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Informe Jurídico sobre el Asunto "Caza de Ballenas en la Antártida" (Australia c. Japón: intervención de Nueva Zelanda)

Trabajo de suficiencia profesional para optar el título profesional de Abogado/a

Autor:

Arlita Sophia Quincho Gamarra

Asesor:

José Manuel Pacheco Castillo

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RESUMEN

El presente informe jurídico se centra en el Asunto "Caza de Ballenas en la Antártida" (Australia c. Japón: intervención de Nueva Zelanda) para efectos de analizar una serie de problemas jurídicos en torno a la jurisdicción de la Corte Internacional de Justicia, interpretación de tratados y el principio precautorio.

Todos ellos serán analizados en complemento con diversos temas de derecho internacional como, por ejemplo, , el objeto y fin de los tratados, la reserva, la enmienda, entre otros.

Palabras clave

Jurisdicción, Corte Internacional de Justicia, Convención Internacional de Caza de Ballenas, Comisión Internacional Ballenera, ballenas, industria de caza de ballenas, moratoria, investigación científica, principio precautorio, objeto y fin, reservas, enmiendas, balance.

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INTRODUCCIÓN

En el presente informe jurídico se analiza Asunto "Caza de Ballenas en la Antártida" (Australia c. Japón: intervención de Nueva Zelanda) el cual es iniciado por el Estado australiano en contra de Japón por la presunta violación de las disposiciones de la Convención Internacional de Regulación de Caza de Ballenas.

Al respecto, nos centraremos en el análisis jurídico de los siguientes problemas jurídicos. En primer lugar, en relación con presunta falta de competencia de la Corte Internacional de Justicia en el caso objeto de estudio; en segundo lugar, en relación a la interpretación del término "investigación científica" en el marco de la Convención analizada; en tercero, sobre la viabilidad del uso de métodos letales en el marco del Artículo VIII de la Convención y, finalidad, sobre la posibilidad de interpretar una disposición de la Convención de forma aislada a esta misma.

Esto con el objeto de emitir un análisis jurídico-crítico en torno a los problemas planteados y otros aspectos relacionados a instituciones importantes del derecho internacional como lo son la interpretación de tratados, el objeto y fin de estos, las reservas, enmiendas, entre otras.

INFORME JURÍDICO SOBRE EL CASO DE LA "CAZA DE BALLENAS EN LA ANTÁRTIDA" (Australia c. Japón: intervención de Nueva Zelanda).

1. Antecedentes y hechos

1.1 Convención Internacional para la Regulación de la Caza de Ballenas.

La caza de ballenas es una actividad que bien podría remontarse a los 2200 años antes Cristo. A lo largo de la historia, esta se ha mantenido debido a la riqueza de productos que se pueden derivar de este cetáceo, como lo son el aceite, la carne y los tejidos de esta especie.

La actividad en sí misma evolucionó y se expandió a tal magnitud que – a pesar de la falta de datos - Tonnesen y Johnsen afirman que para 1883, no cabía la duda sobre la caza de todas las especies de ballenas hasta dicho momento (como se citó por Fitzmaurice, 2020. p, 1). Aunque altamente preocupante, dicha afirmación tiene sentido si consideramos que la caza de este cetáceo se realizó de forma deliberada y sin regulación alguna hasta el año 1931.

A raíz de ello, a inicios de los años veinte, se desató una preocupación mundial por la seria depredación de ballenas ocasionada por el desarrollo mismo de la industria de caza de ballenas; la cual, durante el periodo entre guerras, significó una importante fuente de recursos económicos para los Estados "balleneros".[1]

Ante este panorama, preocupante para la especie, se establecieron los primeros intentos de la comunidad internacional para regular dicha actividad: el Convenio de Ginebra para la Regulación de la Pesca de Ballena de 1931 y el Acuerdo para la Regulación de la Caza de Ballena de 1937. Si bien estos tratados no lograron los efectos deseados, establecieron un marco jurídico referencial para la regulación de la actividad a futuro.

Con respecto al primero de estos intentos, podemos resaltar algunos aspectos relevantes para entender la problemática de aquel entonces. Por medio del Convenio de Ginebra de 1931, solo se impuso una prohibición sobre dos especies de ballenas y se impusieron ciertos requisitos como la prohibición de matanza de ballenas nodrizas,

[1]Denominación otorgada a los Estados que dentro de sus actividades económicas principales consideraban a la caza de ballenas como una de ellas.

hembras en compañías de sus crías, muy jóvenes, etc.[2] Sin embargo, estas medidas no produjeron un mayor impacto en la población de ballenas debido a que cinco de los mayores Estados balleneros[3] de la época se negaron a adoptarlo y tampoco se estableció un órgano con facultades que se encargue de la supervisión del cumplimiento de dicha regulación.

Con respecto al segundo de estos tratados, se incrementó la regulación en el sentido de imponer limitaciones como las "temporadas de caza" y un tamaño máximo de las especies cazadas; así también, mantuvo las prohibiciones de la Convención de 1993 y añadió una con respecto a la prohibición de la caza de ballenas grises.[4]

A pesar de estos intentos, las regulaciones no resultaron eficientes para lograr los objetivos deseados. Al respecto, como señala Fitzmaurice (2013), esto se debió no solo a las disposiciones de estos instrumentos, sino que los mismos no tuvieron el apoyo de los principales Estados que realizaban la caza de ballena como una actividad principal.

En consecuencia, los Estados de la comunidad internacional decidieron reunirse nuevamente para la creación del principal instrumento jurídico internacional para la regulación de la materia a la fecha: la Convención para la Regulación de la Caza de Ballenas de 1946 (en adelante, la "Convención" o la "CIRCB"); que más tarde, entraría en vigor el 10 de noviembre de 1948.

Con respecto a dicho instrumento, es menester resaltar cuatro aspectos importantes. El primero, es el intento de conciliación de dos intereses contrapuestos al momento de su conclusión. Como afirma Fitzmaurice (2020) se intentó conciliar por un lado los intereses de Estados "balleneros", quienes pretendían la preservación de la industria ballenera y, por otro, la conservación de las poblaciones de ballenas.

Como segundo punto a resaltar, a diferencia de sus antecesores, la Convención fue ratificada[5] por la mayoría de los Estados "balleneros"[6] entre los cuales podemos

[2] En conformidad con los Artículos 5 y 6 del Convenio de Ginebra para la Regulación de la Pesca de Ballena de 1931.
[3] Japón, Alemania, Chile, Argentina y Estados Unidos.
[4] En conformidad con los Artículos, 4, 5 y 7 del Acuerdo para la Regulación de la Caza de Ballena de 1937.
[5] Como demostración de su manifestación de consentimiento en ser parte y obligarse a las disposiciones establecidas en la Convención, de acuerdo con el Artículo 11 de la CV 69.
[6] En conformidad con el Artículo X de la Convención.

resaltar la presencia de la Unión de Repúblicas Socialistas Soviéticas (URSS), Gran Bretaña y Estados Unidos; a los cuales se les han ido sumando otros de sus similares.

El aspecto transcendental de su celebración es que, considerando el mencionado respaldo, esta "ha regulado la mayoría de las actividades de caza de ballenas desde su entrada en vigor hasta la fecha" (Lyster y Prince. 1985, p. 18). De hecho, esto sigue siendo así hasta la actualidad.

El tercer aspecto, se basa en que el cuerpo integral Convención. Esto debido a que esta no solo está conformada por las disposiciones de este tratado sino también por un Calendario. La característica principal de este último se basa en que "**it is in the Schedule, which has been constantly amended [The Convention], that detailed regulatory provisions are set ou**t; and, as we shall see below, **the most important mode of operation of the IWC**[International Whaling Commission] is by way of amendment of the Schedule" [es en este Calendario, que ha sido constantemente modificada – la Convención - , donde se establecen disposiciones reglamentarias detalladas y, como veremos más adelante, el modo de funcionamiento más importante de la CBI [Comisión Ballenera Internacional] es mediante la modificación de este Calendario.] (en énfasis es propio) (Fitzmaurice, 2013, p.458)

El cuarto aspecto a resaltar es la creación del órgano responsable de llevar a cabo las gestiones, la revisión y monitoreo de las disposiciones de la Convención: la Comisión Ballenera Internacional (en adelante, la "Comisión" o "CBI").[7] La conformación de esta Comisión está integrada por un representante de cada Estado parte de la Convención, quienes – pudiendo acompañarse de expertos o consejeros - se reúnen de forma anual para adoptar recomendaciones relacionadas a la materia, por ejemplo, especies protegidas, métodos de caza, cuotas de caza, entre otros.

Una de las facultades más relevantes de la Comisión es la de realizar enmiendas al Calendario de la Convención (en adelante, el "Calendario"), el cual es un documento que forma parte integral de la CIRCB en conformidad con el numeral 1 del Artículo 1 de la misma. En ese sentido, de forma regular la Comisión podrá enmendar las disposiciones del Calendario relacionadas a la conservación y utilización de recursos provenientes de ballenas. Estas, a su vez, tienen ciertas exigencias para ser llevadas a

[7] En conformidad con lo estipulado en el Artículo III de la Convención.

cabo, como ser necesarias para los propósitos de la Convención, basarse en logros científicos, entre otras.[8]

De este modo, la Comisión sostendrá reuniones de forma anual para discutir y decidir si es que las disposiciones del Calendario son conformes a los fines de la Convención y realidades sobre la caza de ballenas o, en todo, será necesario enmendar el Calendario, el cual de forma enmendada pasará a formar parte integral de la Convención. En otras palabras, en virtud del referido numeral 1 del artículo 1 de la Convención, podemos sostener que la enmienda sobre el Calendario significa una enmienda a las disposiciones mismas del tratado en referencia.

En 1982, en ejercicio de esa facultad, la Comisión decidió efectuar una enmienda trascendental al Calendario: la moratoria de la caza comercial de ballenas (en adelante, la "Moratoria"):

> "Sin perjuicio de las demás disposiciones del párrafo 10, los **límites de captura para la matanza con fines comerciales de ballenas de todas las poblaciones** para temporadas costera de 1986 y pelágica de 1985/86 y en adelante **será cero**. Esta disposición se mantendrá bajo revisión, con base en el mejor asesoramiento científico y, a más tardar en 1990, la Comisión llevará a cabo una evaluación exhaustiva de los efectos de esta decisión en poblaciones de ballenas y considerará la modificación de esta disposición y el establecimiento de otros límites de captura."[9] (el énfasis es propio).

En este sentido, desde la entrada en vigor de dicha enmienda, que luego se integró al contenido de la Convención, se prohibió la caza comercial de ballenas desde las temporadas referidas hasta que la misma Comisión decida lo contrario. Al respecto, la moratoria se mantiene hasta la actualidad.

Ahora bien, como es usual en el derecho de los tratados, la Convención reguló tanto la posibilidad de objetar la enmienda como la excepción a la regla general (la prohibición de caza comercial de ballenas). En el caso de la primera, los Estados parte de la Convención tienen posibilidad de objetar una enmienda dentro de un determinado

[8] Para mayor detalle, revisar los numerales 1 y 2 del Artículo V de la Convención.
[9] Inciso c), numeral 10 del Calendario de la Convención.

plazo, de modo tal que "la enmienda no podría ser efectiva para aquellos Estado miembros que la hayan objetado hasta la fecha en la que estos retiren su objeción". [10]

En el caso de la segunda, el Artículo VIII, párrafo 1 de la Convención, regula lo siguiente:

> "No obstante todo lo dispuesto en la presente Convención, **cualquier gobierno contratante podrá otorgar a cualquiera de sus nacionales un permiso especial autorizado** a dicho nacional a matar, tomar y tratar ballenas con **finalidades de investigación científica**, con **sujeción a aquellas restricciones en cuanto a cantidad, y a aquellas otras condiciones** que el gobierno contratante crea convenientes, y la muerte, captura y trata de ballenas, **de acuerdo con las disposiciones de este artículo**, estarán exentos de los efectos de esta Convención. **Cada gobierno contratante dará cuenta de inmediato a la Comisión de todas las autorizaciones** de tal naturaleza que haya otorgado. Cada gobierno contratante podrá, en cualquier momento, revocar cualquier permiso de tal naturaleza que haya otorgado". (el énfasis es propio)

Por lo tanto, por medio del referido artículo, la Convención permite a los Estados solicitar permisos especiales para autorizar a sus nacionales la caza de ballenas, siempre que se cumplan con los siguientes requisitos: 1) que la actividad que motive la solicitud tenga la finalidad de investigación científica, 2) en conformidad con las restricciones y disposiciones de la Convención y 3) la notificación inmediata a la Comisión de las autorizaciones otorgadas en virtud del Art VIII.

Una vez presentados, estos deberán ser revisados por el Comité Científico de la Comisión (en adelante, el "Comité"), encargado de la información y asesoramiento sobre el estado, identificación y clasificación de poblaciones de ballenas.[11] Al respecto, todos los Estados Parte que tengan intenciones de adecuarse dentro de la excepcionalidad mencionada, deberán reportar a la CBI todas las autorizaciones que otorguen a sus nacionales, así como los resultados de sus investigaciones. Con posterioridad, será el Comité el órgano encargado de la revisión de su solicitud y en

[10] Numeral 3 del Artículo V de la Convención.
[11] Numeral 4 del Artículo III de la Convención.

función a ello emitirá una recomendación[12] que generalmente es seguida por la Comisión.

En efecto, la moratoria generó el descontento de muchos de los Estados Parte de la Convención. Por este motivo, como Fitzmaurice (2013) señala, varios Estados además de Japón – entre ellos, Noruega y la URSS - decidieron objetar la Moratoria. Incluso uno de los mayores exponentes de la caza de ballenas en aquel entonces, Canadá, dejó de ser parte de la Convención.

No obstante, Japón marcó la diferencia en 1986, cuando además de cesar la caza por la cual había interpuesto una objeción a la enmienda que establece la Moratoria, retira esta misma. Pero, sobre todo, porque este Estado se presenta ante la Comisión proponiendo un programa con fines científicos y basado en el Artículo VIII de la Convención; el cual detallaremos y analizaremos a fondo en el siguiente subcapítulo.

1.2 Hechos del caso

Los hechos del presente caso se relacionan a la Convención sobre la cual se detaSollló en el subcapítulo anterior y, de hecho, el caso materia de análisis del presente Informe se origina ante una presunta violación de las disposiciones de dicho tratado. Para entender con claridad el desarrollo del caso y su relación con los problemas jurídicos que se analizarán en el capítulo siguiente, es menester considerar los siguientes hechos relevantes.

En primer lugar, los Estados litigantes se constituyeron en Estados parte de la Convención con anterioridad a la solicitud de demanda de presentada por Australia, ante el registro de la Corte Internacional de Justicia (en adelante, "CIJ" o la "Corte") . En el caso de Australia, esta se adhirió a la misma el 10 de noviembre de 1948; Nueza Zelanda, el 15 de junio de 1967 y; Japón, hizo lo propio el 25 de abril de 1951. Por lo tanto, todos ellos, de acuerdo con la oportunidad mencionada, se obligaron en virtud de las disposiciones de la Convención, así como los cambios que la Comisión pudiese hacer sobre ella por medio del Calendario.

[12] De acuerdo con la Reglas de Procedimiento del Comité Científico.

En ese sentido, y en consideración que Japón retiró su objeción a la Moratoria, la totalidad de obligaciones y facultades, incluyendo la prohibición de la caza comercial de ballenas era aplicable a todos los Estados mencionados.

Para efectos de entender el camino procesal que siguen Australia y Japón (en adelante, las "Partes") en el presente caso, se desarrollará a más detalle el procedimiento judicial ante la CIJ.

Este se podrá iniciar de forma unilateral con la solicitud del Estado demandante al Secretario General de Naciones Unidas (en adelante, el "Secretario") de la Corte. Adicionalmente, como Vargas (2014) indica, el Estado contra quien se dirige la demanda, el objeto de la controversia, los fundamentos sobre la competencia de la Corte, la índole de la petición y los hechos y argumentos jurídicos en los cuales se basa la demanda.

El procedimiento consta de dos etapas: escrita y oral. En la primera de ellas, las Partes realizarán la presentación escrita de sus respectivas posturas. En el caso del Estado demandante, es denominada como Memoria y; en el caso del demandado, una Contramemoria; además, las Partes podrían acordar la presentación de una réplica y dúplica. En la segunda de ellas, los agentes de los respectivos estados litigantes, en representación de sus respectivos Estados nacionales, darán paso a una exposición de sus alegatos de forma oral; la cual estará sujeta a la intervención de jueces, quienes podrían interrogar tanto a ellos mismos como a los abogados, testigos y peritos experto de ser el caso.

Terminada esta segunda etapa, los agentes deberán presentar sus conclusiones definitiva para que los jueces procederán a la deliberación secreta sobre el caso.

Así, el 31 de mayo de 2010, Australia presenta ante el registro de la CIJ una demanda en contra del Japón por la autorización del Programa de Larga Escala de Caza de Ballenas en Segunda Fase (en adelante, "JARPA II"), ante una presunta violación de las obligaciones del Estado japonés en virtud de la Convención.

Asimismo, el Estado australiano solicitó: a) el cese en la implementación del JARPA II, b) la revocación de toda autorización, permiso o licencia que permita las actividades de las cuales es objeto la demanda y c) la provisión de seguridad y garantías suficientes

de que (Japón) no llevaría a cabio ninguna acción futura bajo el JARPA II o alguno similar hasta que este sea conforme al derecho internacional.

