208. WHALING IN THE ANTARCTIC (AUSTRALIA V. JAPAN: NEW ZEALAND INTERVENING)

Judgment of 31 March 2014

On 31 March 2014, the International Court of Justice rendered its Judgment in the case concerning *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening).*

The Court was composed as follows: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judge *ad hoc* Charlesworth; Registrar Couvreur.

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The operative paragraph of the Judgment (para. 247) reads as follows:

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THE COURT,

(1) Unanimously,

Finds that it has jurisdiction to entertain the Application filed by Australia on 31 May 2010;

(2) By twelve votes to four,

Finds that the special permits granted by Japan in connection with JARPA II do not fall within the provisions of Article VIII, paragraph 1, of the International Convention for the Regulation of Whaling;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Keith, Skotnikov, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; *Judge* ad hoc Charlesworth;

AGAINST: *Judges* Owada, Abraham, Bennouna, Yusuf;

(3) By twelve votes to four,

Finds that Japan, by granting special permits to kill, take and treat fin, humpback and Antarctic minke whales in pursuance of JARPA II, has not acted in conformity with its obligations under paragraph 10 *(e)* of the Schedule to the International Convention for the Regulation of Whaling;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Keith, Skotnikov, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; *Judge* ad hoc Charlesworth;

AGAINST: *Judges* Owada, Abraham, Bennouna, Yusuf;

(4) By twelve votes to four,

Finds that Japan has not acted in conformity with its obligations under paragraph 10 (d) of the Schedule to the International Convention for the Regulation of Whaling in relation to the killing, taking and treating of fin whales in pursuance of JARPA II;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Keith, Skotnikov, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; *Judge* ad hoc Charlesworth;

AGAINST: *Judges* Owada, Abraham, Bennouna, Yusuf;

(5) By twelve votes to four,

Finds that Japan has not acted in conformity with its obligations under paragraph 7 (b) of the Schedule to the International Convention for the Regulation of Whaling in relation to the killing, taking and treating of fin whales in the "Southern Ocean Sanctuary" in pursuance of JARPA II;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Keith, Skotnikov, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; *Judge* ad hoc Charlesworth;

AGAINST: *Judges* Owada, Abraham, Bennouna, Yusuf;

(6) By thirteen votes to three,

Finds that Japan has complied with its obligations under paragraph 30 of the Schedule to the International Convention for the Regulation of Whaling with regard to JARPA II;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja;

AGAINST: *Judges* Sebutinde, Bhandari; *Judge* ad hoc Charlesworth;

(7) By twelve votes to four,

Decides that Japan shall revoke any extant authorization, permit or licence granted in relation to JARPA II, and refrain from granting any further permits in pursuance of that programme.

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Keith, Skotnikov, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; *Judge* ad hoc Charlesworth;

AGAINST: *Judges* Owada, Abraham, Bennouna, Yusuf".

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Judges Owada and Abraham appended dissenting opinions to the Judgment of the Court. Judge Keith appended a declaration to the Judgment of the Court; Judge Bennouna appended a dissenting opinion to the Judgment of the Court; Judge Cançado Trindade appended a separate opinion to the Judgment of the Court; Judge Yusuf appended a dissenting opinion to the Judgment of the Court; Judges Greenwood, Xue, Sebutinde and Bhandari appended separate opinions to the Judgment of the Court; Judge *ad hoc* Charlesworth appended a separate opinion to the Judgment of the Court.

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Chronology of the procedure (paras. 1-29)

The Court recalls that, on 31 May 2010, Australia filed in the Registry of the Court an Application instituting proceedings against Japan in respect of a dispute concerning "Japan's continued pursuit of a large-scale program of whaling under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic ('JARPA II')", in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling (hereinafter the "Convention" or the "ICRW"). The Court further recalls that, on 20 November 2012, New Zealand, pursuant to Article 63, paragraph 2, of the Statute, filed in the Registry of the Court a Declaration of Intervention in the case. In its Declaration, New Zealand stated that it "avail[ed] itself of the right . . . to intervene as a non-party in the proceedings brought by Australia against Japan in this case". By an Order of 6 February 2013, the Court decided that the Declaration of Intervention filed by New Zealand was admissible.

I. JURISDICTION OF THE COURT (paras. 30-41)

The Court notes that Australia invokes as the basis of the Court's jurisdiction the declarations made by both Parties under Article 36, paragraph 2, of the Court's Statute. It observes that Japan, for its part, contests the Court's jurisdiction over the dispute, arguing that it falls within reservation *(b)* of Australia's declaration, which Japan invokes on the basis of reciprocity. This reservation excludes from the Court's jurisdiction "any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation".

The Court considers that the disputes to which Australia's reservation *(b)* refers must either concern maritime delimitation in an area where there are overlapping claims or relate to the exploitation of such an area or of an area adjacent thereto. The existence of a dispute concerning maritime delimitation between the Parties is thus required according to both parts of the reservation. After noting that both Parties acknowledge that the present dispute is not about maritime delimitation, the Court examines whether JARPA II involves the exploitation of an area which is the subject of a dispute relating to delimitation or of an area adjacent to it. The Court observes in this regard that part of the whaling activities envisaged in JARPA II take place in the maritime zone claimed by Australia as relating to the asserted Australian Antarctic Territory or in an adjacent area, and the taking of whales, especially in considerable

numbers, could be viewed as a form of exploitation of a maritime area even if this occurs according to a programme for scientific research. However, while Japan has contested Australia's maritime claims generated by the asserted Australian Antarctic Territory, it does not claim to have any sovereign rights in those areas. The fact that Japan questions those maritime entitlements does not render the delimitation of these maritime areas under dispute as between the Parties. The Parties to the present proceedings have no overlapping claims to maritime areas which may render reservation *(b)* applicable. Moreover, the Court considers that the nature and extent of the claimed maritime zones are immaterial to the present dispute, which is about whether or not Japan's activities are compatible with its obligations under the ICRW. The Court therefore concludes that Japan's objection to the Court's jurisdiction cannot be upheld.

II. ALLEGED VIOLATIONS OF INTERNATIONAL OBLIGATIONS UNDER THE CONVENTION (paras. 42-243)

1. Introduction (paras. 42-50)

The Court notes that the ICRW was preceded by the 1931 Convention for the Regulation of Whaling (which prohibited the killing of certain categories of whales and required whaling operations by vessels of States parties to be licensed, but failed to address the increase in overall catch levels) and the 1937 International Agreement for the Regulation of Whaling (which, *inter alia*, prohibited the taking of certain categories of whales, designated seasons for different types of whaling, closed certain geographic areas to whaling and imposed further regulations on the industry; it also provided for the issuance by Contracting Governments of special permits to their nationals authorizing them to kill, take and treat whales for purposes of scientific research). Adopted on 2 December 1946, the ICRW entered into force for Australia on 10 November 1948 and for Japan on 21 April 1951; New Zealand deposited its instrument of ratification on 2 August 1949, but gave notice of withdrawal on 3 October 1968; it adhered again to the Convention with effect from 15 June 1976.

The Court notes that, in contrast to its predecessors, the ICRW does not contain substantive provisions regulating the conservation of whale stocks or the management of the whaling industry. These are to be found in the Schedule, which forms an integral part of the Convention and which is subject to amendments, to be adopted by the International Whaling Commission (the "IWC" or the "Commission"). An amendment becomes binding on a State party unless it presents an objection. In 1950, the Commission established a Scientific Committee which, according to paragraph 30 of the Schedule, *inter alia*, reviews and comments on special permits before they are issued by States parties to their nationals for purposes of scientific research under Article VIII, paragraph 1, of the Convention. Since the mid-1980s, the Scientific Committee has conducted its review of special permits on the basis of "Guidelines" issued or endorsed by the Commission. At the time that JARPA II was proposed in 2005, the applicable Guidelines had been collected in a document entitled "Annex Y: Guidelines for the Review of Scientific Permit Proposals" ("Annex Y"). The current Guidelines are set forth in a document entitled "Annex P: Process for the Review of Special Permit Proposals and Research Results from Existing and Completed Permits" ("Annex P").

The Court then proceeds with a presentation of the claims by Australia and responses by Japan. It recalls, in this regard, that Australia alleges that because JARPA II is not a programme for purposes of scientific research within the meaning of Article VIII of the

Convention, Japan has breached and continues to breach three substantive obligations under the Schedule: the obligation to respect the moratorium setting zero catch limits for the killing of whales from all stocks for commercial purposes (para. 10 *(e)*), the obligation not to undertake commercial whaling of fin whales in the Southern Ocean Sanctuary (para. 7 *(b)*), and the obligation to observe the moratorium on the taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships (para. 10 *(d)*). Australia further alleges that Japan has violated procedural requirements for proposed scientific permits set out in paragraph 30 of the Schedule. Japan contests all of these allegations. With regard to the substantive obligations, it argues that none of the provisions invoked by Australia applies to JARPA II, as this programme has been undertaken for purposes of scientific research and is therefore covered by the exemption provided for in Article VIII, paragraph 1, of the Convention. Japan also contests any breach of the procedural requirements stated in paragraph 30 of the Schedule.

2. Interpretation of Article VIII, paragraph 1, of the Convention (paras. 51-97)

The Court then turns to its interpretation of Article VIII, paragraph 1, of the Convention, which reads as follows:

> "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."

The Court first examines the function of this provision. It notes that Article VIII is an integral part of the Convention and, therefore, has to be interpreted in light of its object and purpose and taking into account its other provisions, including the Schedule. The Court considers, however, that since Article VIII, paragraph 1, specifies that "the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention", whaling conducted under a special permit which meets the conditions of Article VIII is not subject to the obligations under the above-mentioned paragraphs 10 *(e)*, 7 *(b)*, and 10 *(d)* of the Schedule.

The Court then analyses the relationship between Article VIII and the object and purpose of the Convention. Taking into account the preamble and other relevant provisions of the Convention referred to above, the Court observes that neither a restrictive nor an expansive interpretation of Article VIII is justified. The Court notes that programmes for purposes of scientific research should foster scientific knowledge; they may pursue an aim other than either conservation or sustainable exploitation of whale stocks. This is also reflected in the Guidelines issued by the IWC for the review of scientific permit proposals by the Scientific Committee. In particular, the Guidelines initially applicable to JARPA II, Annex Y, referred not only to programmes that "contribute information essential for rational management of the stock" or those that are relevant for "conduct[ing] the comprehensive assessment" of the moratorium on commercial whaling, but also those responding to "other critically important research needs". The current Guidelines, Annex P, list three broad categories of objectives. Besides programmes aimed at "improv[ing] the conservation and

management of whale stocks", they envisage programmes which have as an objective to "improve the conservation and management of other living marine resources or the ecosystem of which the whale stocks are an integral part" and those directed at "test[ing] hypotheses not directly related to the management of living marine resources".

The Court next discusses the power of the State issuing a special permit and considers that Article VIII gives discretion to a State party to the ICRW to reject the request for a special permit or to specify the conditions under which a permit will be granted, but that the question 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.

The Court then sets out the standard of review it will apply when examining the grant of a special permit authorizing the killing, taking and treating of whales on the basis of Article VIII, paragraph 1, of the Convention: it will assess, first, whether the programme under which these activities occur involves scientific research, and secondly, whether, in the use of lethal methods, the programme's design and implementation are reasonable in relation to achieving its stated objectives.

The Court observes that, in applying the above standard of review, it is not called upon to resolve matters of scientific or whaling policy. The Court is aware that members of the international community hold divergent views about the appropriate policy towards whales and whaling, but it is not for the Court to settle these differences. The Court's task is only to ascertain whether the special permits granted in relation to JARPA II fall within the scope of Article VIII, paragraph 1, of the ICRW.

