses, intended to allow each Party to comment on the statements of scientific evidence. To the extent that it is to be treated as evidence, it is new and does not follow the requirements of the Court.

From the very commencement of this case, Australia has submitted that the Court should adopt the approach outlined by the Court in the case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay). This indicates that 'persons who provide evidence before the Court based on their scientific or technical knowledge ... should testify before the Court as experts ... so that they may be submitted to questioning by the other Party as well as by the Court' (Judgment of 20 April 2010, paragraph 167 quoted in Memorial of Australia, paragraph 1.21).

Australia had understood that Japan agreed with this approach. Indeed, Japan, in numerous interactions with the Court has stated repeatedly that scientific experts should be notified well in advance and provide full statements of expert evidence in preparation for examination and cross-examination in the course of the hearing. For example, on 4 September 2012, the Agent of Japan wrote to the Court stating 'I take this opportunity to confirm that the position of my Government remains the same as stated in my previous letter dated 26 July 2012 which includes the submission in

writing of evidence to be produced by the experts six weeks in advance of the oral hearings ...'. In his letter of 26 July 2012, the Agent of Japan stated 'However, my Government would like to reiterate our view that it would be advantageous for the good administration of justice that the Parties provide the Court and each other in advance with written evidence to be produced by their experts ...'.

Japan might seek to respond that since it is not calling Professor Zeh as an expert it is under no obligation to notify Professor Zeh as an expert or to provide a written statement from her prior to the hearing. However, what Japan has done by way of tendering the detailed comments of Professor Zeh is to seek to introduce expert evidence by the back door. This is plainly contrary to the process laid down in this case, and inconsistent with the views of the Court as expressed in the Pulp Mills Case. In this respect, it is notable that Japan sought and received the initial comments of Professor Zeh nearly six months ago, at the end of December 2012. This was well before the final date for notification of witnesses (28 January 2013). Japan offers no explanation why material received so long ago from someone who might be said to be an expert was not the subject of notification by 28 January 2013, nor submission of any statement by 15 April 2013, nor an application for the introduction of new evidence at a late stage. These actions of Japan would, if allowed to proceed, result in a manifest unfairness to Australia as a Party to the proceedings.

Article 57 of the Rules of Court, to which you advert in your letter of 17 October 2012, requires the Parties to 'communicate to the Registrar, in sufficient time before the opening of the oral proceedings, information regarding any evidence which it intends to produce ...'. Japan has not produced that information in relation to Professor Zeh. If the material is intended not to be expert evidence, but some form of additional written submission or further pleading it plainly falls outside the procedures that are applicable to this case.

For these reasons, Australia requests that the material set out in the document attached to the letter from the Agent of Japan dated 31 May 2013 not be treated as part of the Court's dossier and that no reference should be made to this document or its content during the oral proceedings.

Yours sincerely

W M Campbell QC
Agent of Australia