En este sentido, el Secretario procedió a comunicar la demanda a los siguientes sujetos. Primero, en conformidad con el Artículo 40, párrafo 2 del Estatuto de la CIJ[13] (en adelante, el "Estatuto") se notificó a todos los Estados con capacidad para comparecer ante la Corte y con posible interés en la controversia; segundo, bajo orden de la misma CIJ y en virtud del Artículo 40 de su Reglamento, a todos los Estados parte de la Convención[14] y; finalmente, en conformidad con el Artículo 69, párrafo 3 del Reglamento de la CIJ[15], también a la Comisión.

Por consiguiente, la CIJ estableció las fechas para la presentación por escrito de las Partes y así iniciar la fase escrita. Ambas partes cumplen con una oportuna presentación y, en una ulterior reunión promovida por el Presidente de la Corte, este decide que no será necesaria una segunda ronda de argumentos escritos.

Con fecha 20 de noviembre de 2012, Nueva Zelanda presentó ante el Secretario una declaración de intervención, fundamentada en el Artículo 63, párrafo 2 del Estatuto.[16] En consecuencia, este mismo notifica a las Partes para que puedan realizar sus observaciones, de ser el acaso.[17] Tanto Japón como Australia realizaron la presentación oportuna de sus observaciones. Posteriormente, la CIJ las consideró declaró admisible la intervención de Nueva Zelanda.

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[13] **Artículo 40, Estatuto de la CIJ. -** 2. El Secretario comunicará inmediatamente la solicitud a todos los interesados.3. El Secretario notificará también a los Miembros de las Naciones Unidas por conducto del Secretario General, así como a los otros Estados con derecho a comparecer ante la Corte.

[14] **Artículo 43, Reglamento de la CIJ.-** Cuando la interpretación de una convención en la cual sean parte otros Estados además de las partes en litigio pueda plantearse en el sentido de lo dispuesto en el párrafo 1 del Artículo 63 del Estatuto, la Corte considerará las instrucciones que deberá dar el Secretario en la materia.

[15] **Artículo 69, párrafo 3 del Reglamento de la CIJ**.- 3. En el caso previsto en el párrafo 3 del Artículo 34 del Estatuto, el Secretario, siguiendo instrucciones de la Corte o, si ésta no estuviese reunida, del Presidente, procederá como está prescrito en dicho párrafo. La Corte, o si no estuviese reunida el Presidente, podrá fijar, a contar del día en que el Secretario haya transmitido copias del procedimiento escrito y después de consultar al más alto funcionario administrativo de la organización internacional pública interesada, un plazo dentro del cual la organización podrá presentar a la Corte sus observaciones escritas. Estas observaciones se comunicarán a las partes y podrán ser debatidas por ellas y por el representante de dicha organización en el curso del procedimiento oral.

[16] **Artículo 63, párrafo 2 del Estatuto**.- Todo Estado así notificado tendrá derecho a intervenir en el proceso;

[17] **Artículo 83, párrafo 1 del Reglamento de la CIJ.-** 1. Copia certificada conforme de la petición de permiso para intervenir fundada en el Artículo 62 del Estatuto, o de la declaración de intervención fundada en el Artículo 63 del Estatuto, se transmitirá inmediatamente a las partes en el asunto, las cuales serán invitadas a presentar sus observaciones escritas dentro de un plazo fijado por la Corte o, si ésta no estuviese reunida, por el Presidente.

El 17 de octubre de 2012, el Secretario informó a las partes que la Corte había solicitado la presentación de información relacionada a la evidencia de expertos y que cada Parte tendría la oportunidad de comentar sobre la comunicación de la otra; inclusive enmendar la información ya presentada junto con la lista de expertos a ser llamadas en la audiencia. En efecto, ambas Partes comunicaron los datos relevantes sobre los expertos a ser llamado por cada una la audiencia oral; así como sus respectivos testimonios.

De forma previa al inicio de la fase oral, es decir, al inicio de las audiencias públicas, la CIJ decidió que los escritos de las partes, así como los documentos anexos serian accesibles al público en la apertura de procedimientos orales[18]

Ahora bien, para efectos de pasar al siguiente capítulo, es necesario ahondar más en el programa que da origen a la problemática protagonista del presente caso: El JARPA II. Este es un programa japonés que implica el uso de métodos letales para la toma de muestras de tres especies de ballenas: pequeños rorcuales del Antártico, rorcuales comunes y ballenas jorobadas. Además, tal como lo prevé su denominación, es la segunda fase de un programa lanzado por Japón en el año 1987 (el "JARPA"), con el presunto propósito de la recolección de información científica que permitiese la estimación de la población de ballenas.

Sobre este particular, en marzo de 2005, Japón presentó ante el Comité Científico de la Comisión un Plan de Investigación para su debida revisión y así otorgar los permisos requeridos en relación con dicho programa. Para noviembre del mismo año, el programa inicio sus operaciones y el Estado japonés emitió los permisos especiales en favor del Instituto de Investigación de Cetáceos de Japón, una fundación nacional suya.

Al respecto, cabe recordar que, si bien existía una Moratoria a la caza comercial de ballenas, Japón se encontraba facultado por la Comisión a autorizar de forma excepcional un permiso a los programas JARPA y JARPA II; de acuerdo con artículo VIII, párrafo I de la Convención (en adelante, el "Artículo VIII"), siempre que medien fines científicos y se cumplan una serie de requisitos objetivos.

Aun contando con la autorización emitida por la Comisión, el Estado japonés tenía la obligación de mantener sus actividades de caza en conformidad y respeto a las

[18] En conformidad con el Art 53, párrafo 2 del Reglamento CIJ.

disposiciones de la Convención tal como lo señala el Artículo VIII de la Convención. Sin perjuicio de ello, el volumen de caza de ballenas con el JARPA II aumentó a tal magnitud que resultó un porcentaje exorbitantemente mayor al inicialmente propuesto en su plan de investigación.

En consecuencia, los demás Estados Parte de la CIRCB y la misma Comisión, manifestaron su preocupación por el volumen de caza del programa japonés y se reforzaron una ola de críticas en contra de este. Unas que "no eran nuevas [pues] ya desde el inicio del JARPA I, la CBI ha[bía] manifestado su preocupación por el alcance de pesca científica y su efecto total de la población de ballenas". (Rodríguez, 2010, p. 148).

Esta "ola de preocupación" de parte de la comunidad Parte de la Convención, se refleja en dos resoluciones emitidas por la Comisión.

La primera emitida, es la Resolución 2005-1:

> "*PREOCUPADOS [los Estados Parte de la Convención]* ***porque más de 6800 ballenas minke antárticas*** *(Balaenoptera bonaerensis)* ***han muerto en aguas antárticas en el año 18 del JARPA, en comparación con un total de 840 ballenas asesinadas en todo el mundo por Japón*** *para la investigación científica en el período de 31 años anterior a la moratoria [...]*
>
> *OBSERVANDO TAMBIÉN que* ***algunas ballenas jorobadas que serán objetivo de JARPA II pertenecen a poblaciones reproductoras pequeñas y vulnerables*** *alrededor de islas pequeñas Estados del Pacífico Sur y que* ***incluso pequeñas capturas podrían tener un efecto perjudicial efecto sobre la recuperación y supervivencia de tales poblaciones***." (la negrita es propia).

A pesar de esta resolución, en la que la Comisión hace explícita la preocupación por el volumen de ballenas cazadas por el programa japonés, el Estado de Japón hizo caso omiso y continúa realizando una caza de gran magnitud.

En este sentido, la Comisión emite la Resolución 2007-1, en la cual reafirma que:

> "Japón ha autorizado un nuevo programa de permisos especiales en la Antártida, JARPA II, en el **que la captura de ballenas minke se ha más que duplicado**, y las ballenas de aleta y las ballenas jorobadas se han agregado a la lista de especies objetivo.

> **PREOCUPADOS de que las ballenas de aleta en el hemisferio sur estén actualmente clasificadas como en peligro de extinción**, y que las ballenas jorobadas en el área de investigación JARPA II puedan incluir ejemplares de poblaciones reproductoras […]" (el énfasis es propio)

Sobre este panorama, debemos tener presente que la autorización otorgada al JARPA II, solo podía haberse dado ante el cumplimiento de ciertos requisitos objetivos; una cuestión necesaria y aunque no debería, también "controversial" en el presente Caso. El mayor detalle de la problemática se desarrollará en las líneas siguientes del presente informe.

Ante lo expuesto, el estado australiano decide iniciar un procedimiento en contra de su similar japonés alegando la presunta violación del Artículo VIII, por el otorgamiento de permisos especiales para la caza de ballenas sin cumplir con las exigencias del referido artículo.

2. Análisis legal de problemas jurídicos identificados

2.1 Sobre la presunta falta de jurisdicción de la Corte Internacional de Justicia en el caso "Caza de Ballenas en la Antártida" debido a la declaración unilateral presentada por Australia.

En el presente subcapítulo, se analizará el problema relacionado presunta falta de jurisdicción de la Corte Internacional de Justicia en el caso "Caza de Ballenas en la Antártida" debido a la declaración unilateral presentada por Australia sobre su competencia (en adelante, la "Declaración").

Al respecto, el 22 de marzo de 2002, el Estado australiano realizó la siguiente declaración:

> "El **gobierno de Australia declara que reconoce como vinculante *ipso facto* y sin acuerdo especial, en relación con cualquier Estado aceptando la misma obligación,** la **jurisdicción de la Corte Internacional de Justicia** en conformidad con el parágrafo 2 del artículo 36 del Estatuto de la Corte, hasta el momento en que noticia del retiro de la presente declaración sea entregada al Secretario General de las Naciones Unidas. Esta declaración tiene efecto inmediato.
>
> Esta declaración no aplica para:

b) **Ninguna disputa concerniente o relativa a la delimitación de zonas marítimas, incluyendo mar territorial, zona económica exclusiva y plataforma continental, producto de, concerniente o relativa a la explotación de cualquier área disputada adyacente a cualquier espacio marítimo pendiente de delimitación**". (el énfasis es propio).

En ese sentido, si bien Australia reconoció la jurisdicción obligatoria de la CIJ en conformidad con el Artículo 36, párrafo 2 del Estatuto, también excluyó la misma sobre materias concernientes o relativas a la delimitación de zonas marítimas.

Por un lado, Australia, invoca la jurisdicción de la CIJ con fundamento en las declaraciones expresas de su propio Estado y Japón. Esto en base a su previamente citada Declaración y, en el caso japonés, en la suya del 9 de julio de 2007, según la cual:

"**Japón reconoce como vinculante *ipso facto* y sin ningún tipo de acuerdo especial**, en **relación con cualquier otro Estado aceptando la misma obligación y en condición de reciprocidad, la jurisdicción de la Corte Internacional de Justicia**, **sobre toda disputa** originada y después del 15 de septiembre de 1958 en relación con situación o hechos subsecuentes a esa fecha y que no hubiesen sido resueltos mediante otro medio de solución pacífica de controversias". (el énfasis es propio).

Asimismo, el Estado australiano sostiene dos cuestiones sobre su Declaración. La primera, que esta es solo aplicable para disputas entre este y otro Estado para reclamos relacionados a delimitación marítima y, la segunda, que el segundo supuesto de la exclusión está relacionado a la explotación de recursos derivados de un potencial acuerdo de delimitación, mas no de cualquier tipo de explotación relacionada a un asunto de delimitación.

Por consiguiente, en vista que las Partes no tenían ninguna disputa de delimitación ni mucho menos en relación con la explotación de recursos que pueda surgir de esa misma controversia, Australia sostiene que su Declaración con respecto a la jurisdicción de la CIJ no es aplicable al caso. En consecuencia, la CIJ es competente.

Por su parte, Japón pone en tela de juicio la jurisdicción de la Corte, alegando que el caso se adecuaría al segundo supuesto de la Declaración planteada por Australia. En

particular, señaló que la conjunción "o" de la referida Declaración diferenciaba dos supuestos: a) diputas de delimitación marítima y b) disputas relativas a explotación de zonas marítimas o adyacentes a áreas de delimitación.

Por lo tanto, a criterio japonés, la Declaración podría aplicarse en dos supuestos distintos y el segundo se aplicaría a la presente controversia. Esto debido a que sostiene que se trata de un caso "relacionado a la explotación" de una zona marítima disputada por Australia y, por ende, la Corte no tiene jurisdicción sobre el caso.

Ante la excepción planteada por las partes en torno a su jurisdicción, la CIJ menciona que para interpretar las declaraciones de las partes en las cuales se manifiesta la aceptación de su jurisdicción, procederá a "buscar la interpretación que armonice con una forma natural y razonable de leer el texto, teniendo en cuenta la intención [del Estado declarante]". [19] A partir de este criterio, la Corte concluye lo siguiente:

En primer lugar, la CIJ sostiene que, para identificar la intención de Australia, se debe tomar en cuenta el contexto, las circunstancias y los propósitos de este estado en calidad de declarante. En ese sentido, de la redacción del documento, se desprende que la Declaración debe ser leída como una unidad y tomando en cuenta el comunicado de prensa dado por su Fiscal General y Ministro de Relaciones Exteriores. En este suceso, se expresa que la verdadera intención de su Declaración fue la de incluir a aquellas controversias sobre explotación de un área en donde exista una disputa de delimitación o, en su defecto, un área marítima adyacente a ella.

En otras palabras, se entiende como requisito para la exclusión de la jurisdicción de la CIJ – en base a la Declaración - la existencia de una disputa entre las partes concerniente a delimitación de zonas marítimas.

En segundo lugar, sostiene que el hecho de que existan derechos marítimos en controversia no implica que sobre dicha área exista una delimitación marítima como una disputa entre las partes. Al respecto, para aclarar la diferenciación expuesta, la CIJ manifestó que, tal como estableció en el Asunto Diferendo Territorial y Marítimo: "task of delimitation consists in resolving the overlapping claims by drawing a line of

[19] Criterio también establecido en el Asunto Anglo-Iranian Oil Co, Excepción Preliminar, (22 de junio de 1952) p, 104.

separation between the maritime areas concerned" [20] [la tarea de delimitación consiste en resolver las demandas sobrepuestas mediante el establecimiento de una línea de separación entre las áreas marítimas concernientes] [21]

Por lo tanto, debido a que en el presente caso no existió una disputa relativa a delimitación marítima entre las partes y su controversia no tiene relación alguna con la definición establecida por la CIJ de delimitación marítima, no se presenta el supuesto necesario que la Declaración excluya la competencia de la Corte. En consecuencia, la CIJ sí tiene jurisdicción sobre la disputa entre ambos Estados.

Tomando en cuenta todo lo anterior, procederemos a construir una posición personal en relación con el problema jurídico planteado.

En primer lugar, sobre la competencia de la Corte, cabe resaltar dos aspectos en particular. El primero, que los Estados litigantes, en calidad de miembros de la Organización de Naciones Unidas (en adelante, "ONU")[22] - para efectos de la solución de controversias – se rigen por dos principios[23]: 1) solución pacífica de estas y 2) la libre elección de medio. Precisamente, en ejercicio de estos principios, Australia decide libremente optar por otorgarle competencia a la CIJ en alguna controversia que pueda recaer sobre ellos. El segundo, que la CIJ tendrá la competencia sobre las disputas que los Estados miembros de la ONU de decidan someter ante este tribunal.[24]

En efecto, aún los Estados Parte del Estatuto "pueden optar por hacer una declaración unilateral en la que reconozcan la jurisdicción de la Corte como obligatoria en relación con cualquier otro Estado que acepte la misma obligación" (Naciones Unidas, 2000, p. 27).

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[20] Véase: Asunto Diferendo territorial y marítimo (19 de noviembre de 2012), pp-674-675, para 141. https://www.icj-cij.org/public/files/case-related/124/124-20121119-JUD-01-00-EN.pdf.

[21] La traducción al español es realizada por la autora del presente Informe Jurídico.

[22] Por un lado, Australia tras su ratificación fue admitido como miembro de la Organización de Naciones Unidas el 1 de noviembre de 1945 y; por otro, Japón, quien al hacer lo propio, fue admitido el 18 de diciembre de 1956. Esto refleja a su vez que a la fecha de inicio del presente Caso, ambos Estados eran habían ratificado la Carta ONU, por lo cual los principios referidos le eran aplicables. Véase también: https://www.un.org/es/about-us/member-states.

[23] Numeral 3 del Artículo 2 de la Carta ONU.- "Los Miembros de la Organización arreglarán sus controversias internacionales por medios pacíficos de tal manera que no se pongan en peligro ni la paz y la seguridad internacionales ni la justicia".

[24] Numeral 1 del Artículo 36 del Estatuto de la Cij.- "La competencia de la Corte se extiende a todos los litigios que las partes le sometan y a todos los asuntos especialmente previstos en la Carta de las Naciones Unidas o en los tratados y convenciones vigentes".

En ese sentido, la declaración unilateral por la cual Australia expresa el consentimiento sobre la jurisdicción de la CIJ sobre sus disputas[25] con la salvedad de los asuntos relacionados a delimitación marítima es plenamente válida y, en conformidad con la interpretación efectuada por la Corte, no debería de excluir la competencia de la misma en el caso.

En segundo lugar, sobre la naturaleza de la Declaración, podemos considerar a la misma como un acto unilateral de aquel Estado.