With regard to the meaning of the phrase "for purposes of scientific research" the Court considers that the two elements of that phrase "scientific research" and "for purposes of" are cumulative. As a result, even if a whaling programme involves scientific research, the killing, taking and treating of whales pursuant to such a programme does not fall within Article VIII unless these activities are "for purposes of" scientific research. The Court notes that the term "scientific research" is not defined by the Convention and that Australia, relying primarily on the views of one of the scientific experts that it called, maintains that scientific research (in the context of the Convention) has four essential characteristics: defined and achievable objectives (questions or hypotheses) that aim to contribute to knowledge important to the conservation and management of stocks; "appropriate methods", including the use of lethal methods only where the objectives of the research cannot be achieved by any other means; peer review; and the avoidance of adverse effects on stock. The Court is not persuaded that activities must satisfy the four criteria advanced by Australia in order to constitute "scientific research" in the context of Article VIII. The Court states that these criteria appear largely to reflect what one of the experts called by Australia regarded as well-conceived scientific research, rather than serving as an interpretation of the term as used in the Convention. Nor does the Court consider it necessary to devise alternative criteria or to offer a general definition of "scientific research".

Turning next to the meaning of the term "for purposes of", the Court observes that even if the stated research objectives of a programme are the foundation of a programme's design, it does not need to pass judgment on the scientific merit or importance of those objectives in order to assess the purpose of the killing of whales under such a programme, nor is it for the Court to decide whether the design and implementation of a programme are the best possible means of achieving its stated objectives. The Court reiterates that in order to ascertain whether a programme's use of lethal methods is for purposes of scientific research,

it will consider whether the elements of a programme's design and implementation are reasonable in relation to its stated scientific objectives. Such elements may include: decisions regarding the use of lethal methods; the scale of the programme's use of lethal sampling; the methodology used to select sample sizes; a comparison of the target sample sizes and the actual take; the time frame associated with a programme; the programme's scientific output; and the degree to which a programme co-ordinates its activities with related research projects.

The Court notes that, as the Parties and the intervening State accept, Article VIII, paragraph 2, permits the processing and sale of whale meat incidental to the killing of whales pursuant to the grant of a special permit under Article VIII, paragraph 1. In the Court's view, the fact that a programme involves the sale of whale meat and the use of proceeds to fund research is not sufficient, taken alone, to cause a special permit to fall outside Article VIII. Other elements would have to be examined, such as the scale of a programme's use of lethal sampling, which might suggest that the whaling is for purposes other than scientific research. In particular, a State party may not, in order to fund the research for which a special permit has been granted, use lethal sampling on a greater scale than is otherwise reasonable in relation to achieving the programme's stated objectives.

The Court observes that a State often seeks to accomplish more than one goal when it pursues a particular policy. Moreover, an objective test of whether a programme is for purposes of scientific research does not turn on the intentions of individual government officials, but rather on whether the design and implementation of a programme are reasonable in relation to achieving the stated research objectives. Accordingly, the Court considers that 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. At the same time, such motivations cannot justify the granting of a special permit for a programme that uses lethal sampling on a larger scale than is reasonable in relation to achieving the programme's stated research objectives. The research objectives alone must be sufficient to justify the programme as designed and implemented.

3. JARPA II in light of Article VIII of the Convention (paras. 98-227)

The Court then describes JARPA II and its predecessor, JARPA, before examining whether the design and implementation of JARPA II are reasonable in relation to achieving the programme's stated research objectives.

A. Description of the programmes (paras. 100-126)

The Court recalls that in 1982, the IWC amended the Schedule of the Convention to adopt a moratorium on commercial whaling. Japan made a timely objection to the amendment, which it withdrew in 1986. The following season, it began the JARPA programme, for which it issued special permits pursuant to Article VIII, paragraph 1, of the Convention. The 1987 JARPA Research Plan described JARPA as, *inter alia*, "a program for research on the southern hemisphere minke whale and for preliminary research on the marine ecosystem in the Antarctic", which was "designed to estimate the stock size" of southern hemisphere minke whales in order to provide a "scientific basis for resolving problems facing the IWC" relating to "the divergent views on the moratorium". To those ends, it proposed annual lethal sample sizes of 825 Antarctic minke whales and 50 sperm whales from two "management areas" in the Southern Ocean. Later, the proposal to sample sperm whales by lethal methods was dropped from the programme and the sample size for Antarctic minke whales was reduced to 300 for JARPA's first seven seasons. Japan explains that the decision

to reduce the sample size from 825 to 300 resulted in the extension of the research period, which made it possible to obtain accurate results with smaller sample sizes. Beginning in the 1995-1996 season, the maximum annual sample size for Antarctic minke whales was increased to 400, plus or minus 10 per cent. In total, more than 6,700 Antarctic minke whales were killed over the course of JARPA's 18-year history.

In March 2005, Japan submitted the JARPA II Research Plan to the Scientific Committee and launched the new programme in November 2005, prior to the December 2006 final review of JARPA by the Scientific Committee. As was the case under JARPA, the special permits for JARPA II are issued by Japan to the Institute of Cetacean Research, a foundation established in 1987 as a "public-benefit corporation" under Japan's Civil Code. JARPA II contemplates the lethal sampling of three whale species (Antarctic minke whales, fin whales and humpback whales) and its Research Plan describes the key elements of the programme's design, including: (i) its four research objectives (monitoring of the Antarctic ecosystem, modelling competition among whale species and future management objectives, elucidation of temporal and spatial changes in stock structure, and improving the management procedure for Antarctic minke whale stocks); (ii) its research period and area (structured in six-year phases, JARPA II is a long-term research programme without a specified termination date, which operates in an area that is located within the Southern Ocean Sanctuary established in paragraph 7 *(b)* of the Schedule); (iii) its research methods and sample sizes (a mixture of lethal sampling of 850 Antarctic minke whales, 50 fin whales and 50 humpback whales, as well as non-lethal methods, namely biopsy sampling, satellite tagging and whale sighting surveys); and (iv) the expected effect on whale stocks (the Research Plan states that, based on current abundance estimates, the planned take of each species is too small to have any negative effect).

B. Whether the design and implementation of JARPA II are reasonable in relation to achieving the programme's stated research objectives (paras. 127-227)

In light of the applicable standard of review, the Court then examines whether the design and implementation of JARPA II are reasonable in relation to achieving the programme's stated objectives.

(a) ***Japan's decisions regarding the use of lethal methods*** (paras. 128-144)

The Court considers that the evidence shows that, at least for some of the data sought by JARPA II researchers, non-lethal methods are not feasible. On this basis, and given that the value and reliability of data collected are a matter of scientific opinion, the Court finds no basis to conclude that the use of lethal methods is per se unreasonable in the context of JARPA II. Instead, it looks more closely at the details of Japan's decisions regarding the use of lethal methods in JARPA II and the scale of their use in the programme. In this regard, the Court mentions three reasons why the JARPA II Research Plan should have included some analysis of the feasibility of non-lethal methods as a means of reducing the planned scale of lethal sampling in the programme: (i) IWC resolutions and Guidelines call upon States parties to take into account whether research objectives can be achieved using non-lethal methods; (ii) Japan states that, for reasons of scientific policy, "[i]t does not . . . use lethal means more than it considers necessary" and that non-lethal alternatives are not practical or feasible in all cases; and (iii) the two experts called by Australia referred to significant advances in a wide range of non-lethal research techniques over the past 20 years and described some of those developments and their potential application with regard to JARPA II's stated objectives.

The Court finds no evidence of studies by Japan of the feasibility or practicability of non-lethal methods, either in setting the JARPA II sample sizes or in later years in which the programme has maintained the same sample size targets, or of any examination by Japan whether it would be feasible to combine a smaller lethal take and an increase in non-lethal sampling as a means to achieve JARPA II's research objectives.

(b) ***The scale of the use of lethal methods in JARPA II*** (paras. 145-212)

The Court then examines the scale of the use of lethal methods in JARPA II. Comparing JARPA II and JARPA sample sizes, the Court recalls that the JARPA II sample size for minke whales (850 plus or minus 10 per cent) is approximately double the minke whale sample size for the last years of JARPA, and that JARPA II sets sample sizes for two additional species fin and humpback whales that were not the target of lethal sampling under JARPA. The Court notes, however, that the comparison of the two research plans also reveals considerable overlap between the subjects, objectives, and methods of the two programmes. The Court considers that these similarities cast doubt on Japan's argument that the JARPA II objectives relating to ecosystem monitoring and multi-species competition are distinguishing features of the latter programme that call for a significant increase in the minke whale sample size and the lethal sampling of two additional species. The Court also refers to Japan's emphasis on the need for continuity between the two programmes as a justification for launching JARPA II without waiting for the results of the Scientific Committee's final review of JARPA, noting that weaknesses in Japan's explanation for the decision to proceed with the JARPA II sample sizes prior to the final review of JARPA lend support to the view that those sample sizes and the launch date for JARPA II were not driven by strictly scientific considerations.

Regarding the determination of species-specific sample sizes, the Court examines the five steps in the process of sample size determination, noting those steps that give rise to disagreement between the Parties. In this regard, it reiterates that it does not seek to pass judgment on the scientific merit of the JARPA II objectives and that the activities of JARPA II can broadly be characterized as "scientific research". With regard to the setting of sample sizes, the Court indicates also that it is not in a position to conclude whether a particular value for a given variable has scientific advantages over another; it rather seeks only to evaluate whether the evidence supports a conclusion that the sample sizes are reasonable in relation to achieving JARPA II's stated objectives. The Court concludes that, taken together, the evidence relating to the determination of species-specific sample sizes provides scant analysis and justification for the underlying decisions that generate the overall sample size.

Comparing the sample size and actual take, the Court notes a significant gap between the JARPA II target sample sizes and the actual number of whales that have been killed in the implementation of the programme: a total of 18 fin whales have been killed over the first seven seasons of JARPA II, including ten fin whales during the programme's first year when the feasibility of taking larger whales was under study. In subsequent years, zero to three fin whales have been taken annually. No humpback whales have been killed under JARPA II. Japan recounts that after deciding initially not to sample humpback whales during the first two years of JARPA II, it "suspended" the sampling of humpback whales as of 2007. The Court observes, however, that the permits issued for JARPA II since 2007 continue to authorize the take of humpback whales. Concerning minke whales, notwithstanding the target sample size of 850, the actual take under JARPA II has fluctuated from year to year: 853 minke whales during the 2005-2006 season, approximately 450 in the several seasons following, 170 in the 2010-2011 season and 103 in the 2012-2013 season.

Analysing Australia's contention that the gap between the target sample sizes and the actual take undermines Japan's position that JARPA II is a programme for purposes of scientific research, the Court observes that, despite the number of years in which the implementation of JARPA II has differed significantly from the design of the programme, Japan has not made any changes to the JARPA II objectives and target sample sizes, which are reproduced in the special permits granted annually. In the Court's view, 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 a far more limited actual take, cast further doubt on the characterization of JARPA II as a programme for purposes of scientific research. This evidence suggests, in fact, that the target sample sizes are larger than are reasonable in relation to achieving JARPA II's stated objectives. The fact that the actual take of fin and humpback whales is largely, if not entirely, a function of political and logistical considerations, further weakens the purported relationship between JARPA II's research objectives and the specific sample size targets for each species — in particular, the decision to engage in the lethal sampling of minke whales on a relatively large scale.

(c) ***Additional aspects of the design and implementation of JARPA II*** (paras. 213-222)

The Court then turns to several additional aspects of JARPA II to which the Parties called attention. With respect to the open-ended time frame of JARPA II, the Court observes that with regard to a programme for purposes of scientific research, as Annex P indicates, a "time frame with intermediary targets" would have been more appropriate. Examining the limited scientific output of JARPA II to date, the Court observes that although the first research phase of JARPA II (2005-2006 to 2010-2011) has already been completed, Japan points to only two peer-reviewed papers that have resulted from the programme to date. Furthermore, the Court notes that these papers do not relate to the JARPA II objectives and rely on data collected from minke whales caught during the JARPA II feasibility study. In light of the fact that JARPA II has been going on since 2005 and has involved the killing of about 3,600 minke whales, the Court considers that the scientific output to date is limited. Concerning co-operation with other research institutions, the Court observes that some further evidence of co-operation between JARPA II and other domestic and international research institutions could have been expected in light of the programme's focus on the Antarctic ecosystem and environmental changes in the region.