Al respecto, consideramos relevante el análisis sobre la naturaleza jurídica de dicho acto, para efectos de diferenciar a la Declaración, como acto unilateral de un Estado, de la figura de la reserva. Esta última, entendida como "**una declaración de voluntad de un Estado que es o va a ser Parte de un Tratado, formulada en el momento de la firma, en el de la ratificación o en el de la adhesión** – añadiremos también en el de aceptar o aprobar el Tratado -, y que **una vez que ha sido autorizada o expresa o tácitamente** por los demás contratantes – todos o algunos, según los casos – forman parte integrante del Tratado mismo"[26] (el énfasis es propio) (Diez de Velasco, 2007, p.110).

De este modo, es claro que la Declaración no podría calificar como una reserva debido a que: a) no es realizado en el contexto la celebración o inclusión como parte de un tratado y b) no requiere por lo menos una aceptación(autorización) de los estados parte de un tratado para surtir efectos.

A continuación, se detallarán los argumentos que sustentan la postura a favor de considerar a la Declaración como un acto unilateral de un Estado.

Si bien no hay un extensa regulación doctrinal ni consenso sobre el concepto de acto unilateral, sí se podemos considerar algunos elementos constitutivos a partir de los

[25] En conformidad con el numeral 2 del Artículo 36 del Estatuto de la CIJ.- "2. Los Estados partes en el presente Estatuto podrán declarar en cualquier momento que reconocen como obligatoria ipso facto y sin convenio especial, respecto a cualquier otro Estado que acepte la misma obligación, la jurisdicción de la Corte en todas las controversias de orden jurídico que versen sobre:
a. la interpretación de un tratado; b. cualquier cuestión de derecho internacional; c. la existencia de todo hecho que, si fuere establecido, constituiría violación de una obligación internacional; d. la naturaleza o extensión de la reparación".

[26] En conformidad con el inciso d) del numeral 2 de la CV 69.- "d) se entiende por "reserva" una declaración unilateral, cualquiera que sea su enunciado o denominación, hecha por un Estado al firmar, ratificar, aceptar o aprobar un tratado o al adherirse a el, con objeto de excluir o modificar los efectos jurídicos de ciertas disposiciones del tratado en su aplicación a ese Estado; […]"

cuales se entenderá que existe uno. Como señala Novak (1994) tenemos los siguientes: a) una manifestación de voluntad, b) que esta manifestación sea realizada por un Estado, c) con la tendencia de producir efectos jurídicos, d) cuya validez no depende de otros actos jurídicos y e) que sea conforme al derecho internacional.

En el mismo sentido, la Comisión de Derecho Internacional (en adelante, la "CDI") sostiene que se puede entender a los actos unilaterales como "**unas declaraciones formuladas públicamente** por las que se **manifieste la voluntad de obligarse** podrán **surtir el efecto de crear obligaciones jurídicas**. Cuando se dan condiciones para que eso ocurra, el **carácter obligatorio de tales declaraciones se funda en la buena fe**; en tal caso, los Estados interesados podrán tenerlas en cuenta y basarse en ellas; esos Estados tienen derecho a exigir que se respeten esas obligaciones". (el énfasis es propio) (2006, p. 178).

A partir de las definiciones propuestas podemos sostener que un acto unilateral contará con los siguientes elementos: 1) declaración realizada de forma pública, 2) por un Estado, o un representante con capacidad del mismo para hacerlo, 3) que esta declaración manifieste la voluntad de obligarse, 4) con tendencia a producir efectos jurídicos.

Ahora bien, con respecto a los dos últimos elementos de primera definición consideramos lo siguiente. Por un lado, que la validez de los actos sin que estos dependan de otros deberá de analizarse de acuerdo con el caso concreto; pues si consideramos a las reservas que los Estados pueden realizar sobre los tratados, estas necesitan de por lo menos una aceptación para surtir efectos. Por otro lado, consideramos que el elemento sobre la conformidad con el derecho internacional podría encontrarse implícita pues, "el acto sería ilícito y, por ende, inválido. Más aún si contradice una norma de ius cogens, el acto será nulo ipso iure, careciendo de todo efecto jurídico" (Novak, 1994, p. 151).

En relación con la Declaración podemos sostener que cumple con los elementos previamente expuestos. Esto debido a que, precisamente, fue el mismo Estado quien efectuó una manifestación de voluntad para efectos de obligarse – y de forma pública - así mismo ante la jurisdicción de la CIJ. Además, podemos sostener que en este caso surtió efectos por sí misma, debido a que así lo estableció el Estado australiano de forma expresa. Al respecto, la CDI ha estipulado que "una declaración internacional

entraña obligaciones para el Estado que la ha formulado sólo si se enuncia en términos claros y específicos […]" (2006, p. 181).

Ante lo expuesto, se sostienen las siguientes conclusiones. En primer lugar, en virtud de los argumentos expuestos por la CIJ es razonable concluir que esta sí tiene jurisdicción sobre el Caso materia de estudio. En segundo lugar, es sumamente importante diferenciar la figura de un acto unilateral de un Estado con el de una reserva, pues ambas figuras se dan en contextos muy distintos y, a su vez, tiene implicancias muy distintas. Finalmente, a partir de la distinción planteada y en análisis propio de la Declaración, podemos considerarla como un acto jurídico internacional por medio del cual el Australia, como Estado declarante reconoce la jurisdicción de la CIJ como obligatoria y, además, le otorga la competencia en el presente caso.

2.2 Sobre la interpretación que del término "investigación científica" para efectos de la subsunción de casos bajo la excepcionalidad del Art VIII de la Convención.

El presente subcapítulo se basa en el problema relacionado a la interpretación del término "investigación científica" regulado en el Art VIII de la Convención. Como se expuso previamente, dicho término es un requisito clave para efectos del otorgamiento de permisos especiales para la matanza, toma y/o trata de ballenas en el marco de la CIRCB. Ante ello, el punto controversial sobre el referido término se debe a que la Convención no regula dentro de sus disposiciones su definición.

En consecuencia, en las siguientes líneas se realizará un análisis interpretativo sobre la "investigación científica" para efectos de dilucidar si el JARPA II se adecuó al presupuesto básico de la excepcionalidad del Artículo VIII o no.

Al respecto, la postura australiana, sostiene la viabilidad del JARPA II, para lo cual se basó en dos aspectos. En primer lugar, en el informe proporcionado uno de los científicos expertos presentado por su cuenta. Sobre el particular, el Sr. Mangel (2001) sostiene que un programa de investigación científica en el contexto de conservación y gestión de ballenas, debe tener las siguientes características: a) objetivos definidos y alcanzables que busquen contribuir al conocimiento relevante en la conservación y gestión de ballenas, b) uso de métodos apropiados para alcanzar los objetivos establecidos, incluyendo, c) la revisión periódica de las propuestas y resultados de

investigación, así como, un respectivo ajuste de acuerdo a la revisión referida y d) estar diseñado para evitar efectos adversos en las poblaciones que son objeto de estudio.

En relación a la primera característica, se sostiene que las metas de los programas JARPA y JARPA II no tienen objetivos definidos y alcanzables, ni si quiera a modo de pregunta científica o hipótesis que puedan contribuir al conocimiento sobre la materia de conservación de ballenas.

Al respecto, en el Plan de la Segunda Fase del Programa Japonés de Investigación de Ballenas bajo Permiso Especial en la Antártida (JARPA II) presentado por Japón menciona el seguimiento de los siguientes objetivos: "1) Monitoreo del Ecosistema Antártico, 2) Competencia de modelado entre las especies de ballenas y el desarrollo de futuros objetivos de gestión, 3) Elucidación de los cambios temporales y espaciales en la estructura de las poblaciones y Mejora del procedimiento de gestión del minke antártico poblaciones de ballenas" (2005, p.1)

Ahora bien, sin perjuicio de los objetivos señalados, ellos podrían ocasionar una confusión entre "**el monitoreo (que podría ser importante si es vinculado a la gestión, pero no puede considerarse investigación** debido a que no hay una pregunta enfocada o hipótesis)" (el énfasis en propio) (Mangel, 2001, p. 362).

Sobre la segunda característica, el detalle de esta se tratará en el siguiente subcapítulo, por lo cual, en el presente subcapítulo nos limitaremos a señalar que, si bien el uso de métodos de caza puede incluir aquellos que sean letales, esto será así solo en caso los objetivos de la investigación no pudiesen ser logrados por medio de otros métodos no letales.

Con respecto a la tercera característica, que requiere una revisión periódica de las propuestas y resultado de investigación, con respecto a los programas japoneses. Podemos sostener que el argumento principal australiano se basa en que tanto en su versión inicial como en la segunda, "no hay evidencia que ambos hayan pasado por una revisión rigurosa y anónima de expertos o que estas fueron modificadas

sustancialmente sobre los comentarios obtenidos en su revisión" (Mangel, 2001, p. 372).

Por lo tanto, ante la debilidad de las actuaciones probatorias japonesas y el escaso contenido exigido del JARPA II, Australia sostiene que no se cumpliría con el tercer elemento de investigación científica.

Sobre la última característica, se exige el diseño de un plan que evite los efectos adversos en las poblaciones objeto de estudio, en este caso, las ballenas. El programa japonés, como señala Nakamura (1991 y 1993) se limita a asumir que las capturas legales no tendrán ningún efecto sobre la dinámica de la población. (como se citó en Mangel, 2001, p. 374).

Muestra de ello, son las Resoluciones 2005-1 y 2007-1 de la CBI, en la cual esta expresa su preocupación por el aumento exorbitante del número de ballenas cazadas tras el inicio del JARPA II e incluso se señaló que la cifra de caza japonesa había cuadruplicado la magnitud de años anteriores.

En segundo lugar, el Estado australiano basa su postura tomando en consideración las resoluciones emitidas por la Comisión y las guías relativas a la revisión de los permisos especiales. Sobre estos argumentos, se detallará a mayor profundidad en los siguientes capítulos, por lo cual podemos adelantar por ahora cuestiones sobre las referidas guías.

Al momento de propuesto el JARPA II, eran aplicables las guías para la revisión de propuestas de permisos científicos. Un documento que el Comité tomarían en cuenta al revisar y analizar la solicitud japonesa por el programa mencionado.
Desde una postura contraria, el estado japonés, sostiene principalmente que no se puede definir la disposición de un tratado, en base al punto de vista de un experto. De hecho, aunque el experto citado por dicho Estado, el Sr. Walloe, tiene ciertas posturas concordantes con el Sr. Mangel (perito en favor de Australia), también se difiere en otras.

Aunque Walloe (2013) afirme que coincide con el término "para fines de investigación" debe de evaluar una genuina motivación de realizar una investigación, esta no necesariamente debería de ser la única, pues se podrían presentar motivaciones adicionales como, por ejemplo, obtener la financiación por medio de la venta de productos. De hecho, este sostiene que, las motivaciones "mixtas", son bastante comunes en programas de investigación.

Ante ello, señalaremos las afirmaciones que sostiene la CIJ en relación con el objeto del presente subcapítulo. La primera, que existe cierto grado de consenso, entre los peritos expertos, con respecto a la relevancia de una hipótesis en la investigación científica en general. La segunda, que también existe un consenso entre los Estados litigantes y el interviniente sobre el hecho de que la investigación científica deba de evitar efectos adversos a la existencia de ballenas.

Por lo tanto, la CIJ concluye que no se puede afirmar la exigencia de cuatro requisitos – como sostuvo Australia – para efectos de la constitución de una investigación científica y, además, no considera necesario el establecimiento de una definición al término referido.

En consideración de lo expuesto, se realizará un análisis en función al problema jurídico presentado. Sobre la interpretación del término "investigación científica" optamos por la postura según la cual la CIJ erró al abstenerse en el ejercicio de su labor interpretativa, cuando tuvo la oportunidad de dotar de contenido una disposición a un aspecto de suma relevancia para un tratado como la Convención.

En ese sentido, en las líneas siguientes, realizaremos una labor indagatoria e interpretativa para poder entender qué se entiende o debería entenderse por "investigación científica".
Ante todo, cabe resaltar que, la Convención, así como en los dispositivos que forman parte integral de la misma, como el calendario a cargo de la CIRCB, no definen ni mucho menos establecen criterios para definir "investigación científica".

De este modo, es necesaria la interpretación de este tratado. Para ello, realizaremos la actividad que en palabras de Novak se entiende como la "operación intelectual que

tiene como fin determinar el verdadero sentido y alcances de las normas jurídicas internacionales contenidas en estos instrumentos, aclarando los aspectos oscuros o ambiguos que tales disposiciones puedan contener" (2013, p. 73). Ello tomando las reglas de interpretación general de acuerdo con el artículo 31 la Convención de Viena del Derecho de los Tratados de 1969 (en adelante, "CV 69).

En primer lugar, con respecto a una interpretación según el sentido corriente u ordinario de los términos. Aunque en principio se debería partir del texto de la Convención, ello no podrá ser posible en el presente informe debido a que la Convención no regula dentro de sus disposiciones lo que se entiende por "investigación científica"; enhorabuena, este no es único mecanismo para interpretar de acuerdo con ese criterio, por ello pasaremos al siguiente.

Como lo ha planteado la doctrina internacional y en la realidad práctica la misma CIJ ha venido efectuando, recurriremos a diccionarios para así dilucidar el significado "ordinario" de los términos "investigación" y "científico". En ese sentido, de acuerdo con el diccionario de la Real Académica Española, las acepciones son: en el caso de "investigación", es aquella "acción y efecto de investigar que tiene por fin ampliar el conocimiento científico, sin perseguir, en principio, ninguna aplicación práctica"; en cuanto a "científico", se refiere a aquello "perteneciente o relativa a la ciencia y que tiene que ver con las exigencias de precisión y objetividad propias de la metodología de las ciencias".

Ahora bien, tomando en cuenta que el texto original del caso es redactado en lengua inglesa, consideramos pertinente la conceptualización de un diccionario de igual reputación que el de la Real Academia Española. En efecto, de acuerdo con el Diccionario de la Universidad de Oxford los conceptos son: con respecto a "research", "a careful study of a subject, especially in order to discover new facts or information about it" y; en caso de "scientific", "involving science, connected with science".

Incluso, en el referido diccionario inglés se ejemplifican "collocations" para referirse a "scientific research". Al respecto, "collocation" se entiende como "a combination of words in language that happens very often and more frequently than would happen by chance". En ese sentido, es de suma relevancia el añadido en dicha fuente inglés

debido a que estas son formas comunes o expresiones naturales en la lengua inglesa para referirse a determinada actividad, concepto, entre otros.

En este caso en particular, las “collocations” de investigación científica que podemos resaltar son: “formulate/advance a theory/hypothesis” y “explore and idea/a concept/a hypothesis” . En consecuencia, es razonable sostener que de acuerdo con la lengua inglesa una investigación científica es entendida naturalmente como el avance, formulación o exploración de una teoría o hipótesis.

En definitiva, a partir de lo expuesto podemos afirmar que el sentido corriente de los términos “investigación”, “científica”, así como su conjunción, “investigación científica” resulta en aquella búsqueda con el fin de obtener nuevos o mejores conocimientos sobre un tema relativo a la ciencia. Asimismo, podemos sacar dos conclusiones adicionales. La primera, en la lengua española, la definición de investigación está referida hacia una de carácter científico y, la segunda, - y quizá la más importante para el presente informe- en la lengua inglesa, la investigación científica se entiende de forma ordinaria como una actividad que implica la existencia de una hipótesis.

En segundo lugar, con respecto al contexto, la Convención deberá ser analizada de forma conjunta y armónica con las disposiciones que en su conjunto lo conforman. En esa línea, Villiger (2009) señala que se encuentran incluidos dentro del referido contexto “los términos restantes de la oración y del párrafo; todo el artículo en cuestión y el resto del tratado, es decir, incluidos su preámbulo y anexos y otros medios mencionados en los párrafos 2 y 3” (2009, p. 427).

De este modo, procederemos a analizar cada uno de ellos, de presentarse en el caso. En primer con respecto al preámbulo y las demás disposiciones de la Convención. En el caso del preámbulo, si bien esta es una disposición que en principio no posee naturaleza normativa, es decir, no es vinculante para los Estados Parte, son de suma importancia porque establecen parámetros de interpretación para los tratados de los cuales forman parte.

Sin embargo, en cuanto al preámbulo de la Convención, este no hace mayor mención a la investigación científica, ni de forma conjunta ni sobre los términos en separado, por lo cual es de mucho aporte en este caso en particular. Asimismo, en cuanto a las siguientes disposiciones de la Convención, podemos identificar algunas que hacen referencia a por lo menos uno de los términos de análisis. El numeral 2 del artículo IV, hace referencia a el aspecto "científico" aunque ese en referencia al carácter de pueden tener los reportes que la Comisión considera apropiados emitir sobre información relacionada a ballenas y la casa de estas. En esa línea, el numeral 2 del artículo V, menciona que una de las características que de los cambios que realice la CIRCB al Calendario deben de basarse en descubrimientos científicos. Finalmente, en el mismo Artículo VIII que regula la moratoria, también se regula en su numeral 3 que cada Estado Parte – que sea acoja a la excepcionalidad de la prohibición de caza del referido artículo - remitirá al organismo que designe la Comisión, la información científica y los resultados que deriven de la investigación que este haya realizado, en conformidad con el numeral 1 del Artículo VIII. En otras palabras, se presupone que en consecuencia de la investigación realizada se tendrá un resultado científico.

A partir de ello, podemos concluir que el carácter científico es un elemento valioso para los fines de la Convención, pues la CIRCB, su órgano encargado de la ejecución de sus disposiciones, basa su actuar y emite también documentos con dicha cualidad. Pero, sobre todo, la confirmación de que la investigación científica no solo está ligada a la búsqueda de mayor conocimiento sino a la de un resultado concreto.

Antes de continuar con nuestro análisis es menester realizar la siguiente aclaración sobre los numerales 2 y 3 del artículo 31 de la CV 69, en los cuales se regula la regla de interpretación del contexto y otras en su conjunto, representan "**formas de interpretación auténticas por las cuales todas las partes acuerdan** (o al menos aceptan la interpretación de los términos del tratado por medios que son extrínsecos al tratado" (el énfasis es propio) (Villiger,2009, 429).

En consecuencia, para considerar como un elemento para la interpretación del texto que no sea el preámbulo o anexos del tratado o, en general, parte integral de tratado, para que este se adecúe al supuesto de los numerales 2 y 3 del artículo 31 de la CV 69 deberá de contar con todos Estados Parte de la Convención. Es decir, en el caso de la

CIRCB se requeriría que los 88 miembros Parte hayan consentido o aceptado el potencial instrumento para que este sea usado como un criterio interpretativo en conformidad con los numerales referidos.

En el sentido expuesto procederemos a analizar el Calendario y las Reglas de Procedimiento de la Comisión, para efectos de identificar posibles aportes a la definición que buscamos.

En el caso del Calendario, si bien este ha introducido aspectos que hacen referencia a una base de investigación científica – como la inserción de áreas de santuarios – no hay regulación que otorgue elementos en torno al concepto que buscamos analizar. En el caso de las Reglas de Procedimiento, existe una referencia actual a los términos analizados en el presente subcapítulo, no obstante, por inconvenientes relacionados a la accesibilidad de la versión vigente a la fecha del Caso no será posible ahondar en más detalles para efectos de considerarla en nuestra interpretación.

En segundo lugar, con respecto al objeto y fin del tratado, en vista que en uno de los subcapítulos siguientes analizaremos a profundidad el objeto y fin mismos de la Convención, consideramos pertinente pronunciarnos con respecto a este punto en las conclusiones del informe; pues se requiere antes la formulación del subcapítulo 2.3.

En tercer lugar, con respecto a la conducta ulterior de las partes, analizaremos cómo es que los Estados Parte de la Convención se han comportado en el marco de esta y en relación con el término "investigación científica". Ello es de suma importancia pues como señala Villiger (1984) por medio de esta regla además de buscar el verdadero significado de una disposición, se puede encontrar una significación especial que incluso enmendaría, ampliaría o reduciría su alcance y efectos (como se citó en Novak, 2013, p. 80). Sin embargo, del caso materia de estudio no se desprende alguna actuación de parte de las partes del tratado que nos permita esbozar o afirmar una definición sobre "investigación científica".

No obstante, cabe resaltar que, también en función al contexto , en 1945 la Comisión adopta el párrafo 30 del Calendario :

> "Un Gobierno Contratante proporcionará al Secretario de la Comisión Ballenera Internacional los permisos científicos propuestos antes de que se expidan y en un tiempo suficiente que permita al Comité Científico revisar y comentarlos. Los permisos propuestos deberían de especificar:
> a. Objetivos de investigación. […]"

Si bien este tampoco regula definición de los términos que estamos buscando confirma dos aspectos sobre la investigación científica: a) la investigación científica es un presupuesto básico para el otorgamiento de permisos especiales de caza de ballenas y, por ende b) sin el cumplimiento de este elemento, no cabría la posibilidad de una autorización especial de caza de estos cetáceos.

Ante lo expuesto y, sin perjuicio de la ausencia de algunas fuentes por los problemas previamente señalados. Podemos construir una definición de investigación científica. De este modo, realizando una interpretación armónica sobre los criterios previamente desarrollados podemos sostener que la investigación científica es aquella actividad de exploración de carácter científico que busca, además, de nuevos conocimientos, la consecución de un resultado concreto. Su presencia, en el marco de la Convención, es fundamental para el otorgamiento de permisos especiales en base al artículo VIII de la CIRCB.
En adición, resaltamos la importancia de su definición en el ámbito de la regulación de la caza de ballenas, u otros que en materia de medio ambiente basen sus excepciones a la regla general de protección en la investigación científica.

No obstante, la definición propuesta a nuestro criterio no resulta ambigua o conduzca a un resultado absurdo, consideramos que será provechoso optar también por el uso de las reglas de interpretación complementarias reguladas en el artículo 32 de la Convención, toda vez que su aplicación, aportará y complementará la confirmación de la definición concluida, en base a las reglas del artículo 31.

Ahora bien, aunque en los medios complementarios tampoco demuestran intentos por definir el término estudiado, podemos confirmar lo siguiente. En el caso de los trabajos preparatorios, encontramos dos cuestiones relevantes. La primera, en el

antecedente más próximo de la Convención, el Acuerdo para la Regulación de Caza de Ballenas de 1937 en cuyo artículo 10 se reguló por primera vez en la materia que:

> "Sin perjuicio de lo contenido en este Acuerdo, **cualquier Gobierno contratante podrá conceder a cualquiera de sus nacionales un permiso especial que autorice a ese nacional a matar, capturar y tratar ballenas con fines de investigación científica sujeto a** tales **restricciones** en cuanto al número y sujeto a las demás condiciones que el Gobierno contratante considere adecuadas, y la matanza, captura y tratamiento de ballenas de conformidad con los términos vigentes en virtud de este Artículo estarán exentas de la aplicación de este Acuerdo.
>
> Cualquier Gobierno contratante podrá en cualquier momento revocar un permiso otorgado por él en virtud de este artículo". (el énfasis en propio).

En este sentido, se estableció un supuesto excepcional de caza, siempre que medie fines de investigación científica. La relevancia de esta mención yace en que este artículo fue incluido en la propuesta estadounidense que luego fue parte de las discusiones para Conferencia internacional de Caza de Ballenas para consensuar la redacción de la Convención.

En efecto se establece una base para un requisito esencial de la autorización de caza. A partir de ello, la Convención le añade un aspecto diferencial a los permisos especiales que tengan fines científicos. Este se encuentra en el numeral 3 del actual Artículo VIII, en el cual se estipula que, los Estados Parte deberán transmitir en intervalos no mayores a un año a la Comisión tanto la información como los resultados de investigación científica. Esto podría entenderse, como una especie de constante supervisión de parte de este órgano, del cumplimiento de un requisito esencial, cuya continuidad deberá ser constante y conforme a lo preestablecido en la CIRCB.

En el caso de las circunstancias que llevaron a la conclusión del tratado, en la misma línea de Villiger, tomaremos en cuenta "los factores políticos, sociales y culturales en torno a la conclusión del tratado" (2009, p. 445).

De este modo, como Fitzmaurice (2013) señaló en su momento, la regulación sobre caza de ballenas y - como parte de ella la Convención- se debió a la alta demanda de productos provenientes de ballenas, pues estos significaban recursos económicos importantes desde inicios del siglo XIX. Sin embargo, la falencia regulatoria en "los primeros tratados sobre Caza de Ballenas para detener la disminución de poblaciones [de ballenas] guió a la conclusión a la conclusión de un nuevo instrumento" (Maffei, 1997, p. 291).

Muestra de ello, son los acuerdos predecesores a la Convención a los cuales hicimos referencia en el primer subcapítulo. Estos no fueron lo suficientemente eficaces como para frenar a depredación que ponía en un alto riesgo a los cetáceos objeto de protección de la Convención y, precisamente, ese es uno de los pilares que motivó la celebración de este tratado.

De hecho, esa preocupación se plasmaría luego en el preámbulo de la CIRCB en el cual se menciona de forma expresa que la celebración de esta es para la conservación apropiada de la población de ballenas. Es decir, los Estados contratantes antes de volverse Parte del tratado fueron – o debieron ser- conscientes de que la subsistencia de las actividades de caza, se encontrarían supeditadas a la preocupación internacional previamente expuesta: la depredación de la especie y, por ende, al respeto de su protección.

En conclusión, en virtud de los métodos complementarios de interpretación podemos sostener lo siguiente. En primer lugar, reafirmamos el carácter fundamental de la investigación científica como para que una actividad de caza de ballenas sea conforme a la Convención, previo análisis de la Comisión (por medio del Comité).

En segundo lugar, las circunstancias que llevaron hacia la conclusión de la Convención, no se condicen con la idea de una caza deliberada o sin requisitos a la altura de la preservación de la especie. Por el contrario, es legítimo y razonable con la preocupación internacional que motivó la celebración de este tratado que el sustento para cazar ballenas sea por lo menos potencialmente beneficioso – como lo es la investigación científica- en la búsqueda de nuevas formas y métodos de conservación, pero, sobre todo, que esta no sea arbitraria.

2.3 Sobre la viabilidad del uso de métodos letales, como base del programa JARPA II, un análisis desde el principio precautorio.

En el presente subcapítulo se desarrollará el problema en torno a la viabilidad del uso de métodos legales, los cuales son mecanismos base del Programa JARPA II. La discusión se origina debido a que el programa japonés utiliza principalmente métodos que involucran el descenso de ballenas para cumplir con los fines de investigación científica que exige el Artículo VIII de la Convención.

Al respecto, la postura australiana sostiene que los permisos especiales para matar, capturar o tratar ballenas son autorizados en conformidad del Artículo VIII, siempre que los métodos no letales no se encuentren disponibles. Para ello, Australia basa su postura en resoluciones de la Comisión, guías de esta misma y los reportes de peritos expertos que propuso para el presente caso.

Primero, se hace referencia a la Resolución 1986-2 de la Comisión, que recomienda que los Estados Parte y el Comité al momento de considerar los permisos y revisarlos, respectivamente, "deberán tener en cuenta que **los objetivos de investigación no son factibles práctica y científicamente a través de técnicas de investigación no letales**". (el énfasis es propio) (1986, p. 1).

En esa línea, Australia alega a las Guías sobre el Proceso de Revisión de Propuestas de Permisos Especiales y resultados de Investigación Existentes y Permisos Completos modificados en el SC/66a a la luz de la Resolución 2014-5 (en adelante, el "Anexo P"). Este Anexo establece que dentro de las propuestas de un Estado para solicitar un permiso especial sobre los métodos para lograr sus objetivos se debe incluir "una **evaluación del porqué los métodos no letales**, métodos asociados con cualquier caza comercial de ballenas en curso o análisis de datos pasados **fueron considerados insuficiente**s" (el énfasis en propio) (2016, p. 409)

Sobre estas disposiciones, el Estado australiano sostiene que los referidos documentos fueron aprobados en consenso, en el sentido de aclarar la excepcionalidad de la caza de ballenas solo en caso los fines no puedan ser alcanzados por métodos no letales.

Asimismo, sobre los reportes de los peritos expertos podemos rescatar lo siguiente. En el caso del señor Gales (2013), quien desestima lo señalado por el perito propuesto por Japón. Este basa su postura en la existencia de evidencia directa de tanto científicos japoneses como de otra nacionalidad que demuestran la factibilidad del muestreo de biopsia (método no letal). Además, que este último es más eficaz y eficiente que el muestreo letal y, sobre todo, que como ambos métodos tienen cierta incertidumbre, el tema principal debería ser la obtención de resultados que no requieran matanza de ballenas.

En complemento, el señor Mangel es más determinante al sostener que el programa japonés propone "**tomas letales sin necesidades científicas demostradas**, los objetivos del JARPA II tergiversan la exploración científica potencial y la explotación de recursos" (el énfasis es propio) (2001, p. 362).

Por su parte, la postura japonesa se centra en base a dos afirmaciones: 1) que el mismo artículo VIII permite la matanza de ballenas, 2) el programa japonés no usa métodos letales más de lo que fuese necesario, esto último no por que exista una limitación legal de acuerdo con la Convención, sino que es conforme a su investigación científica y 3) que las resoluciones citadas por Australia no son vinculantes.

Al respecto, Japón sustentó que los métodos la única forma de conseguir los datos necesitados por su programa era por medio de métodos letales y que los no letales, tenían una confiabilidad menor. Para ello, se basan en el reporte presentado por su perito experto el señor Walloe, quien indica que "la información genética necesaria para determinar el stock de las muestras de ballenas se obtiene de ballenas no vivas y […] el número de biopsias que pueden ser obtenidas por un barco será mucho menor que el número de ballenas que pueden ser cazadas durante el mismo periodo" (2013, p. 11).

Ante ello, en relación con el objeto del presente subcapítulo la CIJ señaló lo siguiente. Primero, que algunos datos perseguidos por el programa japonés no pueden ser obtenidos por métodos no letales y, por ende, no sería irrazonable el uso de métodos letales del JARPA II en determinado contexto.

Segundo, el hecho de que un programa, en el marco de la Convención, use métodos letales – cuando hubo disponibilidad de realizar no letales- no significa que en principio, su permiso no sea amparado por el Art VIII. Sin embargo, en este caso, el JARPA II debió incluir un análisis sobre la viabilidad de métodos no letales para efectos de reducir la magnitud de los letales. Esto principalmente debido a que existen resoluciones y directrices de la Comisión que mencionan esa exigencia e incluso Japón aceptó a obligarse a cumplir con dichas recomendaciones. Además, como señalaron los expertos convocados por Australia, hay grandes avances científicos sobre las técnicas no letales en los últimos 20 años.

Tercero, durante los procedimientos orales, cuando un miembro de la Corte le consultó a representante japonés sobre la realización del análisis referido anteriormente y su implicancia en la toma de muestras, el estado japonés hizo referencia a dos documentos: a) el Anexo H a la revisión interina del JARPA por parte del comité científico y 2) un documento no publicado que Japón había presentado al Comité en el 2007. Sin embargo, ninguno de ellos es relevante para el caso en concreto ni mucho menos dio respuesta a lo consultado por la CIJ, pues no demuestran un análisis sobre el JARPA II.

Por tanto, la CIJ concluye que los documentos proporcionados por Japón revelan un ínfimo análisis sobre la viabilidad de la utilización de métodos no letales para lograr los objetivos de investigación de su programa y mucho menos la intención de optar por el uso de métodos no letales.

Ante lo expuesto, se realizará un análisis jurídico en torno al problema presentado, en función al principio precautorio y otros aspectos jurídicos que desde una postura personal resultan relevantes.

En primer lugar, Australia citó varias resoluciones emitidas por la CBI sin el acuerdo de todos los Estados Parte de la Convención y, por ende, estas no podrían ser utilizadas ni siquiera como criterios de interpretación de acuerdo con el Artículo 31 de la CV 69. Sin embargo, dos de las resoluciones referidas hacen la diferencia. Este es el caso de las resoluciones 1986-2 y 2014-5, pues su carácter diferencial se basa en que ambas fueron consentidos por todos los Estados Parte de la Convención.

En consecuencia, estos dos documentos sí podrían ser considerados dentro el marco del numeral 3 del Artículo 31 de la CV 69, para efectos de realizar una interpretación de la Convención siguiendo el criterio del contexto. Al respecto, como señala Villiger (2009) sobre dicho numeral se expresa una forma de interpretación que ha sido acordado por todas las partes, una auténtica.

A partir de ese criterio - y de forma más determinante a la sostenida por la CIJ – podemos concluir que Japón no solo debió realizar una evaluación sobre la viabilidad de métodos no letales, sino que su análisis debió ser mucho más exhaustivo en favor del uso de métodos no letales; sobre todo, en consideración de la referida Resolución de la Comisión.

Por otro lado, es menester analizar la función del principio precautorio en el derecho internacional del medio ambiente. A pesar de que en la actualidad este se encuentra regulado en varios tratados, el mismo no tiene una única definición. En esa línea, Vera sostiene que su concepto "se complejiza más, especialmente, por el carácter internacional del tema, así como por la diversidad de denominaciones que este principio ha acuñado en la doctrina" (1994, 111).

No obstante, no existe un consenso sobre su definición, podemos partir – para efectos teóricos – de la que plantea la Declaración de Río de 1992[27], una que por cierto se encuentra ampliamente reconocida por los Estados y, por ende, nos puede orientar hacia su aplicación:

> "**Con el fin de proteger el medio ambiente, los Estados deberán aplicar ampliamente el criterio de precaución** conforme a sus capacidades. Cuando haya **peligro de daño grave o irreversible, la falta de certeza científica absoluta no deberá utilizarse como razón para postergar la adopción de medidas eficaces** en función de los costos para impedir la degradación del medio ambiente".[28] (el énfasis es propio).

[27] Cabe mencionar que esta definición también se plantea en la Declaración de Estocolmo de 1972. De este modo, el motivo por el cual se cita la Declaración de Río de 1992 se debe a que para dicha fecha se puede afirmar un amplio reconocimiento sobre el principio precautorio.
[28] Principio 15 de la Declaración de Río de 1992.

En este sentido, podemos deducir que este principio nos propone que, para efectos de la protección del medio ambiente, ante la duda o falta de certeza sobre un potencial daño, los Estados deberán realizar actuaciones en base a un criterio de precaución.