(d) ***Conclusion regarding the application of Article VIII, paragraph 1, to JARPA II*** (paras. 223-227)

The Court finds that the use of lethal sampling per se is not unreasonable in relation to the research objectives of JARPA II. However, as compared to JARPA, the scale of lethal sampling in JARPA II is far more extensive with regard to Antarctic minke whales, and the programme includes the lethal sampling of two additional whale species. The Court thus considers that the target sample sizes in JARPA II are not reasonable in relation to achieving the programme's objectives. First, the broad objectives of JARPA and JARPA II overlap considerably. To the extent that the objectives are different, the evidence does not reveal how those differences lead to the considerable increase in the scale of lethal sampling in the JARPA II Research Plan. Secondly, the sample sizes for fin and humpback whales are too small to provide the information that is necessary to pursue the JARPA II research objectives based on Japan's own calculations, and the programme's design appears to prevent random sampling of fin whales. Thirdly, the process used to determine the sample size for minke whales lacks transparency, as the experts called by each of the Parties agreed. Fourthly, some

evidence suggests that the programme could have been adjusted to achieve a far smaller sample size, and Japan does not explain why this was not done. The evidence before the Court further suggests that little attention was given to the possibility of using non-lethal research methods more extensively to achieve the JARPA II objectives and that funding considerations, rather than strictly scientific criteria, played a role in the programme's design.

The Court states that these problems with the design of JARPA II must also be considered in light of its implementation. First, no humpback whales have been taken, and Japan cites non-scientific reasons for this. Secondly, the take of fin whales is only a small fraction of the number that the JARPA II Research Plan prescribes. Thirdly, the actual take of minke whales has also been far lower than the annual target sample size in all but one season. Despite these gaps between the Research Plan and the programme's implementation, Japan has maintained its reliance on the JARPA II research objectives — most notably, ecosystem research and the goal of constructing a model of multi-species competition — to justify both the use and extent of lethal sampling prescribed by the JARPA II Research Plan for all three species. Neither JARPA II's objectives nor its methods have been revised or adapted to take account of the actual number of whales taken. Nor has Japan explained how those research objectives remain viable given the decision to use six-year and 12-year research periods for different species, coupled with the apparent decision to abandon the lethal sampling of humpback whales entirely and to take very few fin whales. Other aspects of JARPA II also cast doubt on its characterization as a programme for purposes of scientific research, such as its open-ended time frame, its limited scientific output to date, and the absence of significant co-operation between JARPA II and other related research projects.

Taken as a whole, the Court considers that JARPA II involves activities that can broadly be characterized as scientific research, but that the evidence does not establish that the programme's design and implementation are reasonable in relation to achieving its stated objectives. The Court therefore concludes that the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II are not "for purposes of scientific research" pursuant to Article VIII, paragraph 1, of the Convention.

4. Conclusions regarding alleged violations of the Schedule (paras. 228-233)

The Court turns next to the implications of the above conclusion, in light of Australia's contention that Japan has breached three provisions of the Schedule that set forth restrictions on the killing, taking and treating of whales: the obligation to respect zero catch limits for the killing for commercial purposes of whales from all stocks (para. 10 *(e)*); the factory ship moratorium (para. 10 *(d)*); and the prohibition on commercial whaling in the Southern Ocean Sanctuary (para. 7 *(b)*).

The Court observes that the precise formulations of the three Schedule provisions invoked by Australia differ from each other. The "factory ship moratorium" makes no explicit reference to commercial whaling, whereas the requirement to observe zero catch limits and the provision establishing the Southern Ocean Sanctuary express their prohibitions with reference to "commercial" whaling. In the view of the Court, despite these differences in wording, the three Schedule provisions are clearly intended to cover all killing, taking and treating of whales that is neither "for purposes of scientific research" under Article VIII, paragraph 1, of the Convention, nor aboriginal subsistence whaling under paragraph 13 of the Schedule, which is not germane to this case. The 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. It may also be observed that at no point in the present proceedings did the Parties and the intervening State suggest that such additional categories exist.

Proceeding therefore on the basis that whaling that falls outside Article VIII, paragraph 1, other than aboriginal subsistence whaling, is subject to the three Schedule provisions invoked by Australia, the Court reaches the following conclusions.

(i) Concerning the moratorium on commercial whaling contained in paragraph 10 *(e)* of the Schedule, the Court observes that, from 2005 to the present, Japan, through the issuance of JARPA II permits, has set catch limits above zero for three species 850 for minke whales, 50 for fin whales and 50 for humpback whales. The Court concludes therefore that Japan has not acted in conformity with its obligations under paragraph 10 *(e)* in each of the years in which it has granted permits for JARPA II (2005 to the present) because those permits have set catch limits higher than zero.

(ii) Regarding the factory ship moratorium contained in paragraph 10 *(d)* of the Schedule, the Court considers that by using the factory ship *Nisshin Maru*, as well as other vessels which have served as whale catchers, for the purpose of hunting, taking, towing, holding on to, or scouting for whales, Japan has not acted in conformity with its obligations under paragraph 10 *(d)* in each of the seasons during which fin whales were taken, killed and treated in JARPA II.

(iii) With respect to the Southern Ocean Sanctuary established by paragraph 7 *(b)* of the Schedule, the Court observes that this provision does not apply to minke whales in relation to Japan (as a consequence of Japan's objection to the paragraph). It further observes that JARPA II operates within the Southern Ocean Sanctuary and concludes that Japan has not acted in conformity with its obligations under paragraph 7 *(b)* in each of the seasons of JARPA II during which fin whales have been taken.

5. Alleged non-compliance by Japan with its obligations under paragraph 30 of the Schedule (paras. 234-242)

The Court recalls that Australia further asks it to adjudge and declare that Japan violated its obligation to comply with paragraph 30 of the Schedule. This provision requires Contracting Governments to make proposed permits available to the IWC Secretary before they are issued, in sufficient time to permit review and comment by the Scientific Committee, and sets out a list of items that is to be included in proposed permits.

As regards the question of timing, the Court observes that Japan submitted the JARPA II Research Plan for review by the Scientific Committee in advance of granting the first permit for the programme, and that subsequent permits that have been granted on the basis of that proposal must be submitted to the Commission pursuant to Article VIII, paragraph 1, of the Convention. The Court notes that Australia does not contest that Japan has done so with regard to each permit that has been granted for JARPA II. As regards the substantive requirements of paragraph 30, the Court finds that the JARPA II Research Plan, which constitutes the proposal for the grant of special permits, sets forth the information specified

by that provision, as was recognized by the Scientific Committee in 2005 in its review of the JARPA II Research Plan. The Court is of the view that the lack of detail in the permits themselves is consistent with the fact that the programme is a multi-year programme, as described in the JARPA II Research Plan. Japan's approach thus accords with the practice of the Scientific Committee, and the Court concludes that Japan has met the requirements of paragraph 30 as far as JARPA II is concerned.

III. REMEDIES (paras. 244-246)

In addition to requesting the Court to find that the killing, taking and treating of whales under special permits granted for JARPA II is not for purposes of scientific research within the meaning of Article VIII and that Japan thus has violated three paragraphs of the Schedule, Australia asks the Court to adjudge and declare that Japan shall: "*(a)* refrain from authorizing or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII; *(b)* cease with immediate effect the implementation of JARPA II; and *(c)* revoke any authorization, permit or licence that allows the implementation of JARPA II." The Court observes that, because JARPA II is an ongoing programme, measures that go beyond declaratory relief are warranted. The Court therefore orders that Japan shall revoke any extant authorization, permit or licence to kill, take or treat whales in relation to JARPA II, and refrain from granting any further permits under Article VIII, paragraph 1, of the Convention, in pursuance of that programme.

The Court sees no need to order the additional remedy requested by Australia, which would require Japan to refrain from authorizing or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII. In the view of the Court, as that obligation already applies to all States parties, it is to be expected that Japan will take account of the reasoning and conclusions contained in this Judgment as it evaluates the possibility of granting any future permits under Article VIII, paragraph 1, of the Convention.

Dissenting opinion of Judge Owada

In his dissenting opinion, Judge Owada states that, to his greatest regret, he cannot associate himself with the Judgment in terms of the conclusions stated in paragraphs 2, 3, 5 and 7 of its operative part, as well as the reasoning stated in the reasoning part. Judge Owada writes that his disagreement lies with the understanding of the Judgment on the basic character of the International Convention for the Regulation of Whaling ("the Convention"), with the methodology the Judgment employs for interpreting and applying the provisions of the Convention, and thus with a number of conclusions that it reaches.

I. Jurisdiction

Judge Owada begins his dissenting opinion by noting that, on the issue of the Court's jurisdiction, he retains certain reservations on some aspects of the reasoning of the Judgment, but concurs with the Judgment's conclusion that the Court has jurisdiction. He also places on record his reservation that under the somewhat unfortunate procedural circumstances, the Parties were not provided in the proceedings with ample opportunities to develop their respective arguments on the issue of jurisdiction.

II. The object and purpose of the Convention

Judge Owada next looks at the object and purpose of the Convention. He remarks that there are two opposing views regarding the Convention. According to the first view, there has

been an evolution in the economic-social vista of the world surrounding whales and whaling over the years since 1946, and this is to be reflected in the interpretation and the application of the Convention. According to the second view, the juridico-institutional basis of the Convention has not changed since it was drafted, based as it was on the well-established principles of international law relating to the conservation and management of fishing resources, including whales, and this basic character of the Convention should essentially be maintained. This, according to Judge Owada, is the fundamental divide that separates the legal positions of Australia and New Zealand, on the one hand, and Japan, on the other.

In examining the object and purpose of the Convention, Judge Owada notes that it was created in the face of a history of unchecked whaling and weak regulation that came to threaten the sustainability of whale stocks and thus the viability of the whaling industry, and should be understood in the context of this situation. Judge Owada further observes that the object and purpose of the Convention is clearly enunciated in its Preamble. According to Judge Owada, it is clear that the object and purpose of the Convention is to pursue the goal of achieving the twin purposes of the sustainability of the maximum sustainable yield of the stocks in question and the viability of the whaling industry. Nowhere in the Convention is to be found the idea of a total permanent ban on the catch of whales. Judge Owada also points out that this is confirmed by the Verbatim Record of the International Whaling Commission which voted for the moratorium on whaling.

According to Judge Owada, it is of cardinal importance that the Court understands this object and purpose of the Convention in its proper perspective, which defines the essential characteristics of the régime established under the Convention. In Judge Owada's view, the Judgment has failed to engage in analysing the essential characteristics of the régime of the Convention. The Judgment's laconic statement that "[t]he functions conferred on the [International Whaling] Commission have made the Convention an evolving instrument" does not specify what this implies. Judge Owada finds that the Convention is not malleable as such in the legal sense, according to the changes in the surrounding socio-economic environments.

III. The essential characteristics of the regulatory régime under the Convention

Judge Owada states that, for the purpose of understanding the essential characteristics of the régime established under the Convention, the structure of the Convention has to be analysed in some detail. In this vein, Judge Owada observes that (1) the Contracting Governments have created an International Whaling Commission ("IWC") as executive organ, which can take a decision by a three-fourths majority, if action is required in pursuance of Article V; (2) under Article V, the IWC may amend provisions of the Schedule, which forms an integral part of the Convention, by adopting regulations with respect to the conservation and utilization of whale resources, subject to certain conditions; (3) the IWC may also make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of the Convention; and (4) notwithstanding anything contained in the Convention, a 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 Article VIII shall be exempt from the operation of the Convention.

Judge Owada states that, based on what has been summarized above, it seems fair to conclude that the Convention has created a kind of self-contained regulatory régime on whales and whaling, although it goes without saying that such a system providing for the autonomy of the Parties is not free from the process of judicial review by the Court. Judge Owada further notes that, within this self-contained regulatory régime, no power of decision-making by a majority is given to the IWC automatically to bind the Contracting Parties, and no amendments to the Schedule will become effective in relation to a Contracting Party who objects to the amendments in question. Judge Owada recalls that, following the amendment to the Schedule to ban commercial whaling of all species beginning in the 1985/86 season, Japan did eventually exercise its right to raise objection under Article V, which it later withdrew under pressure from the United States.