Asimismo, Sands y Peel (2012) establecen como elementos centrales de este principio a: "1) la necesidad de protección del medio ambiente, 2) la presencia de amenaza o riesgo de un daño severo y 3) el hecho de que la falta de certeza científica no deba ser usada para evadir una acción preventiva sobre este daño. (como se citó en Pinto, 2020, p.2)

Ahora bien, la relación de este principio con el caso objeto de estudio de este informe es que las ballenas, como fauna marina, también son consideradas como parte del medio ambiente. Así lo ha reconocido el Tribunal Internacional del Derecho del Mar en el Asunto Southern Bluefin Tuna "que la conservación de los recursos vivos del mar es un elemento de protección y preservación del medio marino".[29]

Además, los Estados de Australia y Japón son parte de la Convención del Derecho Del Mar (CONVEMAR) y uno de sus acuerdos de implementación, el Acuerdo sobre la aplicación de las disposiciones de la Convención relativas a la Conservación y Ordenación de Poblaciones de Peces Transzonales y Poblaciones de Peces Altamente Migratorios (en adelante, el "Acuerdo de Implementación" o "Acuerdo de Nueva York de 1995". En el caso de Australia, este Estado ratificó ambos instrumentos, el primero el 10 de diciembre de 1982 y, el segundo, en el 23 de diciembre de 1999. Por su parte, Japón, ratificó el primero el 20 de junio de 1996 y, el segundo, el 07 de agosto de 2006.

La relevancia de la CONVEMAR y, sobre todo su Acuerdo de implementación, es que en el Artículo 6 de este último se regula de forma expresa la aplicación del principio precautorio, e incluso, se hace referencia a este mismo en otras de sus disposiciones. Con respecto al Artículo 6:

[29] Numeral 70, Southern Bluefin Tuna Cases (New Zealand v. Japan, Australia v. Japan), p. 295.

> "1. **Los Estados aplicarán ampliamente el criterio de precaución a la conservación**, **ordenación y explotación de las poblaciones** de peces transzonales y las poblaciones de peces altamente migratorios en orden de proteger los recursos marinos vivientes y preservar el medio ambiente marítimo [..]" (el énfasis es propio)

En consecuencia, los dos Estados litigantes sobre un conflicto medioambiental en relación de la caza de ballenas, el cual es objeto del presente informe (Australia y Japón), son parte de un tratado que regula la aplicación del principio precautorio y, por ende, se encuentran obligados a aplicar en función a las poblaciones de peces.

Además, cabe resaltar que en vista que las ballenas son especies altamente migratorias, estas también entrarían en el supuesto de hecho de protección del Acuerdo de Nueva York de 1995.

Sobre este último punto, es menester resaltar que lo sucedido con el acuerdo de implementación de la CONVEMAR, no es el único que vincule a los Estados litigantes del Caso de dicho modo. De hecho, Australia y Japón, son parte de varios tratados en los cuales se regula la aplicación del principio precautorio. Entre ellos, por citar algunos ejemplos, tenemos a la Convención de Diversidad Biológica de 1992 y la Convención de Cambio Climático en el Marco de Naciones Unidas de 1992.

En ese sentido, si bien no existe un consenso unívoco ni generalizado sobre la aplicación de este principio, podemos sostener que este ha tenido un gran progreso, el cual se ha reflejado en varias normas convencionales. Y en ese sentido, quizá la clave en su aplicación pueda encontrarse en que este sirva como "una herramienta que tiene lo necesario para lograr ese equilibrio [entre riesgo y precaución]" (Pinto, 2020, p.7)

Ahora, si bien la CIJ como tal se ha pronunciado en los casos bajo su competencia hasta la fecha sobre el principio precautorio, sus magistrados sí han hecho. En el Asunto Test Nucleares, los magistrados Geoffrey Palmer y Werramantry[30], dieron el primer paso e hicieron una referencia al principio precautorio en sus votos disidentes.

[30] Para mayor detalle, véase las opiniones disidentes de los magistrados a través de https://www.icj-cij.org/en/case/97.

Asimismo, la Cámara Especial del Tribunal Internacional sobre el Derecho del Mar sostuvo en su Opinión Consultiva que:

> "**The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments**, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, **this has initiated a trend towards making this approach part of customary international law**" [31][La Sala observa que el criterio de precaución se ha incorporado en un número creciente de tratados internacionales y otros instrumentos, muchos de los cuales están reflejados en la Declaración de Río. En la vista de la Sala, esto ha iniciado una tendencia a hacer de este enfoque parte del derecho internacional consuetudinario] (el énfasis es propio].

En este sentido, este tribunal extiende el peso de su reconocimiento al señalar que este principio se encontraría en el proceso de convertirse en una costumbre internacional.

Ante todo lo expuesto, podemos llevar a dos conclusiones. La primera, sobre los métodos letales en el JARPA II, aunque no exista una certeza absoluta sobre el daño que estos ocasionan a las poblaciones de ballenas, sí hay una amenaza latente y presente con respecto a la preservación de esta especie. Por este motivo, en el caso en particular se pudo y se – debió- aplicar el principio precautorio, en protección de las ballenas

La segunda, por medio de este caso, la Corte tuvo la oportunidad de pronunciarse con respecto al principio precautorio y aplicarlo en base a lo previamente mencionado. Esto, además, pudo haber reforzado sus argumentos e incluso destacado los mismos, para efectos de sustentar la inviabilidad del uso de métodos letales en el programa de caza japonés, incluso si estos fuesen para "lograr" sus fines de investigación científica.

[31] Para mayor detalle, véase: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf.

2.4 Sobre la eventual contravención al objetivo y fin de la Convención, como consecuencia de una interpretación aislada de su Artículo VIII

El presente capítulo se centra en el problema jurídico que podría generarse a consecuencia de una interpretación del Artículo VIII de la Convención de forma aislada a este mismo tratado. Por este motivo, a continuación, se desarrollará a detalle un análisis sobre el objeto y fin de la Convención y las implicancias jurídicas que se ocasionarían a raíz de una interpretación aislada del artículo VIII propuesta por uno de los Estados litigantes.

Al respecto, la postura australiana sostiene que el Artículo VIII[32] debería ser entendido de manera holística en relación con el resto de las disposiciones de la Convención y, por ende, el mencionado artículo merece una interpretación restrictiva en virtud del objeto y fin de la CIRCB. Esto debido a que en el último párrafo del Preámbulo se establece el objetivo primario de "promover la adecuada conservación de poblaciones de ballenas". Y, si bien el secundario se centra en "hacer posible el desarrollo ordenado de la industria de caza de ballenas", este último se encontraría subordinado al primero debido a que la conjunción que los une es una de causa-efecto: "y por lo tanto".[33] En otras palabras, como se señala en el memorial australiano, este segundo objetivo "is expressly made contingent upon the proper and effective conservation of the whale stocks" [se supedita expresamente a la conservación adecuada y eficaz de las poblaciones de ballenas] [34](Estado Australiano, 2011, p. 17)

En esa línea, se cita a Birnie (1983) quien sostiene que "[T]he primary purpose [of the Convention] is conservation and development of whale stocks for the secondary objective of enabling the whaling industry to continue in a more orderly fashion. The other parts of the Preamble are directed to recognising the main problem of that industry – over-exploitation – and the best means for achieving stock development

[32] Que como se ha desarrollado anteriormente es aquel que regula los permisos especiales de caza de ballenas con fines de investigación científica

[33] Véase el último párrafo del Preámbulo: "Having decided to conclude a convention to provide for the proper conservation of whale stocks **and thus** make possible the orderly development of the whaling industry" (el énfasis es propio)

[34] La traducción al español es realizada por la autora del presente Informe Jurídico.

"[El objeto primario de la Convención es la conservación y desarrollo de las poblaciones de ballenas para el objetivo secundario de permitir que la industria de caza de ballenas continúe de manera más ordenada. Las otras disposiciones del Preámbulo están dirigidas a reconocer el problema principal de esa industria –sobreexplotación- y los mejores medios para lograr el desarrollo de las poblaciones] [35](como se citó en el Memorial Australiano, 2011, p. 17).

En este sentido, la postura australiana se centra en que en el objeto primario de la Convención es la preservación de la población de ballenas, y por tanto, el Artículo VIII debe de interpretarse de forma restrictiva.

Asimismo, el estado neozelandés, en su calidad de interventor, le brinda soporte a la posición australiana y sostiene que, aunque el párrafo 1 del Artículo VIII permita una excepción a la moratoria como regla general, este no puede interpretarse de forma deliberada. En efecto, en sus observaciones escritas, Nueva Zelanda indica que la excepción "do not constitute a blanket exemption for Special Permit Whaling from all aspects of the Convention. They provide a limited discretion for Contracting Goverments to issue Special Permits for the specific articulated purpose of scientific research" [no constituye una carta blanca a la excepción sobre todos los aspectos de la Convención para la caza de ballenas dentro del permiso especial. Se otorga una discreción limitada a los gobiernos contratantes para otorgar permisos especiales con el propósito de investigación científica] [36](2013, p.20-21).

Por su parte, Japón presenta una postura cambiante. Inicialmente, sostuvo que el Artículo VIII debería de ser interpretado de forma aislada y, por ende, separada de las demás disposiciones de las Convención. No obstante, de forma posterior, reconoce que el referido artículo debería se interpretarse y aplicarse de forma consistente con otras normas de la CIRCB; aunque también en consideración de la libertad de participar en la caza de ballenas. De este modo, se evidencia el cambio de postura inicial de Japón pues finalmente termina proponiendo una lectura en congruente con la Convención pero entendida como una excepción a la misma.

[35] La traducción al español es realizada por la autora del presente Informe Jurídico.
[36] La traducción al español es realizada por la autora del presente Informe Jurídico.

Ahora bien, respecto al pronunciamiento de la CIJ, podemos resaltar dos aspectos relevantes. Por un lado, esta confirma que tanto la preservación adecuada de la ballenas como hacer posible el desarrollo ordenado de la industria de caza son objetivos reconocidos en el último párrafo del Preámbulo. Así también, la Corte sostiene que no podría justificarse ni una interpretación restrictiva ni expansiva toda vez que como se menciona en las Guías expedidas por la Comisión, los programas de investigación científica – en el marco de la excepción de caza de la CIRCB – podrían perseguir otros fines además de la investigación científica.

En virtud de lo expuesto, se realizará un análisis crítico en torno al pronunciamiento de la CIJ. Este se enfocará en dos frentes: 1) encontrar el objeto y fin de la Convención y 2) exponer los motivos por los cuales el Artículo VIII no podría ser interpretación de forma aislada a la Convención.

Ante todo, es menester entender lo que entiende o puede entenderse por el "objeto y fin" de un tratado. De acuerdo con Villiger "the terms are used as a combined whole and include a treaty's aims, its nature and is end" [esos términos se utilizan como un todo combinado e incluyen los objetivos de un tratado, su naturaleza y su fin] [37](2009, p. 427).

En esa línea, Linderfalk sostiene que "the object and purpose of a treaty means those reasons for which the treaty exists – sometimes termed as the ratio legis or the treaty's *raison d'être*" [el objeto y fin de un tratado significa las razones por las cuales un tratado existe, a veces conocido como la ratio legis, o la razón de ser del tratado] [38](2010, p. 204).

En virtud de las definiciones propuestas podemos sostener dos afirmaciones. Primero, si bien hay posturas doctrinales que tienen a considerar al "objeto y fin" de forma separada - y, por ende, con significados distintos - para efectos del presente informe, estos serán entendidos como una unidad. Segundo, estos términos en conjunto son

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entendidos como las razones y motivos que llevaron a la conclusión del tratado y el objetivo (u objetivos) que este instrumento persigue.

Ahora bien, con respecto al estado del objeto y fin. Una postura doctrinal indica que este mismo será estático y, en consecuencia, se mantendrá intacto y tal como fue establecido al momento de la conclusión de un tratado. No obstante, en este informe, nos centraremos en la postura contraria. Esto debido a que "another means prone to variation is the object and purpose of a treaty – more specifically, the state-of-affairs will henceforth be termed in Greek at the telos, or – if the plural is intented – the teloi, of the treaty. [**otro medio propenso a la variación es el objeto y el fin de un tratado**, **más específicamente, el estado de cosas se denominará en griego en griego en el telos, o – si se intenta el plural – el teloi, del tratado**.] [39](Linderfalk, 2010, p. 210) (el énfasis es propio).

Al respecto, cabe aclarar que el término "telos" se entiende como el fin, objeto u objeto último y, en esa línea, su sustantivo plural es "teloi".[40]
Un ejemplo práctico de nuestra postura se refleja en el pronunciamiento del Tribunal Europeo de Derechos Humanos en el *Asunto de Loizidou v. Turkey* [41](Excepciones Preliminares), en el cual se sostuvo que:

> "That the Convention is a living instrument which **must be interpreted in the light of present-day conditions** is firmly rooted in the Court's case-law (…) **It follows that these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago** (…) In addition, the **object and purpose of the Convention** as an instrument for the protection of individual human beings **requires that its provisions be interpreted and applied so as to make its safeguards practical and effective**" [42](el énfasis es propio)

[39] La traducción al español es realizada por la autora del presente Informe Jurídico.
[40]Véase: https://www.oxfordreference.com/view/10.1093/acref/9780199891573.001.0001/acref-9780199891573-e-7023.
[41] No obstante, la naturaleza de los tratados de derechos humanos es distinta, pues estos tienen un carácter no sinalagmático, la presente cita es solamente para efectos de reflejar cómo un tribunal internacional reconoce la variabilidad del objeto y fin de un tratado.
[42] Véase: Asunto de Loizidou v. Turkey (23 de marzo de 1995), pp. 21, §71-72

Como se observa, el Tribunal Europeo, señala la necesidad de una interpretación que tome en cuenta las condiciones actuales para que el objeto y fin del tratado interpretado sean eficaz en cuanto a la protección que este busca. En consecuencia, se acepta que el objeto y fin del referido tratado no solo puede haber cambiado a lo largo del tiempo, sino que es necesario para fines prácticos no pasar por desapercibido dicho cambio, sino todo lo contrario.

En torno a la relación de esta característica con la CIRCB, en líneas posteriores se detallará la relevancia de considerar al objeto y fin de un tratado como variable.

Otro aspecto a tomar en cuenta, en relación con la presente búsqueda del objeto y fin de la Convención es la cuestión sobre su cantidad, es decir, si lo que pretende encontrar será a un único objeto y fin o a más de uno. Nuevamente, se presentan posturas contrarias. Por un lado, existe una postura doctrinal que tiende a sostener que el objeto y fin debe ser leído y considerado en singular. Esta podría encontrar sustento en lo notado por Jacobs, pues inicialmente el Comité redactor de la Comisión Internacional de Derecho Internacional propuso – como disposición de la CV 69 – a los términos "objetos y propósitos" forma plural. Sin embargo, en la presentación de la versión final de la CV 69, se cambió a su versión en singular (como se citó en Linderfalk, 2010, p.213). Esto llevaría a concluir que el debido a la referida modificación se debería considerar solo un objeto y fin.

Por otro lado, como el mismo Linderfalk y Villiger, existe una postura contraria. Así, en palabras de este último se propone que "**a treaty may have many objects and purposes**" [un tratado podrá tener varios objetos y fines] [43](el énfasis es propio) (2009, p.427). En virtud de este criterio - como quizá los Estados litigantes ya anticiparon - podremos partir para el hallazgo del objeto y fin de la Convención.

A partir de los aspectos previamente expuestos sobre el objeto y fin de los tratados, procederemos a la búsqueda de este mismo en la Convención.

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Si bien ni la CV 69 ni su Artículo 31 nos dicen por dónde iniciar nuestro ejercicio, podemos tomar encuentra lo indicado por Villiger: "traditionally, the preamble is resorted to, or a general clause at the beginning of the treaty" [tradicionalmente, se recurre al preámbulo o a una cláusula general al principio del tratado][44] (2011, p. 110)

Así, nos remitimos al último párrafo del Preámbulo en el cual se indica que: "[The Parties] Having decided to conclude a convention **to provide for the proper conservation of whale stocks** and thus **make possible the orderly development of the whaling industry**".

Ahora, tomando en cuenta la definición propuesta sobre el "objeto y fin" podemos afirmar que las razones que motivaron a los Estados Parte de la Convención a la conclusión de esta misma fueron dos. La primera, la preocupación por la población de ballenas debido a la caza deliberada de estos cetáceos y, la segunda, el interés de los países cuya actividad principal económica era la caza de ballenas porque esta industria se mantenga y se desarrolle.
En consecuencia, resulta lógico que la Convención persiga, a su vez, dos objetivos. Por un lado, la preservación de la población de ballenas y, por otro, el desarrollo ordenado de la industria de caza de ballenas.

Por lo tanto, sostenemos que la Convención tendría no solo un objeto y fin, sino dos. Esta afirmación, por ende, será analizada en contrario a la postura anteriormente planteada por Australia. Esto pues, discrepamos con quienes sostienen que "treaties always have a single, principal, and all-embracing telos, to which every other telos of the treaty can be set to be subordinate" [los tratados tienen siempre un telos único, principal y global al que puede decirse que están subordinados todos los demás telos del tratado] [45](Linderfalk, 2010, p.214.)

En ese sentido, la posibilidad de contar con dos objetos y fines en la Convención, lejos de ser un problema[46], será de ayuda en la interpretación de otras disposiciones

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[46] Es menester recalcar, que como señala Linderfalk, una interpretación que considere a un único objeto y fin por sobre todos los otras las disposiciones podrían traer varios problemas prácticos. Por ejemplo, ante un tratado que inevitablemente tenga más de un objeto y fin, un intérprete podría verse impedido de realizar

del mismo tratado. En efecto, compartimos la postura de Trevinarus, según la cual "**one of them** [referring to the objects and purposes found] **will be to maintain the balance of rights and obligations created by the treaty**" [uno de ellos – en referencia a los objetos y fines encontrados – apoyará al mantenimiento del equilibrio de derechos y obligaciones creado por el tratado][47](el énfasis es propio) (como se citó en Villiger, 2011, p. 110).