According to Judge Owada, the argument advanced with regard to this situation by the Applicant, and developed further by the Intervener, that the Convention has gone through an evolution during these 60 years in accordance with the change in the environment surrounding whales and whaling, would seem to be an argument that would be tantamount to an attempt to change the rules of the game as provided for in the Convention and accepted by the Contracting Parties in 1946. Judge Owada observes that, according to the Respondent, faced with this new situation of the adoption of a moratorium on whaling for commercial purposes, it became necessary for the Respondent to advance a programme of activities for purposes of scientific research so that scientific evidence could be collected for the consideration of the IWC (or its Scientific Committee), with a view to enabling the IWC to lift or review the moratorium, which professedly was a measure adopted to be of not unlimited duration and subject to future review. According to Judge Owada, it would seem difficult to see anything wrong in the Respondent's course of action.

Judge Owada remarks that, given the language of Article V, paragraph 2, and Article VIII, paragraph 1, of the Convention, what the Respondent embarked upon under JARPA and JARPA II is *prima facie* to be regarded as being in conformity with the Convention and its revised Schedule. Thus, according to Judge Owada, the whole question of the legality of the whaling activities of Japan under JARPA, and JARPA II as its continuation, has come to hinge upon the question of whether these activities of the Respondent could fall under the heading of activities "for purposes of scientific research" within the meaning of Article VIII of the Convention.

IV. The interpretation of Article VIII

According to Judge Owada, the essential character of the Convention as examined above lies in the fact that the Contracting Parties have created a self-contained regulatory régime for the regulation of whales and whaling. The prescription contained in Article VIII of the Convention, in Judge Owada's view, is one important component of this regulatory régime. Judge Owada states that it would be wrong in this sense to characterize the power recognized to a Contracting Party to grant to its nationals special permits "to kill, take and treat whales for purposes of scientific research" (Convention, Art. VIII, para. 1) as nothing else than an exception to the regulatory régime established by the Convention. Judge Owada states that the Contracting Party which is granted this prerogative under Article VIII is in effect carrying out an important function within this regulatory régime by collecting scientific materials and data required for the promotion of the objectives and purposes of the Convention. Judge Owada further notes that under this regulatory régime of the Convention the power to determine such questions as what should be the components of the scientific research, or how the scientific research should be designed and implemented in a given

situation, is primarily left to the discretionary decision of the granting Government. According to Judge Owada, the Contracting Government is obligated to exercise this discretionary power only for purposes of scientific research in good faith and to be eventually accountable for its activities of scientific research before the executive organs of the Convention, the IWC and the Scientific Committee.

Judge Owada emphasizes that this does not mean that the Court, as the judicial institution entrusted with the task of interpreting and applying the provisions of the Convention, has no role to play in this process. Given the nature and the specific characteristics of the regulatory framework created by the Convention, however, this power of the Court has to be exercised with a certain degree of restraint, to the extent that what is involved is *(a)* related to the application of the regulatory framework of the Convention, and *(b)* concerned with the techno-scientific task of assessing the merits of scientific research assigned by the Convention to the Scientific Committee.

Regarding the problem relating to the application of the regulatory framework of the Convention (point *(a)* above), Judge Owada asserts that good faith on the part of the Contracting State has necessarily to be presumed. According to Judge Owada, the function of the Court in this respect is to see to it that the State in question is pursuing its activities in good faith and in accordance with the requirements of the regulatory régime for the purposes of scientific research that is conducive to scientific outcomes which would help promote the object and purpose of the Convention. Judge Owada states, however, that the programme's design and implementation should by its nature not be the proper subject of review by the Court. Judge Owada notes that Article VIII expressly grants to the Contracting Government the primary power to decide on this.

Judge Owada states that allegations made by the Applicant that the activities were designed and implemented for purposes other than scientific research under the cover of scientific research thus cannot be presumed, and will have to be established by hard conclusive evidence that could point to the existence of bad faith attributable to the State in question.

On the second aspect of the problem relating to the determination of what constitutes activities "for purposes of scientific research" (point *(b)* above), Judge Owada does not agree with the approach of the Judgment that distinguishes between "scientific research" as such and "[activities] for purposes of scientific research". To Judge Owada, such a distinction is so artificial that it loses any sense of reality when applied to a concrete situation. Instead, Judge Owada states that the Court should focus purely and simply on the issue of the scope of what constitutes activities "for purposes of scientific research" according to the plain and ordinary meaning of the phrase.

Judge Owada further remarks that, on the question of what constitutes activities "for purposes of scientific research", this Court, as a court of law, is not professionally qualified to give a scientifically meaningful answer, and should not try to pretend that it can. Judge Owada argues that what is "scientific research" is a question on which qualified scientists often have a divergence of opinion and are not able to come to a consensus view. Nonetheless, Judge Owada observes that the Judgment *does* get into a "scientific assessment" on various substantive aspects of JARPA/JARPA II activities, in order to come to the conclusion that these activities cannot qualify as activities conducted "for purposes of scientific research" because they cannot be regarded as objectively reasonable, according to the Court's own scientific assessment. According to Judge Owada, the question that

immediately arises is "in what context is this reasonableness to be judged?" If the Court is speaking of the legal context, Judge Owada argues that the answer is clear, as the Convention leaves this point primarily to the good faith appreciation of the party which undertakes the research in question. If we are speaking of the scientific context, it would be impossible for the Court to establish that certain activities are objectively reasonable or not without getting into a techno-scientific examination and assessment of the design and implementation of JARPA/JARPA II, a task which this Court could not and should not attempt to do.

V. The scope of review by the Court

Judge Owada writes that the Contracting Parties to the Convention expressly recognize the need and the importance of scientific research for the purpose of supporting the "system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks" (Preamble, para. 7). Judge Owada points out that the Conference which was convened for the conclusion of the Convention in 1946 stressed the critical importance of scientific research by scientific organizations engaged in research on whales. According to Judge Owada, the intention of the Contracting Parties, in agreeing on the language of Article VIII, was to provide for the right of a Contracting Government to grant to its nationals special permits to take whales for purposes of scientific research. Judge Owada argues that the Contracting Government may take this action without prior consultations with, or the approval of, the IWC or its Scientific Committee.

Judge Owada remarks that this is not to say that a Contracting Government has unlimited discretion in granting a special permit. According to Judge Owada, it is the role of the Court to examine from a legal point of view whether the procedures expressly prescribed by the regulatory régime of the Convention, including those in Article VIII, are scrupulously observed. Judge Owada notes that the Court can also review whether the activities in question can be regarded as meeting the generally accepted notion of "scientific research" (the substantive requirement for the Contracting Party under Article VIII). This process involves the determination of the standard of review to be applied by the Court.

VI. The standard of review by the Court

Judge Owada notes that, in determining the standard of review, the Judgment concludes as follows:

> "When reviewing the grant of a special permit authorizing the 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. This standard of review is an objective one." (Judgment, paragraph 67.)

In Judge Owada's view, the Judgment, in establishing this standard of review, ignores the difference in the positions taken by the Parties on this question and, without further explanation, seems to endorse the position of one of the Parties, namely that of the Applicant. According to Judge Owada, the language used by the Judgment suggests that the application of this standard of objective reasonableness had been accepted as the common ground among the Parties in relation to the overall scope of the review, whereas, in reality, there was a wide difference of position between the Parties, especially in relation to the scope of the review. Further, according to Judge Owada, the Judgment provides no explanation as to why it is

legitimate or appropriate for the Court to expand the scope of the review by engaging in an examination of the "design and implementation" of the JARPA II programme.

Judge Owada observes that a careful examination of the arguments of the Parties reveals that the genesis of this standard of review would appear to derive its origin from the jurisprudence of the Appellate Body of the World Trade Organization ("WTO") in the *United States — Continued Suspension of Obligations in the EC-Hormones Dispute* case (hereinafter "*EC-Hormones*"). In Judge Owada's view, the Judgment takes this magic formula of objective reasonableness out of the context in which this standard was employed and applies it somewhat mechanically for our purposes, without giving proper consideration to the context in which this standard of review was applied.

Judge Owada notes that the Respondent stated the following with regard to the standard of review:

> "Japan agrees with Australia and New Zealand in regarding the test as being whether a State's *decision is objectively reasonable, or 'supported by coherent reasoning and respectable scientific evidence and . . ., in this sense, objectively justifiable'*." (Emphasis added).

According to Judge Owada, the Respondent is relying on a quotation, word-for-word, from the *EC-Hormones* case. It is for this reason important to examine the precise context in which this quoted passage appears, which is as follows:

> "[S]o far as fact-finding by [the WTO] panels is concerned, the applicable standard is 'neither *de novo* review as such, nor 'total deference', but rather the 'objective assessment of facts' . . .

It is the WTO Member's task to perform the risk assessment. The panel's task is to review that risk assessment. Where a panel goes beyond this limited mandate and *acts as a risk assessor*, it would be substituting its own scientific judgment for that of the risk assessor and making a *de novo* review and, consequently, would exceed its functions under Article 11 of the [Dispute Settlement Understanding of the WTO]. Therefore, *the review power of a panel is not to determine whether the risk assessment undertaken by a WTO Member is correct, but rather to determine whether that risk assessment is supported by coherent reasoning and respectable scientific evidence* and is, in this sense, objectively justifiable." (Emphasis added.)

Judge Owada emphasizes that the WTO Appellate Body's decision states that the body would exceed its functions were it to act as a risk assessor and make a *de novo* review. In Judge Owada's view, therefore, the Judgment erred by taking this standard of objective reasonableness out of its context, and by mechanically applying it for the opposite purpose, that is, for the purpose of engaging the Court in making a *de novo* assessment of the activities of the Respondent, when that State is given the primary power under the Convention to grant special permits for purposes of scientific research.

Judge Owada also points out that in the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, the Court referred to the contention of the Applicant (Costa Rica) which argued that the way the Respondent (Nicaragua) restricted Costa Rica's navigational rights on the San Juan river was "not reasonable". The Court stated that

> "the regulator, in this case the State with sovereignty over the river, has the primary responsibility for assessing the need for regulation and for choosing, on the basis of

> its knowledge of the situation, the measure that it deems most appropriate to meet that need. It will not be enough in a challenge to a regulation simply to assert in a general way that it is unreasonable."

Judge Owada states that the position of the Respondent in the present case is analogous in law to that of the Respondent in the above-mentioned case. According to Judge Owada, the dictum of this Court in the latter case should be applicable to the situation in the present case.

VII. Application of the standard of review in the present case

Judge Owada states that he will refrain from engaging in the exercise of refuting the conclusions of the Judgment resulting from its substantive assessment of each of the concrete aspects of the design and implementation of the JARPA II programme, because to engage in this exercise would be doing precisely what the Court should not have done under the Convention. Judge Owada wishes, however, to critique the methodology that the Judgment employs in applying the standard of objective reasonableness when assessing the concrete activities of JARPA II. In Judge Owada's view, there is a strong, though rebuttable, presumption that the granting Government, in granting permits under Article VIII, has made this determination not only in good faith, but also in light of a careful consideration that the activities carried out are for purposes of scientific research. Judge Owada states that the function of the Court is to assess whether this determination of the Contracting Government is objectively reasonable, in the sense that the programme of research is based upon a coherent reasoning and supported by respectable opinions within the scientific community of specialists on whales, even if the programme of research may not necessarily command the support of a majority view within the scientific community involved.

In Judge Owada's view, the Judgment appears to be applying the standard of objective reasonableness in such a way that it is the granting Party that bears the burden of establishing that the scale and the size of the lethal take envisaged under the programme is reasonable in order for the programme to be qualified as a genuine programme "for purposes of scientific research". Judge Owada states that it should be the Applicant, rather than the Respondent, who has to establish by credible evidence that the activities of the Respondent under JARPA II cannot be regarded as "reasonable" scientific research activities for the purposes of Article VIII of the Convention. In Judge Owada's view, the Applicant has failed to make such a showing in this case.