De esta forma, la presencia de más de un objeto y fin nos exigirá que entre ellos se promueva un balance interpretativo y una aplicación que demuestre un respeto recíproco entre ambos.

Asimismo, sobre las demás disposiciones iniciales del Preámbulo, podemos destacar a las siguientes. Primero, que la población de ballenas podría aumentar en tanto la caza de estas esté regulada de forma adecuada; segundo, es de interés común que la población de este cetáceo aumente a un nivel óptimo y; tercero, las actividades de casa deben limitarse solo a especies que puedan soportar su explotación[48].

En consecuencia, esto nos lleva afirmar que, por un lado, para el respeto y realización del objeto y fin de la Convención relacionado a la preservación de las poblaciones de ballenas, se requiere una serie de consideraciones de por medio como lo son la posibilidad de limitar la actividad de caza solo a algunas especies , esto de la mano, con el alcance de un nivel ideal de la población de ballenas y; por otro lado, solo una interpretación armónica de los dos objetos y fines de la Convención, permitirán lograr los objetivos de ambos y de forma igualitaria. Un ejemplo de esto último sería una regulación apropiada que permita la permanencia de la industria de caza sin afectar de forma perniciosa a la población de ballenas.

Teniendo claro lo anterior, se procederá a analizar la posibilidad de que los objetos y fines de la Convención, puedan evolucionar. Es decir, variar desde la conclusión del tratado mismo hasta la fecha en la cual se sitúa la interpretación (el presente caso).

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este ejercicio porque no podría utilizar un criterio "absoluto" o incluso, podría caer la excesiva tarea de intentar encontrar un telos específico en cada caso concreto (dentro del tratado) y finalmente en función a lo encontrado determinar cuál sería el principal de todos.

[47] La traducción al español es realizada por la autora del presente Informe Jurídico.

[48] Para mayor detalle véase los párrafos 4, 5 y 6 del Preámbulo de la Convención.

Para ello, podemos tomar como referencia la lógica que la CIJ, que ha establecido y reafirmado en los diversos pronunciamientos [49] en relación a la necesidad de una interpretación evolutiva. Así, en el Asunto Caja de la Plataforma Continental del Mar Egeo[50], la Corte indica que:

> "Having regard to the foregoing considerations, the **Court is of the opinion that** the expression in reservation (b) "disputes relating to the territorial status of Greece" **must be interpreted in accordance with the rules of international law as they exist today**, and not as they existed in 1931. (…)" [51](el énfasis es propio).

En relación con este análisis, recalcamos que nuestra posición consiste en que el estado de los objetos y fines de la CIRCB no es estático sino variable. Esto principalmente debido a que, se encuentran constantemente expuestos a potenciales cambios que la Comisión considere pertinentes para lograr el objetivo de los mismos objetos y fines.

Al respecto, recordemos la facultad que tiene la Comisión de enmendar el Calendario, el cual es parte integral del tratado y, en ese sentido, de una forma indirecta la Convención misma. En efecto, en el Artículo V de la Convención se establece que:

> "The **Commission may amend from time to time** the provisions of the Schedule by adopting regulations with respects to the conservation and utilization of whale resources [...] **These amendments** of the Schedule (a) **shall be such as are necessary to carry out the objectives and purposes of this Convention** [52]and **to provide for the conservation, development and optimum utilization of the whale resources** […]" (el énfasis es propio)

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[49] También véase el Asunto Consecuencias Legales para Estados que continúen en la presencia de África del Sur en Namibia (Suroeste de África) (Opinión Consultiva del 21 de junio de 1971), p. 19, parra. 53. https://www.icj-cij.org/public/files/case-related/53/053-19710621-ADV-01-00-EN.pdf.

[50] La presente cita es solamente para efectos de reflejar que la CIJ estableció y aplicó un criterio de interpretación evolutivo.

[51] Véase el Asunto Caja de la Plataforma Continental del Mar Egeo (Grecia v. Turquía) (Sentencia del 19 de diciembre de 1978), p.9-34. https://www.icj-cij.org/public/files/case-related/62/062-19781219-JUD-01-00-EN.pdf.

[52] Nótese que en este artículo se hace referencia plural explícita a los objetos y fines de la Convención. Esto reafirma la postura de la autora, que consiste en sostener la presencia de dos objetos y fines de la CRCB.

Así, podemos sostener dos afirmaciones. La primera, que estas variaciones a las cuales está expuesta la Convención están intrínsecamente relacionadas a los objetos y fines de la Convención, y la segunda, es razonable que estos mismos sean susceptibles a estos cambios para su propio beneficio y, por ende, tengan un carácter variable.

Como se mencionó con anterioridad, la enmienda más resaltante efectuada por la Comisión al Calendario fue la establecida en el año 1982 con la incorporación de la moratoria general a la caza comercial de ballenas[53]. Ello, bien pudo ser una señal de que, a pesar de la conclusión de la Convención, le sobreexplotación hasta antes de la moratoria aún continuó de forma preocupante hasta antes de la moratoria y exigió que en base a las necesidades de los objetos y fines de la CIRCB se efectúe un cambio.

Ahora, en vista que esta variación producto de una enmienda fue sustancial y efectuada en relación a los objetos y fines de la Convención y, además, estaba en vigor en el momento sobre el cual nos encontramos interpretando (la oportunidad del Caso), es relevante precisar más acerca de la figura de la enmienda en un tratado.

La enmienda, en conformidad al artículo 40 de la CV69[54], "alude al cambio de las disposiciones de un tratado respecto a todas las partes del tratado" (Novak, 2016, p. 349). En este sentido, nos referimos a actos que buscarán ser obligatorios para todas

[53] Para mayor detalle, revisar el subcapítulo 1.1 del presente Informe Jurídico.

[54] Artículo 40 de la Convención de Viena de 1969.- 40. Enmienda de los tratados multilaterales.
1. Salvo que el tratado disponga otra cosa, la enmienda de los tratados multilaterales se regirá por los párrafos siguientes.
2. Toda propuesta de enmienda de un tratado multilateral en las relaciones entre todas las partes habrá de ser notificada a todos los Estados contratantes, cada uno de los cuales tendrá derecho a participar:
a) en la decisión sobre las medidas que haya que adoptar con relación a tal propuesta:
b) en la negociación y la celebración de cualquier acuerdo que tenga por objeto enmendar el tratado.
3. Todo Estado facultado para llegar a ser parte en el tratado estará también facultado para llegar a ser parte en el tratado en su forma enmendada.
4. El acuerdo en virtud del cual se enmiende el tratado no obligará a ningún Estado que sea ya parte en el tratado que no llegue a serlo en ese acuerdo, con respecto a tal Estado se aplicará el apartado b) del párrafo 4 del artículo 30.
5. Todo Estado que llegue a ser parte en el tratado después de la entrada en vigor del acuerdo en virtud del cual se enmiende el tratado será considerado, de no haber manifestado ese Estado una intención diferente:
a) parte en el tratado en su forma enmendada; y
b) parte en el tratado no enmendado con respecto a toda parte en el tratado que no esté obligada por el acuerdo en virtud del cual se enmiende el tratado.

las partes. Tal como lo fue la moratoria general, pues en función a las necesidades de los objetivos y fines de la Convención la Comisión decidió proponer la moratoria a la caza comercial, con la vocación de que esta sea aplicada por todos los Estados Parte.

No obstante, sobre este particular, debemos mencionar lo señalado en el numeral 4 del artículo 40: "**El acuerdo en virtud del cual se enmiende el tratado no obligará a ningún Estado que sea ya parte en el tratado que no llegue a serlo en ese acuerdo**, con respecto a tal Estado se aplicará el apartado b) del párrafo 4 del artículo 30" (el énfasis es propio).

De este modo, como indica Novak, se "dispone que el acuerdo de enmienda no obligue a aquellos Estados que no suscribieron la modificación, rigiendo entre ellos el tratado original" (2016, p .350).
En ese caso, será crucial considerar que, sin perjuicio de la vocación de aplicación general de la Moratoria, la misma Convención regula la posibilidad de que los Estados que no se encuentren en acuerdo con las enmiendas efectuadas por la Comisión, tengan la posibilidad de manifestar su desacuerdo. Esto último, por medio de una objeción antes del plazo de noventa días desde la notificación de esta e incluso, presentar una objeción con treinta días de anticipación desde la fecha de la última objeción recibida en un periodo adicional de noventa días. Esto se refleja en el numeral 3 del Artículo V de la CIRCB:

> "**Each of such amendments shall become effective with respect to the Contracting Governments ninety days following notification** of the amendment by the Commission to each of the Contracting Governments, **except that** (a) **if any Government presents to the Commission objection** to any amendment **prior to the expiration of this ninety-day period**, the **amendment shall not become effective** with respect to any of the Governments for an additional ninety days; b) thereupon, any other Contracting Government may present objection to the amendment **at any time prior to the expiration of the additional ninety-day period, or before the expiration of thirty days from the date of receipt of the last objection** received during such additional ninety-day period, whichever date shall be the later[…]" (el énfasis es propio).

Además, es importante considerar que al momento de toma de decisiones en la Comisión, como lo fue para el establecimiento de la Moratoria, se requiere una votación con un mínimo de de los Estados Partes a favor. Esto en conformidad con el numeral 2 del artículo III:"[…]**Decisions of the Commission shall be taken by a simple majority of those members voting except that a three-fourths majority of those members voting shall be required** for action in pursuance of Article V[…]"

De este modo, para efectuar una enmienda al Calendario se requiere como mínimo la votación de tres cuartos de los Estados Parte. Ahora si bien, se obtuvo el mínimo requerido, también hubo quienes votaron en contra [55] y emitieron objeciones expresas.

En consecuencia, para aquellos Estados que no hayan emitido sus fotos a favor de la Resolución efectuada por la Comisión que estableció la Moratoria y en virtud de su desacuerdo, hayan presentado una objeción expresa a la Comisión, no se les podría aplicar el tratado enmendado. En estos casos se les debería aplicar la Convención sin la Moratoria, el tratado original.

Por este motivo, no podríamos afirmar de forma generalizada que la Moratoria – aunque implique un cambio sumamente esencial para los objetivos y fines de la Convención – efectúae una evolución al contenido de estos mismos. Pues, esto solo sería así para aquellos Estados Parte que: 1) hayan votado a favor de Moratoria y no efectuado una objeción al respecto o 2) a pesar de no votar a favor, no hayan efectuado ninguna objeción a la Moratoria. Solo a estos Estados se les podría aplicar el tratado enmendado, que incluye a la Moratoria.

Precisamente debido a esta salvedad, se consideró pertinente un análisis particular en torno a las enmiendas en los tratados y en el marco de la Convención. Aún más debido a que, de ignorar un aspecto tan importante como el mencionado en una interpretación sobre el objeto y fin, podría traer consecuencias negativas como "**the danger with such arguments** [the teleological ones] **is that they can easily trespass over the intention of the parties** and allow the militant judge to arrogate to himself legislative

[55] Para mayor detalle, véase: https://archive.iwc.int/pages/themes.php?theme1=01+-+The+Commission&theme2=Commission+Meeting+Voting+Records.

functions ” [El peligro con tales argumentos es que pueden traspasar fácilmente la intención de las partes y permitir un el juez militante se arrogarse funciones legislativas]. [56](el énfasis es propio) (Kolb, 2016, p. 146).

Por otro lo expuesto podemos concluir con respecto a los objetos y fines de la Convención lo siguiente. En primer lugar, la CIRCB puede y, en efecto, tiene dos objetos y fines: 1) LA preservación adecuada de las ballenas y 2) el desarrollo ordenado de la industria de caza. En segundo lugar, si bien estos son de carácter variable debido a la estructura planteada en las mismas disposiciones del tratado, para que su evolución – en el marco del Artículo V de la Convención - sea aplicable de forma absoluta a todos los Estados Parte, se requiere la inexistencia de objeciones sobre las variaciones que propuestas por la Comisión. En tercer lugar, la Moratoria no podría variar el contenido de los objetos y fines de la Convención, aunque se encuentre estrechamente relacionada con los mismos.

De modo que se ha planteado una postura concreta en torno a los objetos y fines de la Convención, se analizará las implicancias de una interpretación del Artículo VIII de forma aislada a este tratado.

En primer lugar, cabe recordar lo establecido en el artículo 18 de la CV 69, según el cual “Estado deberá abstenerse de actos en virtud de los cuales se frustren el objeto y el fin de un tratado”[57]. En este sentido, el solo hecho de considerar una interpretación que desconoce las disposiciones de la Convención, podría muy probablemente arriesgarse al incumplimiento de la obligación previamente expuesta.

En segundo lugar, esta obligación ha sido reafirmada por la CIJ en la Opinión Consultiva sobre las reservas formuladas a la Convención para la prevención y

[56] La traducción al español es realizada por la autora del presente Informe Jurídico.

[57] Artículo 18 CV 69.- 18. Obligación de no frustrar el objeto y el fin de un tratado antes de su entrada en vigor. Un Estado deberá abstenerse de actos en virtud de los cuales se frustren el objeto y el fin de un tratado:
a) si ha firmado el tratado o ha canjeado instrumentos que constituyen el tratado a reserva de ratificación, aceptación o aprobación, mientras no haya manifestado su intención de no llegar a ser parte en el tratado: o b) si ha manifestado su consentimiento en obligarse por el tratado, durante el periodo que preceda a la entrada en vigor del mismo y siempre que esta no se retarde indebidamente.

sanción del delito de Genocidio de 1948[58], en la cual sostuvo que "Ningún Estado contratante está autorizado a frustrar o afectar el propósito y la razón de ser de un tratado".[59]

Por lo tanto, de ninguna forma cabría la posibilidad de interpretar el Artículo VIII, ni cualquier otra disposición de la Convención de forma aislada a esta misma. Por el contrario, la interpretación de toda disposición de la CIRCB debería ser realizada tomando en cuenta la coexistencia de los dos objetos y fines que esta presenta y el mutuo respeto de estos.

[58] Véase la Opinión Consultiva del 20 de mayo de 1951 sobre las reservas formuladas a la Convención para la prevención y la sanción del delito de genocidio de 1948.

[59] Sin perjuicio de que la cita se encuentra relacionada al marco de las reservas, se consideró pertinente para efectos de exponer el énfasis planteado por la CIJ con respecto a la obligación de no frustrar el objeto y fin del tratado.

CONCLUSIONES

El presente informe jurídico nos permite sostener las conclusiones que se detallan a continuación.

En primer lugar, aún ante instancias de alto nivel como la de la honorable Corte Internacional de Justicia, se pueden presentar confusiones en cuanto a instituciones jurídicos sumamente básicas, como lo son la reserva y la declaración unilateral de Estados. De hecho, en el presente caso, fue el estado japonés quien planteó la denominación de reserva para la declaración australiana. Por este motivo, es sumamente importante tener una mirada analítica-crítica en función a las instituciones jurídicas del derecho internacional público que se puedan plantear en la jurisprudencia.

En segundo lugar, la investigación científica es un término de suma importancia en el marco de la Convención. En ese sentido, la CIJ no debió de pasar por desapercibido su análisis, pues como se plasmó en el presente informe, las consideraciones de este término son fundamentales, aún más cuando es un presupuesto indispensable para la excepcionalidad del Artículo VIII. Con mayor razón, este mismo exige una interpretación balanceada en relación con los objetos y fines de la Convención de modo que su interpretación y aplicación no sea deliberada sino, balanceada para ambos.

En tercer lugar, el principio precautorio, se encuentra en ascenso pues bien podría trascender a un nivel consuetudinario, aunque para llegar a ese nivel el camino no sería tan fácil. No obstante, la práctica internacional de este principio ha demostrado lo beneficiosa que puede ser su consideración en materia medioambiental, como para la protección de la población de ballenas en este caso en concreto. Por ello, consideramos que la CIJ perdió una gran oportunidad de pronunciarse sobre este y también complementar el entendimiento del mismo en el plano internacional.

Finalmente, a partir de lo analizado queda claro que los tratados pueden tener más de un objeto y fin, como por ejemplo, sucede con la CIRCB y, además, un carácter variable; aunque esto último dependerá mucho de la estructura diseñada para cada tratado. Así, ante tratados con características como la expuesta, la interpretación deberá seguir un criterio armónico y que promueva un balance de los objetos y fines que pueda tener un tratado y, que de ninguna manera, pretenda la primacía de uno sobre el otro; salvo las Partes lo hayan establecido así.

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2014

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
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*

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JUDGMENT

Present: *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.

In the case concerning whaling in the Antarctic,

between

Australia,

represented by

Mr. Bill Campbell, Q.C., General Counsel (International Law), Attorney-General's Department,

as Agent, Counsel and Advocate;

H.E. Mr. Neil Mules, A.O., Ambassador of Australia to the Kingdom of the Netherlands,

as Co-Agent;

The Honourable Mark Dreyfus, Q.C., M.P., former Attorney-General of Australia,

Mr. Justin Gleeson, S.C., Solicitor-General of Australia,

Mr. James Crawford, A.C., S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institut de droit international, Barrister, Matrix Chambers, London,

Mr. Henry Burmester, A.O., Q.C., Special Counsel, Australian Government Solicitor,

Mr. Philippe Sands, Q.C., Professor of Law, University College London, Barrister, Matrix Chambers, London,

Ms Laurence Boisson de Chazournes, Professor of International Law, University of Geneva,

as Counsel and Advocates;

Ms Kate Cook, Barrister, Matrix Chambers, London,

Mr. Makane Mbengue, Associate Professor, University of Geneva,

as Counsel;

Ms Anne Sheehan, Acting Assistant Secretary, Attorney-General's Department,

Mr. Michael Johnson, Principal Legal Officer, Attorney-General's Department,

Ms Danielle Forrester, Principal Legal Officer, Attorney-General's Department,

Ms Stephanie Ierino, Acting Principal Legal Officer, Attorney-General's Department,

Ms Clare Gregory, Senior Legal Officer, Attorney-General's Department,

Ms Nicole Lyas, Acting Senior Legal Officer, Attorney-General's Department,

Ms Erin Maher, Legal Officer, Attorney-General's Department,

Mr. Richard Rowe, former Senior Legal Adviser, Department of Foreign Affairs and Trade,

Mr. Greg French, Assistant Secretary, Department of Foreign Affairs and Trade,

Mr. Jamie Cooper, Legal Officer, Department of Foreign Affairs and Trade,

Ms Donna Petrachenko, First Assistant Secretary, Department of Sustainability, Environment, Water, Population and Communities,

Mr. Peter Komidar, Director, Department of Sustainability, Environment, Water, Population and Communities,

Mr. Bill de la Mare, Scientist, Australian Antarctic Division, Department of Sustainability, Environment, Water, Population and Communities,

Mr. David Blumenthal, former Senior Adviser, Office of the Attorney-General,

Ms Giulia Baggio, former Senior Adviser, Office of the Attorney-General,

Mr. Todd Quinn, First Secretary, Embassy of Australia in the Kingdom of the Netherlands,

as Advisers;

Ms Mandy Williams, Administration Officer, Attorney-General's Department,

as Assistant,

and

Japan,

represented by

H.E. Mr. Koji Tsuruoka, Ambassador, Chief Negotiator for the Trans-Pacific Partnership Agreement Negotiations,

as Agent;

H.E. Mr. Yasumasa Nagamine, Deputy Minister for Foreign Affairs,

H.E. Mr. Masaru Tsuji, Ambassador Extraordinary and Plenipotentiary of Japan to the Kingdom of the Netherlands,

as Co-Agents;

Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, President of the Société française pour le droit international, member of the Institut de droit international,

Mr. Vaughan Lowe, Q.C., member of the English Bar, Emeritus Professor of International Law, Oxford University, member of the Institut de droit international,

Mr. Alan Boyle, Professor of International Law at the University of Edinburgh, member of the English Bar,

Mr. Yuji Iwasawa, Professor of International Law at the University of Tokyo, member and former Chairperson of the Human Rights Committee,

Mr. Payam Akhavan, LL.M., S.J.D. (Harvard), Professor of International Law, McGill University, member of the Bar of New York and the Law Society of Upper Canada,

Mr. Shotaro Hamamoto, Professor of International Law, Kyoto University,

Ms Yukiko Takashiba, Deputy Director, ICJ Whaling Case Division, Ministry of Foreign Affairs,

as Counsel and Advocates;

Mr. Takane Sugihara, Emeritus Professor of International Law, Kyoto University,

Ms Atsuko Kanehara, Professor of International Law, Sophia University (Tokyo),

Mr. Masafumi Ishii, Director-General, International Legal Affairs Bureau, Ministry of Foreign Affairs,

Ms Alina Miron, Researcher, Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

as Counsel;

Mr. Kenji Kagawa, Deputy Director-General, Fisheries Agency,

Mr. Noriyuki Shikata, Minister, Embassy of Japan in the United Kingdom of Great Britain and Northern Ireland,

Mr. Tomohiro Mikanagi, Director, International Legal Affairs Division, Ministry of Foreign Affairs,

Mr. Joji Morishita, IWC Commissioner, Director-General, National Research Institute of Far Seas Fisheries,
Mr. Tatsuo Hirayama, Director, Fishery Division, Ministry of Foreign Affairs,
Mr. Takero Aoyama, Director, ICJ Whaling Case Division, Ministry of Foreign Affairs,
Mr. Naohisa Shibuya, Deputy Director, ICJ Whaling Case Division, Ministry of Foreign Affairs,
Ms Yuriko Akiyama, Ph.D., ICJ Whaling Case Division, Ministry of Foreign Affairs,
Mr. Masahiro Kato, ICJ Whaling Case Division, Ministry of Foreign Affairs,

Mr. Hideki Moronuki, Senior Fisheries Negotiator, International Affairs Division, Fisheries Agency,
Mr. Takaaki Sakamoto, Assistant Director, International Affairs Division, Fisheries Agency,
Mr. Shinji Hiruma, Assistant Director, International Affairs Division, Fisheries Agency,
Mr. Sadaharu Kodama, Legal Adviser, Embassy of Japan in the Kingdom of the Netherlands,
Mr. Nobuyuki Murai, LL.D., First Secretary, Embassy of Japan in the Kingdom of the Netherlands,
Ms Risa Saijo, LL.M., Researcher, Embassy of Japan in the Kingdom of the Netherlands,
Ms Héloïse Bajer-Pellet, member of the Paris Bar,

as Advisers;

Mr. Douglas Butterworth, Emeritus Professor, University of Cape Town,
Ms Judith E. Zeh, Ph.D., Research Professor Emeritus, University of Washington,

as Scientific Advisers and Experts;

Mr. Martin Pratt, Professor, Department of Geography, Durham University,

as Expert Adviser;

Mr. James Harrison, Ph.D., Lecturer in International Law, University of Edinburgh,
Ms Amy Sander, member of the English Bar,
Mr. Jay Butler, Visiting Associate Professor of Law, George Washington University Law School, member of the New York Bar,

as Legal Advisers,

with New Zealand,

as a State whose Declaration of Intervention has been admitted by the Court,

represented by

Ms Penelope Ridings, International Legal Adviser, Ministry of Foreign Affairs and Trade,

as Agent, Counsel and Advocate;

H.E. Mr. George Troup, Ambassador of New Zealand to the Kingdom of the Netherlands,

as Co-Agent;

The Honourable Christopher Finlayson Q.C., M.P., Attorney-General of New Zealand,

as Counsel and Advocate;

Ms Cheryl Gwyn, Deputy Solicitor-General, Crown Law Office,
Ms Elana Geddis, Barrister, Harbour Chambers, Wellington,

as Counsel;

Mr. Andrew Williams, Legal Adviser, Ministry of Foreign Affairs and Trade,

Mr. James Christmas, Private Secretary, Attorney-General's Office,
Mr. James Walker, Deputy Head of Mission, Embassy of New Zealand in the Kingdom of the Netherlands,
Mr. Paul Vinkenvleugel, Policy Adviser, Embassy of New Zealand in the Kingdom of the Netherlands,

as Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. 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 . . ., as well as its other international obligations for the preservation of marine mammals and the marine environment".

In its Application, Australia invoked as the basis for the jurisdiction of the Court the declarations made, pursuant to Article 36, paragraph 2, of the Statute of the Court, by Australia on 22 March 2002 and by Japan on 9 July 2007.

2. In accordance with Article 40, paragraph 2, of the Statute, the Registrar communicated the Application forthwith to the Government of Japan; and, pursuant to paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. On the directions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the International Convention for the Regulation of Whaling (hereinafter the "ICRW" or the "Convention") the notification provided for in Article 63, paragraph 1, of the Statute. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar also addressed to the International Whaling Commission (hereinafter the "IWC" or the "Commission") the notification provided for in Article 34, paragraph 3, of the Statute. The Commission indicated that it did not intend to submit any observations in writing under Article 69, paragraph 3, of the Rules of Court.

4. Since the Court included upon the Bench no judge of Australian nationality, Australia proceeded to exercise its right conferred by Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case; it chose Ms Hilary Charlesworth.

5. By an Order of 13 July 2010, the Court fixed 9 May 2011 and 9 March 2012 as the respective time-limits for the filing of the Memorial of Australia and the Counter-Memorial of Japan; those pleadings were duly filed within the time-limits thus prescribed.

6. On 23 April 2012, the President of the Court met with the Agents of the Parties in order to ascertain their views with regard to the organization of the oral proceedings. At this meeting, the Agent of Australia stated that his Government did not consider it necessary to organize a second round of written pleadings; the Agent of Japan, for his part, requested a second round of written pleadings.

The Court, having regard to Article 45, paragraph 2, of the Rules of Court, decided that a second round of written pleadings was not necessary. By letters dated 2 May 2012, the Registrar informed the Parties accordingly.

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7. On 19 September 2012, the Government of New Zealand, referring to Article 53, paragraph 1, of the Rules of Court, requested the Court to furnish it with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties pursuant to that same provision, the Court decided to grant this request. The documents in question were duly transmitted to New Zealand.

8. 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".

9. In accordance with Article 83, paragraph 1, of the Rules of Court, the Registrar, by letters dated 20 November 2012, transmitted certified copies of the Declaration of Intervention to the Governments of Australia and Japan, which were informed that the Court had fixed 21 December 2012 as the time-limit for the submission of written observations on that Declaration. In accordance with paragraph 2 of the same Article, the Registrar also transmitted a copy of the Declaration to the Secretary-General of the United Nations, as well as to States entitled to appear before the Court.

10. Australia and Japan each submitted written observations on New Zealand's Declaration of Intervention within the time-limit thus fixed. The Registrar transmitted to each Party a copy of the other's observations, and copies of the observations of both Parties to New Zealand.

11. In the light of Article 84, paragraph 2, of the Rules of Court, and considering the absence of objections from the Parties, the Court took the view that it was not necessary to hold hearings on the question of the admissibility of New Zealand's Declaration of Intervention.

12. By an Order of 6 February 2013, the Court decided that the Declaration of Intervention filed by New Zealand pursuant to Article 63, paragraph 2, of the

Statute was admissible. The Court also fixed 4 April 2013 as the time-limit for the filing by New Zealand of the written observations referred to in Article 86, paragraph 1, of the Rules of Court; moreover, it authorized the filing by Australia and Japan of written observations on those submitted by New Zealand, and fixed 31 May 2013 as the time-limit for such filing.

13. New Zealand duly filed its written observations within the time-limit thus fixed. The Registrar transmitted copies of New Zealand's written observations to the Parties.

Japan then filed, within the time-limit prescribed by the Court in its Order of 6 February 2013, its observations on those filed by New Zealand. The Registrar transmitted copies of Japan's written observations to Australia and to New Zealand.

Australia, for its part, notified the Court, by letter dated 31 May 2013, that it would not submit such observations, but that it "reserve[d] its right to address certain points raised in the written observations of New Zealand in the course of oral argument". The Registrar communicated copies of this letter to Japan and to New Zealand.

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14. By letters dated 17 October 2012, the Registrar informed the Parties that the Court had requested that they provide, by 28 December 2012, information regarding expert evidence which they intended to produce, including the details referred to in Article 57 of the Rules of Court. The Registrar informed the Parties, moreover, that each Party would then be given an opportunity to comment on the other's communication, and if necessary to amend the information it had given, including the list of experts to be called at the hearing, by 28 January 2013. Finally, the Registrar informed the Parties that the Court had decided that each Party should communicate to it, by 15 April 2013, the full texts of the statements of the experts whom the Parties intended to call at the hearings.

15. By letters dated 18 December 2012 and 26 December 2012, respectively, the Agents of Australia and Japan each communicated information concerning one expert to be called at the hearing. By a letter dated 25 January 2013, the Co-Agent of Australia communicated such information regarding a second expert.

16. By letters dated 15 April 2013, the Parties communicated the full texts of the statements of the experts whom the Parties intended to call at the hearings. These texts were exchanged between the Parties and transmitted to New Zealand.

17. By letters dated 23 April 2013, the Registrar informed the Parties that the Court had decided that they could submit written statements in response to the statement submitted by each of the other Party's experts, and had fixed 31 May 2013 as the time-limit for such submission. Within the time-limit thus fixed, Australia submitted such statements in response from the two experts it would call at the hearing, and Japan submitted certain observations in response to the statements by the two experts to be called by Australia.

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18. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings. After consulting the Parties and New Zealand, the Court decided that the same should apply to the written observations of the intervening State and of the Parties on the subject-matter of the intervention, as well as to the written statements of experts called to give evidence in the case, and the written statements and observations in response.

19. Public hearings were held between 26 June and 16 July 2013, at which the Court heard the oral arguments and replies of:

For Australia: Mr. Bill Campbell,
Mr. Justin Gleeson,
Ms Laurence Boisson de Chazournes,
Mr. Henry Burmester,
Mr. James Crawford,
Mr. Philippe Sands,
Mr. Mark Dreyfus.

For Japan: Mr. Koji Tsuruoka,
Mr. Alain Pellet,
Mr. Payam Akhavan,
Mr. Shotaro Hamamoto,
Mr. Alan Boyle,
Mr. Vaughan Lowe,
Ms Yukiko Takashiba,
Mr. Yuji Iwasawa.

For New Zealand: Ms Penelope Ridings,
Mr. Christopher Finlayson.

20. During the public hearings of 27 June 2013, Australia called the following experts: Mr. Marc Mangel, Distinguished Research Professor of Mathematical Biology and Director of the Center for Stock Assessment Research, University of California, Santa Cruz; and Mr. Nick Gales, Chief Scientist of the Australian Antarctic Program. Mr. Mangel was examined by Mr. Philippe Sands, counsel for Australia, and cross-examined by Mr. Vaughan Lowe, counsel for Japan. Mr. Gales was examined by Mr. Justin Gleeson, counsel for Australia, and cross-examined by Mr. Vaughan Lowe, counsel for Japan. He was then re-examined by Mr. Gleeson. Several judges put questions to Mr. Mangel and to Mr. Gales, to which they replied orally.

21. During the public hearing on the afternoon of 3 July 2013, Japan called Mr. Lars Walløe, Professor Emeritus of the University of Oslo and Scientific Adviser to the Norwegian Government on Marine Mammals. He was examined by Mr. Vaughan Lowe, counsel for Japan, and cross-examined by Mr. Justin Gleeson, counsel for Australia. Several judges put questions to Mr. Walløe, to which he replied orally.

22. At the hearings, some judges put questions to the Parties, and to New Zealand as intervening State, to which replies were given orally and in writing. The Parties and New Zealand presented their comments on those replies.

*

23. In its Application, Australia made the following claims:

"For [the] reasons [set forth in its Application], and reserving the right to supplement, amplify or amend the present Application, Australia requests the Court to adjudge and declare that Japan is in breach of its international obligations in implementing the JARPA II program in the Southern Ocean.

In addition, Australia requests the Court to order that Japan:

(a) cease implementation of JARPA II;

(b) revoke any authorizations, permits or licences allowing the activities which are the subject of this application to be undertaken; and

(c) provide assurances and guarantees that it will not take any further action under the JARPA II or any similar program until such program has been brought into conformity with its obligations under international law."

24. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Australia,

in the Memorial:

"1. For the reasons given in this Memorial, and reserving the right to supplement, amplify or amend the present submissions, Australia requests the Court to adjudge and declare that Japan is in breach of its international obligations in authorizing and implementing JARPA II in the Southern Ocean.

2. In particular, the Court is requested to adjudge and declare that, by its conduct, Japan has violated its international obligations to:

(a) observe the zero catch limit in relation to the killing of whales for commercial purposes;

(b) refrain from undertaking commercial whaling of fin whales in the Southern Ocean Sanctuary; and

(c) observe the moratorium on taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships.

3. Further, the Court is requested to adjudge and declare that JARPA II is not a program for purposes of scientific research within the meaning of Article VIII of the International Convention for the Regulation of Whaling.

4. Further, the Court is requested 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."

On behalf of the Government of Japan,

in the Counter-Memorial:

"On the basis of the facts and arguments set out [in its Counter-Memorial], and reserving its right to supplement or amend these submissions, Japan requests that the Court adjudge and declare:

— that it lacks jurisdiction over the claims brought against Japan by Australia, referred to it by the Application of Australia of 31 May 2010;

— in the alternative, that the claims of Australia are rejected."

25. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Australia,

"1. Australia requests the Court to adjudge and declare that the Court has jurisdiction to hear the claims presented by Australia.

2. Australia requests the Court to adjudge and declare that Japan is in breach of its international obligations in authorizing and implementing the *Japanese Whale Research Program under Special Permit in the Antarctic Phase II* (JARPA II) in the Southern Ocean.

3. In particular, the Court is requested to adjudge and declare that, by its conduct, Japan has violated its international obligations pursuant to the International Convention for the Regulation of Whaling to:

(a) observe the zero catch limit in relation to the killing of whales for commercial purposes in paragraph 10 *(e)* of the Schedule;

(b) refrain from undertaking commercial whaling of fin whales in the Southern Ocean Sanctuary in paragraph 7 *(b)* of the Schedule;

(c) observe the moratorium on taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships in paragraph 10 *(d)* of the Schedule; and

(d) comply with the requirements of paragraph 30 of the Schedule.

4. Further, the Court is requested to adjudge and declare that JARPA II is not a program for purposes of scientific research within the meaning of Article VIII of the International Convention for the Regulation of Whaling.

5. Further, the Court is requested 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."

On behalf of the Government of Japan,

"Japan requests that the Court adjudge and declare:

1. — that it lacks jurisdiction over the claims brought against Japan by Australia, referred to it by the Application of Australia of 31 May 2010; and

— that, consequently, the Application of New Zealand for permission to intervene in the proceedings instituted by Australia against Japan lapses;

2. in the alternative, that the claims of Australia are rejected."