Judge Owada states that, in his view, the activities carried out pursuant to JARPA II can be characterized as "reasonable" activities for purposes of scientific research. Judge Owada notes that evidence, including a statement of the Chair of the Scientific Committee, has clearly shown that JARPA II provides some useful scientific information with respect to minke whales that has been of substantial value to the Scientific Committee. Judge Owada further recalls that the IWC Intersessional Workshop Report expressed the view that the JARPA programme, which is in many respects substantively similar to JARPA II, can provide valuable statistical data which could result in a reconsideration of the allowed catch of minke whales under the Revised Management Procedure. Judge Owada states that what is referred to in this report is precisely the type of data that was envisioned as useful by the Convention, as evidenced by the language of Article VIII stating 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".

Judge Owada argues that, in light of this evidence, it is difficult to see how the activities of JARPA and its successor, JARPA II, could be considered "unreasonable".

VIII. Conclusion

By way of conclusion, Judge Owada emphasizes that the sole and crucial issue at the centre of the present dispute is whether the activities under the programme of JARPA II are "for purposes of scientific research", and not whether JARPA II has attained a level of excellence as a project for scientific research for achieving the object and purpose of the Convention. Judge Owada states that it may be true that JARPA II is far from being perfect for attaining such objective. Even if JARPA II contains some defects, however, that fact in itself would not turn these activities into activities for commercial whaling. Judge Owada concludes that this certainly could not be the reason for this Court to rule that "Japan shall revoke any extant authorization, permit or licence granted in relation to JARPA II" (Judgment, paragraph 247 (7)).

Dissenting opinion of Judge Abraham

In his dissenting opinion, Judge Abraham states that, while he voted in favour of the point in the operative paragraph whereby the Court dismisses the objection to jurisdiction raised by Japan, he nonetheless disagrees with the reasoning followed by the Court in order to reach that conclusion. Indeed, while the Court was correct in rejecting Japan's literal interpretation of the second limb of the Australian reservation, which excludes from the Court's jurisdiction any 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", its own interpretation of that limb of the reservation is highly debatable and unnecessarily restrictive.

In Judge Abraham's view, this second limb should be understood as intended 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. When those conditions are satisfied, the reservation must therefore apply, even when the Parties do not have overlapping claims to the maritime areas concerned.

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On the merits of the case, Judge Abraham fundamentally disagrees with the approach adopted by the Court.

He disagrees, first, with the interpretation of the concept of a programme "for purposes of scientific research" in the sense of paragraph 1 of Article VIII of the International Convention for the Regulation of Whaling. In this regard, Judge Abraham accepts the proposition that Article VIII of the Convention should be interpreted neither restrictively nor expansively, and he agrees with the way in which the Court has addressed the notion of "scientific research", in particular by rejecting the definition proposed by an expert called by Australia. On the other hand, he criticizes the Court's choice of an "objective" test in seeking to determine whether a programme is "for purposes of" scientific research. In fact, the phrase "for purposes of" necessarily involves an examination of the aims pursued by the State responsible for the programme in question. In seeking to determine whether the design and implementation of a scientific research programme reasonably correspond with its stated

aims, the Court is assuming the status of a scientific committee rather than carrying out its function of ascertaining the nature of the activities in question. Judge Abraham further considers that, in a situation where a State relies on Article VIII to justify authorization of a whaling programme which includes scientific research activities, to find that the programme falls outside the terms of that Article necessarily implies that the good faith of the State concerned is being called into question; however, good faith must be presumed.

Judge Abraham also disagrees with the Court's assessment of the facts of the case, and with the unfavourable presumption which he considers that it has raised against Japan. The Court constantly requires Japan to provide explanations, demonstrations, justifications, regarding various aspects of the design and implementation of the JARPA II programme. It concludes, wrongly, from a combined examination of certain of these aspects, that the design and implementation of JARPA II are unreasonable in light of its stated aims. However, the examination conducted by the Court has merely raised what it admits are doubts, which cannot suffice to deny JARPA II the character of a programme conducted for purposes of scientific research. The Court should have found that there was no manifest mismatch between JARPA II's stated aims and the means used to achieve them, and that the sample sizes had not been set at a manifestly excessive level; and the Court should accordingly have accepted that JARPA II does have the character of a programme conducted for purposes of scientific research.

Judge Abraham thus voted against point 2 of the operative paragraph, which finds that the special permits granted by Japan in connection with JARPA II do not fall within the provisions of Article VIII, paragraph 1, of the Convention; and, in consequence, against points 3, 4, 5, and 7.

Declaration of Judge Keith

1. In his declaration, Judge Keith addresses three matters in support of the conclusion the Court has reached and its reasons. The first is the broader context in which the case is to be seen. Over the 65 years the Convention has been in force there have been massive changes in the whaling industry and in attitudes and policies towards whaling. At the outset, the Schedule to the International Whaling Convention allowed a take in southern waters of the equivalent of 16,000 blue whales. By 1965 there was a prohibition on their taking and by 1972, the year in which the Stockholm Conference on the Human Environment called for a ten-year moratorium on commercial whaling, the limit for Antarctic minke whales was set at 5,000. The Schedule now includes many zero catch limits. Has a system established to regulate an industry been used virtually to prohibit it? Judge Keith points out that Contracting Governments had a number of options open to them if they wished to avoid those constraints or that outcome. He concludes by recalling that an attempt, through *The Future of the IWC Process*, running from 2007 to 2010 to resolve through negotiation a range of matters, including the dispute before the Court, had failed.

2. The second matter Judge Keith considers is the essential interrelatedness of the power to grant a special permit under Article VIII (I) of the Convention and the extent of the power of the Court to review the grant. He identifies three features of the power to grant a special permit which indicate real limits on the power of a Contracting Government. He also sees as significant the extensive body of information in the record before the Court about the process which led to the decisions to establish the JARPA II programme and about its implementation. He states the standard of review 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 the Court does have the role of determining, in the light of the identified features of the power mentioned earlier, whether the evidence before it demonstrates coherent scientific reasoning supporting central features of the programme.

3. In the third part of his declaration, Judge Keith emphasizes, by reference to that evidence, the failure of the Japanese authorities, in planning and implementing the programme, to give any real consideration or indeed any consideration at all to the central elements of the programme discussed in this declaration and more fully in the Judgment: the decisions regarding the use of lethal methods as opposed to non-lethal ones and the determination of the sample sizes; and the comparison of the sample size to the actual take. As indicated in the declaration, those decisions, including those relating to the implementation of the programme, were not supported by evidence of relevant studies, or by coherent scientific reasoning, or by relevant reporting and explanations to the International Whaling Commission or its Scientific Committee.

4. For those reasons and those given by the Court, Judge Keith concludes that the programme does not fall within Article VIII (I) of the Convention and, as a result, the actions taken under it for the killing, taking and treating of the whales, breach particular provisions of the Convention.

Dissenting opinion of Judge Bennouna

Judge Bennouna has voted against points 2, 3, 4, 5 and 7 of the operative paragraph.

Judge Bennouna does not agree with the majority's interpretation of the relevant provisions of the International Convention for the Regulation of Whaling (hereinafter the "Convention").

Judge Bennouna notes that the issue of whaling carries a heavy emotional and cultural charge. He points out, however, that this must not interfere with the task of the Court, which is to do justice by applying international law, in accordance with its Statute.

Judge Bennouna considers that there is nothing to suggest that JARPA, the predecessor to JARPA II, which was launched in parallel with Japan's acceptance of the moratorium on commercial whaling, was a way of continuing commercial whaling under a different legal guise. On the contrary, Judge Bennouna emphasizes that the launch of JARPA was a means of making good the lack of scientific data, particularly as regards whales' diet, previously obtained under the commercial whaling programme.

Judge Bennouna deplores the fact that the Court undertook a detailed analysis of sample sizes, illustrated with tables and graphics, which ultimately resulted simply in a finding of concern as to the reasonableness of the design of JARPA II in light of its stated aims. In Judge Bennouna's view a comparison of sample sizes with actual catches was likewise irrelevant.

Judge Bennouna thus asks himself whether a series of concerns and queries is sufficient to justify a finding that JARPA II was not designed and implemented "for purposes of scientific research".

Judge Bennouna notes that the Court declined to consider the evidence relating to the issue of JARPA II's commercial character. However, in Judge Bennouna's view, the Court was not entitled to forego showing that JARPA II was a commercial operation, since the provisions of the Schedule whose breach had been alleged by Australia apply only to commercial whaling.

Judge Bennouna considers that JARPA II could not be described as a commercial whaling programme, since it is not conducted with a view to profit.

Judge Bennouna considers that the position adopted by the majority of the Court has failed to take account of the spirit of the Convention, which is founded on co-operation between States parties, under the institutional framework established by the Convention. He considers that the Court, in engaging in an evaluation of JARPA II, has, in certain respects, substituted itself for the bodies created by the Convention, namely the International Whaling Commission and the Scientific Committee. In Judge Bennouna's view, it is preferable to rely on the institutional framework established by the Convention, since that is the best way of strengthening multilateral co-operation between States parties and of arriving at an authentic interpretation of the Convention.

Separate opinion of Judge Cançado Trindade

1. Judge Cançado Trindade begins his separate opinion, composed of eleven parts, observing that, although he has voted in favour of the adoption of the present Judgment in the case concerning *Whaling in the Antarctic*, he would have wished certain points to be further developed by the Court. He feels thus obliged to leave on the records, in the present separate opinion, the foundations of his personal position thereon. The first point he identifies pertains to the object and purpose of the International Convention on the Regulation of Whaling (ICRW Convention — Part I). The adoption of a Convention like the ICRW, endowed with a supervisory organ of its own, encompassing member States that do not practice whaling, speaks to the understanding that the ICRW Convention's object and purpose cannot be limited to the development of the whaling industry.

2. The goal of conservation integrates its object and purpose, certainly not limited to the development of the whaling industry. If the main goal of the ICRW Convention were only to protect and develop the whaling industry, the entire framework of the ICRW Convention would have been structured differently. Furthermore, the adoption of a moratorium on commercial whaling within the framework of the ICRW Convention also seems to indicate that the conservation of whale stocks is an important component of the object and purpose of the ICRW Convention (paras. 2-3). This is also reflected in the preamble of the Convention.

3. Pursuant to a teleological approach, the practice of the International Whaling Commission (IWC), conformed by its successive resolutions, seems to indicate that conservation of whale stocks is an important objective of the ICRW Convention (para. 5). The Schedule of regulations annexed to the ICRW Convention is an integral part of it, with equal legal force; amendments have regularly been made to the Schedule, so as to cope with international environmental developments. It has become a multilateral scheme, seeking to avoid unilateral action so as to foster conservation (para. 6).

4. Judge Cançado Trindade recalls that, in the response to a question he deemed it fit to put to it, the intervenor (New Zealand) recalled that, distinctly from the 1937 International Agreement for the Regulation of Whaling, the 1946 ICRW Convention counts on a permanent Commission (the IWC) endowed with a supervisory role, evidencing a "collective

enterprise", and acknowledging that whale conservation "must be an international endeavour". In sum, in New Zealand's view, the object and purpose of the ICRW Convention ought to be approached in the light of the *collective interest* of States Parties in the conservation and management of whale stocks. This role of collective regulation of the IWC, was in the line of the U.N. Convention on the Law of the Sea, which requires States (Article 65) to cooperate with a view to the conservation of marine mammals and to work through the appropriate international organs. Such endeavours of conservation have become a "collective responsibility" (para. 9).

5. In Judge Cançado Trindade's understanding, the collective system established by the ICRW Convention (Part II) aims at replacing a system of unilateral unregulated whaling, with a system of *collective guarantee and regulation*, so as to provide for the interests of the States Parties in the proper conservation and management of whales. This collective regulation is achieved through a process of collective decision-making by the IWC, which adopts regulations and resolutions (paras. 10-11). Thus, the nature and structure of the ICRW Convention, the fact that it is a multilateral Convention (comprising both whaling and non-whaling States) with a supervisory organ of its own, which adopts resolutions and recommendations, highlights the collective decision-making process under the Convention and the collective guarantee (pursuant to collective regulation) provided thereunder (para. 12).

6. In fact, in numerous resolutions, the IWC has provided guidance to the Scientific Committee for its review of Special Permits under paragraph 30 of the Schedule. This is aimed at amending proposed special permit programmes that do not meet the conditions. The expectation ensues therefrom that, e.g., non-lethal methods will be used whenever possible, on the basis of successive resolutions of the IWC stressing the relevance of obtaining scientific information without needing to kill whales for "scientific research". In accordance with the IWC resolutions, the Scientific Committee has, for its part, elaborated a series of *Guidelines* to enable it to undertake its function of review of Special Permits (para. 13).

7. Successive IWC resolutions have consistently requested the States Parties concerned not to continue their activities whenever they do not satisfy the Scientific Committee's criteria (para. 14). Bearing the IWC resolutions in mind, the Scientific Committee's Guidelines have endeavoured to assist it in undertaking adequately its function of review of special permit proposals and of research results from existing and completed special permits. In recent years, the Guidelines have insisted on the use of non-lethal research methods. It is clear that there is here not much room for State unilateral action and free-will (para. 15).

8. It clearly appears, from paragraph 30 of the Schedule, that a State Party issuing a Special Permit is under the obligation to provide the IWC Secretary with proposed scientific permits before they are issued, and in sufficient time so as to allow the Scientific Committee to review and comment on them. States granting Special Permits do not have an unfettered freedom to issue such permits (paras. 16-17). There is thus a *positive* (procedural) obligation of the State willing to issue a special permit to cooperate with the IWC and the Scientific Committee (paras. 18-19). In the framework of the system of collective guarantee and collective regulation under the ICRW Convention, the Court has determined, on distinct points, that the respondent State has not acted in conformity with paragraph 10 *(d)* and *(e)*, and paragraph 7 *(b)*, of the Schedule to the ICRW Convention (resolutory points 3-5).

9. Judge Cançado Trindade then moves to what he identifies as the limited scope of Article VIII (1) of the ICRW Convention (Part III). Article VIII (1) appears as an *exception* to the normative framework of the ICRW Convention, to be thus interpreted restrictively. A State issuing a permit does not have *carte blanche* to dictate that a given programme is "for purposes of scientific research". It is not sufficient for a State Party to describe its whaling programme as "for purposes of scientific research", without demonstrating it (paras. 21-22). The Court has determined that the Special Permits granted by Japan in connection with Jarpa-II "do not fall within the provisions of Article VIII (1)" of the ICRW Convention (resolutory point 2). In his perception,

> "such an unfettered discretion would not be in line with the object and purpose of the ICRW Convention, nor with the idea of multilateral regulation. The State issuing a Special Permit should take into consideration the resolutions of the IWC which provide the views of other States Parties as to what constitutes 'scientific research'. There is no point in seeking to define 'scientific research' for all purposes. When deciding whether a programme is 'for purposes of scientific research' so as to issue a special permit under Article VIII (1), the State Party concerned has, in my understanding, a duty to abide by the principle of prevention and the precautionary principle" (para. 23).

10. Judge Cançado Trindade adds that Article VIII, part and parcel of the ICRW Convention as a whole, is to be interpreted taking into account its object and purpose, which "discards any pretence of devising in it a so-called 'self-contained' regime or system" (para. 24). He then concludes, on this particular point, that

> "a State Party does not have an unfettered discretion to decide the meaning of 'scientific research' and whether a given whaling programme is 'for purposes of scientific research'. The interpretation and application of the ICRW Convention in recent decades bear witness of a gradual move away from unilateralism and towards multilateral conservation of living marine resources, thus clarifying the limited scope of Article VIII (1) of the ICRW Convention" (para. 24).

11. Judge Cançado Trindade then turns to the interactions between systems, in the evolving law relating to conservation (Part IV). He observes that, with the growth in recent decades of international instruments related to conservation, not one single of them is approached in isolation from the others: not surprisingly, the co-existence of international treaties of the kind has called for a *systemic outlook*, which has been pursued in recent years. Reference can here be made, e.g., to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES Convention), the 1979 Convention on Migratory Species of Wild Animals, the 1980 Convention on the Conservation of Antarctic Marine Living Resources, the 1982 U.N. Convention on the Law of the Sea, the 1992 U.N. Convention on Biological Diversity (CBD Convention) (paras. 25-26).

12. He adds that the interpretation and application of the aforementioned treaties, in the light of the systemic outlook, have been contributing to the gradual formation of *an opinio juris communis* in the present domain of contemporary international law (Part V). As the Court itself has put it (para. 45), the functions conferred upon the IWC have made the Convention an "evolving instrument". This is not the first time that the Court acknowledges that international treaties and conventions are "living instruments". The Court did so, e.g., in its *célèbre* Advisory Opinion (of 21.06.1971) on *Namibia*, and, more recently, in its

Judgment (of 25.09.1997) in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary* v. *Slovakia)* (paras. 27 and 29-30).

13. Judge Cançado Trindade further recalls that other contemporary international tribunals have pursued the same evolutionary interpretation, for example, the European Court of Human Rights, in its Judgment (of 25 April 1978) in the *Tyrer* v. *United Kingdom* case, and also in its Judgment (on preliminary objections, of 23 March 1995) in the case of *Loizidou* v. *Turkey*; and the Inter-American Court of Human Rights, in its Judgment (of 31 August 2001) in the case of the *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, and also in its *célèbre* and ground-breaking Advisory Opinion (of 1 October 1999) on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (paras. 31-32). He then ponders that

> "The experience of supervisory organs of various international treaties and conventions points to this direction as well. Not seldom they have been faced with new challenges, requiring new responses from them, which could never have been anticipated, not even imagined, by the draftsmen of the respective treaties and conventions. In sum, international treaties and conventions are a product of their time, being also *living instruments*. They evolve with time; otherwise, they fall into *desuetude*. The ICRW Convention is no exception to that. Those treaties endowed with supervisory organs of their own (like the ICRW Convention) disclose more aptitude to face changing circumstances.
>
> Moreover, in distinct domains of international law, treaties endowed with a supervisory mechanism of their own have pursued a hermeneutics of their own, facing the corresponding treaties and conventions as *living instruments*. International treaties and conventions are products of their time, and their interpretation and application *in time*, with a temporal dimension, bears witness that they are indeed living instruments. This happens not only in the present domain of conservation and management of living marine resources, but likewise in other areas of international law" (paras. 33-34).

14. By the time of the adoption of the 1946 ICRW Convention, in the mid-twentieth century, there did not yet exist an awareness that the living marine resources were not inexhaustible. Three and a half decades later, the adoption of the 1982 U.N. Convention on the Law of the Sea (UNCLOS) — a major international law achievement in the twentieth century — contributed to the public order of the oceans, and to the growing awareness that their living resources were not inexhaustible. Unilateralism gradually yielded to collective regulation towards conservation, as illustrated by the 1982 general moratorium on commercial whaling under the 1946 ICRW Convention (para. 35).

15. Another example can be found in the establishment by the IWC of whale sanctuaries (under Article V (1) of the ICRW Convention). Judge Cançado Trindade recalls that the IWC has so far adopted three whale sanctuaries: first, the Southern Ocean Sanctuary (1948-1955); secondly, the Indian Ocean Sanctuary (1979, renewed in 1989, and indefinitely as from 1992); and thirdly, the new Southern Ocean Sanctuary (from 1994 onwards). Moreover, in its meetings of 2001-2004, the IWC was lodged with a proposal (revised in 2005) of a new sanctuary, the South Atlantic Sanctuary, so as to reassert the need of conservation of whales (para. 36).

16. Parallel to this, multilateral Conventions (such as UNCLOS and CBD) have established a framework for the conservation and management of living marine resources.

The UNCLOS Convention contains a series of provisions to that effect; as to the CBD Convention, the Conference of the Parties held in Jakarta in 1995, for example, adopted the *Jakarta Mandate on Coastal and Marine Biodiversity*, reasserting the relevance of conservation and ecologically sustainable use of coastal and marine biodiversity, and, in particular, linking conservation, sustainable use of biodiversity, and fishing activities. Furthermore, in its meeting of 2002, the States Parties to the Convention on Migratory Species (CMS) pointed out the need to give greater protection to six species of whales (including the Antarctic minke whales) and their habitats, breeding grounds and migratory routes (paras. 38-39).

17. These are, — Judge CançadoTrindade proceeds, — clear illustrations of the evolving *opinio juris communis* on the matter. In its 2010 meeting, held in Agadir, Morocco, the "Buenos Aires Group" reiterated support for the creation of a new South Atlantic Sanctuary for whales, and positioned itself in favour of conservation and non-lethal use of whales, and against so-called "scientific whaling" (in particular in case of endangered or severely depleted species). The "Buenos Aires Group" expressed its "strongest rejection" of the ongoing whale hunting (including species classified as endangered) in the Southern Ocean Sanctuary, called for non-lethal methods and the maintenance of the commercial moratorium in place since 1986, and stated that the ongoing whale hunting was in breach of "the spirit and the text" of the 1946 ICRW Convention, and failed to respect the "integrity of the whale sanctuaries" recognized by the IWC (paras. 39-40).

18. The next point examined by Judge Cançado Trindade is that of inter-generational equity (Part VI). He begins by pointing out that the 1946 ICRW Convention was "indeed pioneering", in acknowledging, in its preamble, "the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks". At that time, shortly after the Second World War, its draftsmen could hardly have anticipated that this concern would achieve the dimension it did, in the international agenda and in international law-making (in particular in the domain of international environmental law) in the decades that followed. The conceptual construction of *inter-generational equity* (in the process of which he took part) was to take place, in international legal doctrine, four decades later, from the mid-eighties onwards (para. 41).

19. He then recalls (para. 42) his own considerations on the long-term temporal dimension, in relation to inter-generational equity, expressed in his separate opinion appended to the Judgment of 20 April 2010 in case concerning *Pulp Mills on the River Uruguay* (*Argentina* v. *Uruguay*). Although the factual context of the *cas d'espèce* is quite distinct from that of the *Pulp Mills* case, it cannot pass unnoticed that, significantly, in one and the other, inter-generational equity marks its presence in distinct international instruments of international environmental law, and in its domain as a whole (para. 43). He examines the point in the 1973 CITES Convention, in the 1979 Convention on the Conservation of Migratory Species of Wild Animals, in the 1992 CBD Convention (paras. 44-45), among others (paras. 46-47).

20. Turning to the conservation of living species, he then reviews the tension between conservation and exploitation in the arguments of the contending Parties in the course of the proceedings of the present case (Part VII), in both the written phase (paras. 48-51) and the oral phase. In respect of this latter, he reviews the responses of the contending Parties and the intervenor to the questions he put to them in the public sitting of the Court of 8 July 2013 (paras. 52-56). He then concludes that it

> "has been made clear, in recent decades, that the international community has adopted a conservation-oriented approach in treaty regimes, including treaties covering marine mammals. The ICRW Convention is to be properly interpreted in this context (...). [T]he ICRW Convention should be read in the light of other international instruments that follow a conservation-oriented approach and the precautionary principle. The existence of the ICRW Convention in relation to Conventions aimed at conservation of living resources supports a narrow interpretation of Article VIII of the ICRW Convention" (paras. 57-58).

21. Judge Cançado Trindade dedicates Part VIII of his separate opinion to the principle of prevention and the precautionary principle, as from the arguments of the contending Parties and the intervenor. He begins by pointing out that, although the Court does not dwell upon the precautionary principle in the present Judgment in the case concerning *Whaling in the Antarctic*, in the course of the proceedings in the present case, the two contending Parties (Australia and Japan) as well as the intervenor (New Zealand) addressed the principle of prevention and the precautionary principle as related to the *cas d'espèce* (para. 60). After reviewing their arguments, he comments that those two principles, interrelated in the present case, "are to inform and conform any programmes under Special Permits within the limited scope of Article VIII of the ICRW Convention" (para. 70). And he concludes, on this point, that, in the domain of international environmental law in general, and in respect of the ICRW Convention in particular, "there has occurred, with the passing of time, a move towards conservation of living marine resources as a common interest, prevailing over State unilateral action in search of commercial profitability" (para. 71).

22. Judge Cançado Trindade then moves on to a review of the responses from the experts (of Australia and Japan) to the several questions he put to them during the public sittings of the Court (Part IX). Despite their responses, there remained, in his perception, the impression of a lack of general criteria for the determination of the total whales to be killed, and for how long, for the purposes of so-called "scientific research" (para. 73). "Scientific research", — he continues, — is surrounded by uncertainties, and is undertaken on the basis of uncertainties. Suffice it here to recall, — he adds, — the legacy of Karl Popper (mainly his *Conjectures and Refutations*), who used to ponder wisely that

> "scientific knowledge can only be uncertain or conjectural, while ignorance is infinite. Scientific research is a search for truth, amidst conjectures, and, given one's fallibility, one has to learn with mistakes incurred into. One can hope to be coming closer to truth, but without knowing for sure whether one is distant from, or near it. Without the ineluctable refutations, science would fall into stagnation, losing its empirical character. Conjectures and refutations are needed, for science to keep on advancing in its empirical path. As to the *cas d'espèce*, would this mean that whales could keep on being killed, and increasingly so, for 'scientific purposes' and amidst scientific uncertainty? I do not think so; there are also non-lethal methods, and, after all, living marine resources are not inexhaustible" (para. 74).

23. Judge Cançado Trindade then reviews the reiterated calls under the ICRW Convention for non-lethal use of cetaceans (Part X), on the part of the IWC in its resolutions (paras. 75-79). The way is then paved for the presentation of his concluding observations, on Jarpa-II programme and the requirements of the ICRW Convention and its Schedule (Part XI). There are a few characteristics of Jarpa-II which do not allow it to qualify under the exception of Article VIII, to be restrictively interpreted; in effect, the programme at issue

does not seem to be genuinely and solely motivated by the purpose of conducting scientific research (para. 80).

24. In practice, the use of lethal methods by Jarpa-II in relation to what seems to be a large number of whales does not appear justifiable as "scientific research"; furthermore, the fact that Jarpa-II runs for an indefinite duration also militates against its professed purpose of "scientific research" (paras. 81-82). Jarpa-II, in the manner it is being currently conducted, can have adverse effects on whale stocks; commercial whaling, pure and simple, is not permissible under Article VIII (2) of the ICRW Convention (paras. 83-84). The Court has found, in the present Judgment in the *Whaling in the Antarctic* case, that Japan has not acted in conformity with paragraph 10 *(d)* and *(e)* (whaling moratorium, and assessment of effects of whale catches on stocks), and paragraph 7 *(b)* (prohibition of commercial whaling in the Southern Ocean Sanctuary), of the Schedule (resolutory points 3-5). The respondent State does not appear to have fulfilled this obligation to take into account comments, resolutions and recommendations of the IWC and the Scientific Committee (para. 85).

25. Judge Cançado Trindade then observes that the present case has provided "a unique occasion for the Court to pronounce upon a system of collective regulation of the environment for the benefit of future generations". The Court's present Judgment in the *Whaling in the Antarctic* case "may have wider implications than solely the peaceful settlement of the present dispute between the contending Parties, to the benefit of all" (para. 87). Although international treaties and conventions are a product of their time, they have an aptitude to face changing conditions, and their interpretation and application in time bear witness that they are *living* instruments; the 1946 ICRW Convention is no exception to that, and, endowed with a mechanism of supervision of its own, it has proven to be a *living* instrument.

26. Moreover, in distinct domains of international law, treaties and conventions — especially those setting forth a mechanism of protection — "have required the pursuance of a hermeneutics of their own, as *living* instruments. This happens not only in the present domain of conservation and sustainable use of living marine resources, but likewise in other areas of international law" (para. 88). Judge Cançado Trindade then concludes that

> "The present case on *Whaling in the Antarctic* has brought to the fore the evolving law on the conservation and sustainable use of living marine resources, which, in turn, has disclosed what I perceive as its contribution to the gradual formation of an *opinio juris communis* in the present domain of contemporary international law. *Opinio juris*, in my conception, becomes a key factor in the formation itself of international law (here, conservation and sustainable use of living marine resources); its incidence is no longer that of only one of the constitutive elements of one of its 'formal' sources. The formation of international law in domains of public or common interest, such as that of conservation and sustainable use of living marine resources, is a much wider process than the formulation of its 'formal sources', above all in seeking the legitimacy of norms to govern international life.
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> *Opinio juris communis*, in this way, comes to assume a considerably broader dimension than that of the subjective element constitutive of custom, and to exert a key role in the emergence and gradual evolution of international legal norms. After all, juridical conscience of what is necessary (*jus necessarium*) stands above the 'free-will' of individual States (*jus voluntarium*), rendering possible the evolution of international law governing conservation and sustainable use of living marine

resources. In this domain, State voluntarism yields to the *jus necessarium*, and notably so in the present era of international tribunals, amidst increasing endeavours to secure the long-awaited primacy of the *jus necessarium* over the *jus voluntarium*. Ultimately, this becomes of key importance to the realization of the pursued common good" (paras. 89-90).

Dissenting opinion of Judge Yusuf

1. Judge Yusuf appends a dissenting opinion to the Judgment of the Court in which he expresses serious doubts as to the legal correctness of the Court's reasoning and its conclusions regarding the conformity to the ICRW of Japan's decision to authorize JARPA II, and the legal standards to be applied to assess such conformity.

2. According to Judge Yusuf, the dispute between the Parties concerns the interpretation and application of Article VIII of the ICRW. The issue before the Court is whether Japan lawfully employed the discretionary power granted to any Contracting Government to issue special permits to its nationals to kill whales for purposes of scientific research. It is not about the fit between the design and implementation of JARPA II and its stated objectives, as the analysis in the Judgment may suggest.

3. Judge Yusuf observes that the most relevant legal criteria to be considered in the assessment of the legality of Japan's actions in connection with JARPA II are those of Article VIII of the Convention, together with paragraph 30 of the Schedule and the guidelines for the application of Article VIII contained in "Annex P", which was adopted by consensus at the International Whaling Commission (IWC). For Judge Yusuf, this is the law applicable to the present case, on the basis of which the Court should have tried to resolve the dispute before it. The Court instead came up with a standard of review that is extraneous to the Convention (Judgment, paragraph 67) and then applied it directly to "the design and implementation of JARPA II" rather than to the legality of the conduct of Japan in issuing special permits for JARPA II. Thus, Judge Yusuf considers that the law applicable to the dispute between the Parties was set aside by the Court in favour of an obscure and debatable standard which cannot be found anywhere in the Convention, and which is based on the "reasonableness of the design and implementation of JARPA II in relation to the stated objectives of the programme". This, in the judge's view, is neither grounded in law nor in the practice of this Court.

4. Judge Yusuf notes that while the Court recognizes the centrality of the interpretation and application of the applicable law in paragraph 50 of the Judgment, it quickly skates over their analysis to embark in an extremely detailed assessment of the fit between design and implementation of JARPA II and its stated objectives. According to Judge Yusuf, reviewing the design and implementation of a scientific research programme is more properly the task of the Scientific Committee of the IWC, not of the Court. In any case, the reasonableness of the design and implementation of JARPA II in relation to its objectives is an arguable matter on which scientists may have genuine differences of opinion.

5. According to Judge Yusuf, Article VIII constitutes an exception to the regulatory régime established by the Convention for commercial whaling, but it is not outside the scope of the ICRW. Nor is the discretionary power granted to States parties to issue a special permit for purposes of scientific research *unrestricted. It is to be lawfully used only for the achievement of the purposes laid down in the Convention.*

6. Judge Yusuf is however of the view that the evidence before the Court does not support the conclusion that the special permits for JARPA II have been issued by Japan for a purpose other than scientific research. Nor does such evidence establish that the special permits for JARPA II do not comply with the requirements and conditions laid down in the Convention. According to Judge Yusuf, the JARPA II programme was duly reviewed and commented by the Scientific Committee of the IWC in 2005 in accordance with Article VIII, paragraph 30, of the Schedule and the applicable guidelines (now Annex P) with regard to its methodology, design, and the effect of catches on the population concerned. In other instances, where the committee was of the view that a permit proposal did not meet its criteria, it specifically recommended that the permit should not be issued. This was not the case with regard to JARPA II.

7. Judge Yusuf also points to the fact that the Scientific Committee of the IWC in its Report of 2012 specifically recommended the use of data arising from both JARPA and JARPA II for catch-at-age based analysis for the minke whale dynamics model the committee is investigating; and in its 2013 Report the Committee referred to non-lethal sampling of humpback whales occurring within JARPA/JARPA II programmes as useful in the assessment of certain breeding stocks of humpback whales. In light of these reports by the Scientific Committee of the IWC on the generation by JARPA II of data which is useful to the work of the Scientific Committee, Judge Yusuf finds unpersuasive the majority's conclusion that JARPA II is not for purposes of scientific research.

8. Judge Yusuf is also not persuaded that there is any legal basis for the Court's conclusion that JARPA II is in breach of the moratorium established in paragraph 10 *(e)* of the Schedule, the prohibition on whaling in the Southern Ocean Sanctuary (para. 7 *(b)* of the Schedule), or of the factory ship moratorium (para. 7 *(b)*). All of these provisions apply to commercial whaling, not to research whaling. In the judge's view, this conclusion by the Court is especially unwarranted in the absence of clear evidence that JARPA II is commercial whaling in disguise. The Court has not established that the preponderant purpose of the programme was commercial whaling. In effect, the Judgment entails a finding of bad faith by Japan which is not explicitly expressed.

9. In the view of Judge Yusuf, the Court should have assessed, on account of the developments that have taken place both in the ICRW and in international environmental law in general, whether the continued conduct of JARPA II, as a programme that uses lethal methods under Article VIII, constitutes an anomaly which may frustrate the object and purpose of the Convention in light of the recent amendments thereto, as well as the extent to which such amendments may have restricted the right to issue special permits.

10. For Judge Yusuf, the amendments made to the Schedule with respect to the regulatory framework for commercial whaling, and in particular the moratorium adopted in 1982, which is still in place, and the Schedule on the prohibition on commercial whaling in the Southern Ocean Sanctuary, cannot be considered to be devoid of influence on the interpretation and implementation of Article VIII of the Convention in so far as they reflect a shift in attitudes and societal values towards the use of lethal methods for whaling in general. Thus, the application of Article VIII in the context of JARPA II should have been interpreted through the prism of all these developments, and in light of their effect on the object and purpose of the Convention.

11. In the judge's view, an interpretation of Article VIII in light of the evolving regulatory framework of the Convention, in addition to anchoring the reasoning and

conclusions of the Court on the law applicable to the dispute between the Parties, would have been of great value to the States parties to the Convention in view of the growing disconnect between Article VIII and the recent amendments to the Convention, and might have provided them with the tools necessary to restore an appropriate balance within the Convention.

Separate opinion of Judge Greenwood

The Court is not concerned with the moral, ethical or environmental issues relating to Japan's whaling programmes in the present case but only with whether JARPA II is compatible with Japan's international legal obligations under the International Convention for the Regulation of Whaling ("the Convention"). The answer to that question turns on the interpretation of Article VIII of the Convention, which grants each State the power to issue special permits authorizing whaling for purposes of scientific research. There is no presumption that Article VIII should be interpreted either in a restrictive or an expansive way. While recommendations by the International Whaling Commission ("the Commission") constitute part of the subsequent practice of the parties to the Convention, they are not legally binding and offer guidance on the interpretation of the Convention only to the extent that they reflect agreement among the parties. Most of the recommendations which have been invoked in support of a narrow reading of Article VIII were adopted only by very narrow majorities and do not reflect such agreement.

If the killing, taking and treating of whales in the course of JARPA II is within Article VIII, then the effect is that this conduct cannot be contrary to the other provisions of the Convention and its Schedule. However, if they fall outside Article VIII, then they are contrary to the Schedule, specifically to paragraphs 7 *(b)* (prohibiting the taking of fin whales in the Southern Ocean Sanctuary), 10 *(d)* (prohibiting the taking of fin whales by factory ship) and 10 *(e)* (prohibiting the setting of limits above zero in respect of any species of whale for commercial purposes).

Judge Greenwood agrees with the reasoning in the Judgment that JARPA II whaling does not meet the requirements of Article VIII, paragraph 1, of the Convention. In order to fall within the exemption contained in Article VIII, paragraph 1, it is necessary that the numbers of whales to be killed under JARPA II are sufficiently related to the achievement of the objectives of the programme. The much higher numbers of whales to be taken under JARPA II, compared with JARPA, is not justified on this basis. A key difference between JARPA and JARPA II is the latter's objective of "modelling competition among whale species and future management objectives". That objective clearly requires research into more than one species of whale. Yet, from the outset Japan has taken no humpback whales, and the number of fin whales taken has been very small. Japan's independent expert stated that the fin whale sample size was unjustifiable and would not have yielded any useful data. While Japan is not to be criticized for not having killed more fin whales or for acceding to the request by the Chair of the Commission not to take humpback whales, there is no sign that Japan attempted to adapt the JARPA II sample size as a result of the changed circumstances. Japan has also not provided the Court with any answer as to why, since data in respect of other species could be obtained by the use of non-lethal methods, such methods were not employed in respect of minke whales. Further, if the objective of modelling competition between whale species is set aside, the dramatic increase in the number of minke whales to be taken under JARPA II as compared to those taken under JARPA is difficult to justify.

Japan has not breached its obligations under paragraph 30 of the Schedule, since it has provided the required information to the IWC Scientific Committee but Judge Greenwood

questions whether Japan has fully complied with the duty of co-operation under the Convention.

The Court had been right not to order a second round of written argument in the present case.

Separate opinion of Judge Xue

Although Judge Xue concurs with the Court's finding that special permits granted under JARPA II do not fall within the meaning of Article VIII, paragraph 1, of the International Convention for the Regulation of Whaling (the Convention), she does not agree with certain reasonings of the majority decision.

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

Judge Xue takes the view that Article VIII, in setting up the special category of scientific whaling, allows a contracting party to specify the number of killings and other conditions as it "thinks fit", and exempts the killing, taking and treating of whales under special permits from restrictions imposed on commercial whaling under the Convention régime. By these terms the Convention thus confers a discretionary power on the contracting parties with regard to scientific whaling. What remains unclear is to what extent a contracting party may exercise such discretion. Judge Xue observed that first, a contracting party must avoid any adverse effect on the stocks with a view to maintaining sustainable utilization and conservation of the resources. Secondly, attention must be paid to the situation of commercial whaling, as 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. She adds that prior to the moratorium on commercial whaling, such dispute as the current one with JARPA II programme would not arise; lethal sampling did not pose an issue. Thirdly, discretion under Article VIII, paragraph 1, 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. She concludes that for these reasons, Article VIII has not bestowed a self-defined right on the contracting parties.

The Court should, according to Judge Xue, first address the issue whether the authorizing party can 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. She emphasizes that although the terms of Article VIII remain intact, various restrictions on commercial whaling for purposes of conservation in the course of the past 68 years have exerted a creeping effect on the way in which scientific research may be conducted, particularly with respect to methodology and scale of sample size. Revisions 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, free-standing, 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. Judge Xue thus observes that 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

On the standard of review, Judge Xue stresses that the review by the Court should focus on legal issues. First, in assessing Japan's exercise of its right under Article VIII, paragraph 1, judicial review of the Court should link with treaty interpretation. In her opinion, 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. In accordance with the well-established principle *onus probandi incumbit actori*, it is up to Australia to prove with convincing evidence to the Court that JARPA II does not involve scientific research.

Judge Xue also finds problematic the distinction between the term "scientific research" and the phrase "for purposes of" in Article VIII, paragraph 1, of the Convention in the Judgment. In her view, this interpretation 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. As stated above, determination of scientific research is primarily a matter of fact subject to scientific scrutiny. When the Court is tasked to determine whether or not, 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 will inevitably be set to assess the scientific merit of the programme.

III. JARPA II programme in light of Article VIII, paragraph 1, of the Convention

While Judge Xue agrees with some of the findings reached by the Court, she believes that 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.

She observes that Japan does not deny funding consideration is involved in the determination of granting special permits, claiming that such practice is normal in fishery research. In regard to the scale of lethal sampling of JARPA II, she thinks that 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 the Party of the burden of proof.

Moreover, 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 fund-raising 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. For these reasons, Judge Xue is of the opinion that at the time when the moratorium on commercial whaling is imposed, the term "for purposes of scientific research" under Article VIII, paragraph 1, should be strictly interpreted; sample sizes that are dictated by fund-raising consideration, therefore, cannot be considered as "objectively reasonable", or "for purposes of scientific research".

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

On the question of the alleged breach of the three provisions of the Schedule (commercial whaling moratorium, factory ship moratorium, and Southern Ocean Sanctuary moratorium), Judge Xue does not agree with the Court's reasoning that since JARPA II does

not fall within the meaning of Article VIII, paragraph 1, of the Convention, it should be subject to the above-mentioned three provisions. She is of the view that 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. Fund-raising, 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. According to her view, scientific whaling, even if with flaws, remains scientific in nature.

Judge Xue finally underlines that 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. 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, it shall be obliged to revoke all the extant special permits and refrain from granting further for JARPA II, thus forestalling the Scientific Committee's future review. In her opinion, JARPA II remains a programme for scientific research, and 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.

Separate opinion of Judge Sebutinde

Judge Sebutinde concurs with the Court's findings in points 1, 2, 3, 4, 5 and 7 of the Judgment but considers that the Court should have clarified more precisely the limits of discretion of a Contracting Government under Article VIII of the International Convention for the Regulation of Whaling (ICRW) as well as the scope of the Court's power to review the exercise of that discretion.

In particular, Judge Sebutinde is of the view that the Court should have specified the criteria that have guided and informed its determination of whether the special permits issued under JARPA II were "for purposes of scientific research", taking account of the parameters that the States parties to the ICRW consider relevant in this regard. These parameters are reflected in paragraph 30 to the Schedule and elaborated further in the binding resolutions and guidelines of the IWC. Among the latter, the Annex P guidelines should be given a particular weight, since they are the most recent set of guidelines adopted by consensus and on the basis of which JARPA II will be assessed by the Scientific Committee in 2014. On this basis, Judge Sebutinde considers that the Court should have taken into account the following parameters.

First, the whaling programme for which the special permit is sought must include defined research objectives and must be based on appropriate scientific methodology. Secondly, the Contracting Government issuing a special permit for scientific research whaling must set limits on the number of whales to be killed, in addition to any other conditions it sees fit, and must specify the number, sex, size and stock of the animals to be taken. While the Contracting Government enjoys considerable discretion in determining the catch limits, it must exercise that discretion consistent with the object and purpose of the ICRW, in that whales may be killed only to the extent necessary for achieving the stated goals of the scientific research programme. Thirdly, the issuing State must ensure that the proposed scientific research programme is designed and implemented so as not to endanger the target whale stocks, and must specify the possible effect of the research programme on conservation of whale stocks. Lastly, the Contracting Government must submit the proposed

special permits to the Scientific Committee for prior review and comments. This procedural requirement enables the IWC and its Scientific Committee to play a monitoring role in respect of special permit whaling, while obligating the issuing State to co-operate with the IWC.

In addition, Judge Sebutinde disagrees with the reasoning and findings of the Court regarding Japan's compliance with its obligations under paragraph 30 of the Schedule to the ICRW. In her view, Japan has failed to fulfil its obligation of meaningful co-operation with the IWC and the Scientific Committee.

In particular, against the recommendation of the IWC that no additional Japanese special permit programmes be conducted in the Antarctic until the Scientific Committee had completed an in-depth review of the results of JARPA, Japan launched JARPA II before the Scientific Committee had completed such review. Secondly, there is no indication that Japan has duly considered the IWC comments and recommendations in respect of certain controversial aspects of JARPA II such as its resort to lethal methods. Thirdly, although the JARPA II Plan provided the essential information required under paragraph 30 of the Schedule, much of the information is not detailed enough to be considered compliant with the relevant IWC guidelines, a shortcoming likely to hamper the Scientific Committee's upcoming review of JARPA II. Fourthly, Japan has failed to submit the specific special permits issued in respect of JARPA II to the Scientific Committee for prior review, as required by paragraph 30. Given that these permits are virtual replicas of the permits issued under JARPA and that JARPA II differs in implementation at least, from its predecessor, it is imperative that the Scientific Committee ought to have had prior opportunity to review and comment on them. Fifthly, as noted in the Judgment (paragraph 222), apart from reference to collaboration with Japanese research institutes in relation to JARPA I, there is no evidence of co-operation between JARPA II and other domestic and international research institutions other than an undertaking, in the JARPA II Plan, that "[p]articipation of foreign scientists will be welcomed, so long as they meet the qualifications established by the Government of Japan".

In view of these shortcomings Judge Sebutinde was unable to join the majority in finding that "Japan has complied with its obligations under paragraph 30 of the Schedule to the [ICRW] with regard to JARPA II".

Separate opinion of Judge Bhandari

In his separate opinion, Judge Bhandari explains the reasons for his vote against operative subparagraph (6) of the Judgment. While noting the existence of a duty to co-operate arising from paragraph 30 of the Schedule to the International Convention for the Regulation of Whaling when States parties interact with the International Whaling Commission and its Scientific Committee regarding the issuance of special permits for purposes of scientific research, Judge Bhandari rejects the Court's conclusion that the Government of Japan has complied with paragraph 30. In his view, while Japan has demonstrated formal compliance with the dictates of paragraph 30, its actions have not demonstrated substantive compliance with the broad and purposive scope of the duty to co-operate. Moreover, Judge Bhandari believes that in addition to finding that JARPA II is not a programme for purposes of scientific research under Article VIII, paragraph 1, of the Convention, the Court ought to have made a further pronouncement that JARPA II is a commercial whaling programme. In his view, this conclusion is inescapable given the mutually exclusive categories of whaling envisaged under the Convention, as well as the

abundant evidentiary record chronicling the history surrounding JARPA II, its indefinite duration, and certain unmistakably commercial qualities of the programme.

Separate opinion of Judge *ad hoc* Charlesworth

In her separate opinion, Judge *ad hoc* Charlesworth addresses two specific areas in which her views differ from those of the majority, namely, the nature of the restrictions on the use of lethal methods "for purposes of scientific research" under Article VIII of the International Convention for the Regulation of Whaling 1946 (ICRW), and Japan's compliance with paragraph 30 of the Schedule.

Judge *ad hoc* Charlesworth is of the view that Article VIII of the ICRW should be read in light of resolutions on research methods adopted by consensus by the International Whaling Commission (IWC). In this regard, she argues that applicable resolutions support an interpretation of Article VIII that the use of lethal methods should be essential to the objectives of the scientific research programme. According to Judge *ad hoc* Charlesworth, the precautionary approach — which is also relevant to the interpretation of the ICRW — reinforces the conclusion that lethal methods should be of last resort in scientific research programmes under Article VIII.

Judge *ad hoc* Charlesworth concludes that Japan has breached paragraph 30 of the Schedule in that it has failed to comply with States parties' duty of co-operation with the Scientific Committee, which she considers a critical element of the fabric of the ICRW. While the Scientific Committee's views on special permit proposals are not legally binding on States parties under the terms of paragraph 30, the IWC has empowered the Committee to review and comment on such proposals, thereby creating an obligation on the proposing State to co-operate with the Committee. Such an obligation requires States parties to show genuine willingness to reconsider their positions in light of the Committee's views.

According to Judge *ad hoc* Charlesworth, Japan has failed to comply with its duty of co-operation, *inter alia*, by (i) launching JARPA II before a review of JARPA by the Scientific Committee had taken place; (ii) failing to give meaningful consideration to the feasibility of non-lethal methods in the design of JARPA II; and (iii) continuing to rely on JARPA II's original Research Plan as a basis for subsequent annual permits in circumstances where the conduct of JARPA II has differed in substantial ways from the scheme set out in the Research Plan.