*

26. At the end of the written observations submitted by it in accordance with Article 86, paragraph 1, of the Rules of Court, New Zealand stated:

"In summary, the provisions of Article VIII must be interpreted in good faith in their context and in light of the object and purpose of the Convention, taking account of subsequent practice of the parties and applicable rules of international law, as confirmed by supplementary means of interpretation. On the basis of those considerations, Article VIII is properly to be interpreted as follows:

(a) Article VIII forms an integral part of the system of collective regulation established by the Convention, not an exemption from it. As such, it cannot be applied to permit whaling where the effect of that whaling would be to circumvent the other obligations of the Convention or to undermine its object and purpose.

(b) Only whaling that is conducted 'in accordance with' Article VIII is exempt from the operation of the Convention.

(c) Article VIII only permits a Contracting Government to issue a Special Permit for the exclusive 'purposes of scientific research'. The purpose for which a Special Permit has been issued is a matter for objective determination, taking account of the programme's methodology, design and characteristics, including: the scale of the programme; its structure; the manner in which it is conducted; and its results.

(d) Article VIII requires a Contracting Government issuing a Special Permit to limit the number of whales to be killed under that permit to a level that is the lowest necessary for and proportionate to the objectives of that research, and that can be demonstrated will have no adverse effect on the conservation of stocks.

(e) A Contracting Government issuing a Special Permit must discharge its duty of meaningful co-operation, and demonstrate that it has taken proper account of the views of the Scientific Committee and the Commission.

(f) Only whaling under Special Permit that meets all three of the requirements of Article VIII outlined above is permitted under Article VIII."

27. In the written observations which the Court, by its Order of 6 February 2013, authorized the Parties to submit on those filed by New Zealand, Japan stated *inter alia*:

— "Japan submits that the Court should defer its consideration of New Zealand's request until it has decided whether it has jurisdiction to examine Australia's Application"; and [. . .]

— "New Zealand reaches erroneous conclusions on a number of points that are pertinent to the present case. New Zealand . . . misstates the scope of the discretion expressly reserved to the Contracting Governments by Article VIII of the ICRW, particularly in relation to research methods and sample sizes as well as to the duty of co-operation. New Zealand also attempts to reverse the burden of proof with regard to the precautionary approach, to the procedural duties incumbent upon Contracting Governments issuing special permits, and to the determination of what constitutes 'scientific purposes' under Article VIII of the ICRW. Japan submits that New Zealand's characterization of each of these points is incorrect.

— New Zealand implicitly requests the Court to substitute its own judgment for that of the Government of Japan as to the character of the special permits granted by Japan. It is respectfully submitted that the Court does not have such a power and cannot substitute its own appreciation for that of a Contracting Government granting a special permit."

28. Australia, for its part, did not submit any written observations (see paragraph 13 above).

29. At the end of the oral observations which it presented with respect to the subject-matter of its intervention, in accordance with Article 86, paragraph 2, of the Rules of Court, New Zealand stated *inter alia*:

"[T]he Convention establishes a system of collective regulation for the conservation and management of whale stocks. Article VIII must be interpreted in light of that object and purpose.

Article VIII permits the grant of special permits only to take whales 'for purposes of scientific research'. Japan has sought to mystify the determination of what is scientific research, and to accord for itself the right to decide whether a programme of whaling is for that purpose . . .

Even where a Contracting Government issues a special permit 'for purposes of scientific research', it is still required to ensure that the number of whales to be killed under that permit is the lowest necessary for, and proportionate to, the scientific purpose, and takes into account the collective interests of the parties. This is a matter for objective determination in light of the facts, as evidenced through the Guidelines and resolutions of the Scientific Committee and the Commission.

There is, in any case, a substantive duty of meaningful co-operation on a Contracting Government which proposes to issue a special permit. This requires it to show that it has taken into account the legitimate interests of the other parties to the Convention; that it has balanced the interests of all the parties in the conservation and management of whale stocks."

* * *

I. Jurisdiction of the Court

30. In the present case Australia contends that Japan has breached certain obligations under the ICRW to which both States are parties by issuing special permits to take whales within the framework of JARPA II. Japan maintains that its activities are lawful because the special permits are issued for "purposes of scientific research", as provided by Article VIII of the ICRW. The Court will first examine whether it has jurisdiction over the dispute.

31. 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. Australia's declaration of 22 March 2002 reads in relevant part as follows:

> "The Government of Australia declares that it recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to the Secretary-General of the United Nations withdrawing this declaration. This declaration is effective immediately.
>
> This declaration does not apply to:
>
> . . . . . .
>
> *(b)* 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."

Japan's declaration of 9 July 2007 reads in relevant part as follows:

> "Japan recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation and on condition of reciprocity, the jurisdiction of the International Court of Justice, over all disputes arising on and after 15 September 1958 with regard to situations or facts subsequent to the same date and being not settled by other means of peaceful settlement."

32. Japan contests the jurisdiction of the Court over the dispute submitted by Australia with regard to JARPA II, arguing that it falls within Australia's reservation *(b)*, which it invokes on the basis of reciprocity. While acknowledging that this dispute does not concern or relate to the delimitation of maritime zones, Japan maintains that it is a 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".

In Japan's view, the latter part of Australia's reservation, introduced by the second conjunction "or", is separate from the first part, with the consequence that the reservation applies both to disputes on delimitation and to other kinds of disputes involving the exploitation of maritime zones or adjacent areas pending delimitation. Japan adds that this interpretation is in conformity with Australia's intention when making the declaration. According to Japan, the phrase "pending its delimitation" merely describes a point in time, but not the subject-matter of the dispute excluded from the Court's jurisdiction.

Japan maintains that the present dispute "relates to the exploitation" of a maritime zone claimed by Australia or of an area adjacent to such a zone. Japan argues that this would be the case under Australia's characterization of JARPA II as a programme for the commercial exploitation of whales, as well as under Japan's own characterization of JARPA II as a scientific research programme, given that the research conducted under JARPA II is "an element of the process leading to exploitation".

33. Japan further contends that the dispute between the Parties relates to a disputed area in the sense of the reservation, given that

> "the JARPA II programme is taking place in or around maritime areas Australia claims to be part of its exclusive economic zone (EEZ), the rights of which are generated, according to Australia's claims, by its purported sovereignty over a large part of the Antarctic continent".

In Japan's view, these maritime areas are disputed since it does not recognize Australia's claims and considers the areas in question to be part of the high seas. Conceding that the area of operation of JARPA II and the areas of the Southern Ocean claimed by Australia do not overlap precisely, Japan argues that this is irrelevant because the Australian reservation also includes the waters that are "adjacent" to the area in dispute, the term being understood broadly by Australia.

34. Australia rejects Japan's interpretation of its reservation, maintaining that

> "the reservation only operates in relation to disputes between Australia and another country with a maritime claim that overlaps with that of Australia — that is, a situation of delimitation. Australia has no delimitation [dispute] with Japan and hence the paragraph *(b)* reservation can have no operation."

It adds that "[i]n particular, the reservation does not cover a dispute concerning the validity, or otherwise, under the 1946 Convention, of Japan's JARPA II programme, a dispute entirely unconnected with any delimitation situation".

According to Australia, the intent underlying the reservation was to give effect to its "belief that its overlapping maritime claims are best resolved by negotiations", especially the complex maritime boundary delimitations with New Zealand and Timor-Leste that were ongoing at

the time the declaration was made. Australia maintains that the wording of the reservation is to be understood against this background. Thus, the purpose of the second part of the reservation

> "is to make clear [that] the reservation extends beyond disputes over delimitation of maritime zones *per se*, to associated disputes concerning [the] exploitation of resources that may arise between the States with overlapping maritime claims pending delimitation".

Australia also contests Japan's view that the dispute over JARPA II is about "exploitation" in the sense of its reservation, arguing that the exploitation contemplated by the reservation is "exploitation of resources covered by a potential delimitation arrangement and not any exploitation unrelated to that delimitation situation that happens to occur in the relevant geographic area".

35. Australia furthermore contends that the geographic area of operation of JARPA II, which in any event extends well outside any waters claimed by it, cannot determine the Court's jurisdiction over a treaty dispute that is unrelated to the status of the waters in which the activity occurs. According to Australia, "[t]he dispute before the Court concerning compliance of JARPA II with the whaling Convention exists whether or not Australia asserts maritime zones adjacent to Antarctica and irrespective of any delimitation with adjacent claimants". Australia emphasizes that, in the maritime context, the word "delimitation" has a specific meaning, referring solely to "the fixing of boundaries between neighbouring States, whether adjacent or opposite".

36. The Court recalls that, when interpreting a declaration accepting its compulsory jurisdiction, it "must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention" of the declaring State (*Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 104). The Court noted in the *Fisheries Jurisdiction* case that it had "not hesitated to place a certain emphasis on the intention of the depositing State" (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 454, para. 48). The Court further observed that

> "[t]he intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served" (*ibid.*, p. 454, para. 49).

37. Reservation *(b)* contained in Australia's declaration (see paragraph 31 above) refers to disputes concerning "the delimitation of mari-

time zones" or to those "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 wording of the second part of the reservation is closely linked to that of the first part. The reservation thus has to be read as a unity. The disputes to which the reservation refers must either concern maritime delimitation in an area where there are overlapping claims or the exploitation of such an area or of an area adjacent thereto. The existence of a dispute concerning maritime delimitation between the Parties is required according to both parts of the reservation.

38. The meaning which results from the text of the reservation is confirmed by the intention stated by Australia when it made its declaration accepting the compulsory jurisdiction of the Court. According to a press release issued by the Attorney-General and the Minister for Foreign Affairs of Australia on 25 March 2002, the reservation excluded "disputes involv[ing] maritime boundary delimitation or disputes concerning the exploitation of an area in dispute or adjacent to an area in dispute". The same statement is contained in the National Interest Analysis submitted by the Attorney-General to Parliament on 18 June 2002, which referred to "maritime boundary disputes" as the object of the reservation. Thus, the reservation was intended to cover, apart from disputes concerning the delimitation of maritime zones, those relating to the exploitation of an area in respect of which a dispute on delimitation exists, or of a maritime area adjacent to such an area. The condition of a dispute between the parties to the case concerning delimitation of the maritime zones in question was clearly implied.

39. Both Parties acknowledge that the dispute before the Court is not a dispute about maritime delimitation. The question remains 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.

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. Moreover, 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. As the Court stated in the *Territorial and Maritime Dispute* case, "the task of delimitation consists in resolving the overlapping claims by drawing a line of separation between the maritime areas concerned" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, pp. 674-675, para. 141). There are no overlap-

ping claims of the Parties to the present proceedings which may render reservation *(b)* applicable.

40. Moreover, it is significant that Australia alleges that Japan has breached certain obligations under the ICRW and does not contend that JARPA II is unlawful because the whaling activities envisaged in the programme take place in the maritime zones over which Australia asserts sovereign rights or in adjacent areas. The nature and extent of the claimed maritime zones are therefore immaterial to the present dispute, which is about whether or not Japan's activities are compatible with its obligations under the ICRW.

41. 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

1. Introduction

A. General overview of the Convention

42. The present proceedings concern the interpretation of the International Convention for the Regulation of Whaling and the question whether special permits granted for JARPA II are for purposes of scientific research within the meaning of Article VIII, paragraph 1, of the Convention. Before examining the relevant issues, the Court finds it useful to provide a general overview of the Convention and its origins.

43. The ICRW was preceded by two multilateral treaties relating to whaling. The Convention for the Regulation of Whaling, adopted in 1931, was prompted by concerns over the sustainability of the whaling industry. This industry had increased dramatically following the advent of factory ships and other technological innovations that made it possible to conduct extensive whaling in areas far from land stations, including in the waters off Antarctica. The 1931 Convention 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.

This increase in catch levels and a concurrent decline in the price of whale oil led to the adoption of the 1937 International Agreement for the

Regulation of Whaling (hereinafter "the 1937 Agreement"). The Preamble of this Agreement expressed the desire of the States parties "to secure the prosperity of the whaling industry and, for that purpose, to maintain the stock of whales". The treaty 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. As had already been the case under the 1931 Convention, States parties were required to collect from all the whales taken certain biological information which, together with other statistical data, was to be transmitted to the International Bureau for Whaling Statistics in Norway. The 1937 Agreement also provided for the issuance by a "Contracting Government . . . to any of its nationals [of] a special permit authorizing that national to kill, take and treat whales for purposes of scientific research". Three Protocols to the 1937 Agreement subsequently placed some additional restrictions on whaling activities.

44. In 1946, an international conference on whaling was convened on the initiative of the United States. The aims of the conference, as described by Mr. Dean Acheson, then Acting Secretary of State of the United States, in his opening address, were "to provide for the co-ordination and codification of existant regulations" and to establish an "effective administrative machinery for the modification of these regulations from time to time in the future as conditions may require". The conference adopted, on 2 December 1946, the International Convention for the Regulation of Whaling, the only authentic text of which is in the English language. The Convention 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.

45. In contrast to the 1931 and 1937 treaties, the text of 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, as is stated in Article I, paragraph 1, of the latter. The Schedule is subject to amendments, to be adopted by the IWC. This Commission, established under Article III, paragraph 1, of the Convention, is given a significant role in the regulation of whaling. It is "composed of one member from each Contracting Government". The adoption by the Commission of amendments to the Schedule requires a three-fourths majority of votes cast (Art. III, para. 2). An amendment becomes binding on a State party unless it presents an objection, in which case the amendment does not become effective in respect of that State until the objection is withdrawn. The Commission has amended the Schedule many times. The functions conferred on the Commission have made the Convention an evolving instrument.

Among the objects of possible amendments, Article V, paragraph 1, of the Convention lists

> "fixing *(a)* protected and unprotected species . . . *(c)* open and closed waters, including the designation of sanctuary areas . . . *(e)* time, methods, and intensity of whaling (including the maximum catch of whales to be taken in any one season), *(f)* types and specifications of gear and apparatus and appliances which may be used".

Amendments to the Schedule "shall be such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources" and "shall be based on scientific findings" (Art. V, para. 2).

46. Article VI of the Convention states that "[t]he Commission may from time to time make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention". These recommendations, which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule.

47. In 1950, the Commission established a Scientific Committee (hereinafter the "Scientific Committee" or "Committee"). The Committee is composed primarily of scientists nominated by the States parties. However, advisers from intergovernmental organizations and scientists who have not been nominated by States parties may be invited to participate in a non-voting capacity.

The Scientific Committee assists the Commission in discharging its functions, in particular those relating to "studies and investigations relating to whales and whaling" (Article IV of the Convention). It analyses information available to States parties "with respect to whales and whaling" and submitted by them in compliance with their obligations under Article VIII, paragraph 3, of the Convention. It contributes to making "scientific findings" on the basis of which amendments to the Schedule may be adopted by the Commission (Art. V, para. 2 *(b)*). According to paragraph 30 of the Schedule, adopted in 1979, the Scientific Committee 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. The Scientific Committee has not been empowered to make any binding assessment in this regard. It communicates to the Commission its views on programmes for scientific research, including the views of individual members, in the form of reports or recommendations. However, when there is a division of opinion, the Committee generally refrains from formally adopting the majority view.

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" (hereinafter "Annex Y"). The current Guidelines, which were elaborated by the Scientific Committee and endorsed by the Commission in 2008 (and then further revised in 2012), 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" (hereinafter "Annex P").

B. Claims by Australia and response by Japan

48. Australia alleges that JARPA II is not a programme for purposes of scientific research within the meaning of Article VIII of the Convention. In Australia's view, it follows from this that Japan has breached and continues to breach certain of its obligations under the Schedule to the ICRW. Australia's claims concern compliance with the following substantive obligations: (1) the obligation to respect the moratorium setting zero catch limits for the killing of whales from all stocks for commercial purposes (para. 10 *(e)*); (2) the obligation not to undertake commercial whaling of fin whales in the Southern Ocean Sanctuary (para. 7 *(b)*); and (3) 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)*). Moreover, according to Australia's final submissions, when authorizing JARPA II, Japan also failed to comply with the procedural requirements set out in paragraph 30 of the Schedule for proposed scientific permits.

49. Japan contests all the alleged breaches. With regard to the substantive obligations under the Schedule, Japan argues that none of the obligations invoked by Australia applies to JARPA II, because 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 contends that there has been no breach of the procedural requirements stated in paragraph 30 of the Schedule.

50. The issues concerning the interpretation and application of Article VIII of the Convention are central to the present case and will be examined first.

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

A. The function of Article VIII

51. Article VIII, paragraph 1, of the Convention 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."

52. Japan initially argued that "special permit whaling under Article VIII is entirely outside the scope of the ICRW". Article VIII, paragraph 1, it contended, was to be regarded as "free-standing" and would have to be read in isolation from the other provisions of the Convention. Japan later acknowledged that Article VIII "must . . . be interpreted and applied consistently with the Convention's other provisions", but emphasized that a consistent reading would consider Article VIII, paragraph 1, as providing an exemption from the Convention.

53. According to Australia, Article VIII needs to be read in the context of the other provisions of the Convention, to which it provides a limited exception. In particular, Australia maintained that conservation measures adopted in pursuance of the objectives of the Convention, "including the moratorium and the Sanctuary", are relevant also for whaling for scientific purposes, given that the reliance on Article VIII, paragraph 1, cannot have the effect of undermining the effectiveness of the regulatory régime as a whole.

54. New Zealand observed that the phrase "[N]otwithstanding anything contained in this Convention", which opens paragraph 1 of Article VIII, "provide[s] a limited discretion for Contracting Governments to issue special permits for the specific articulated purpose of scientific research". It "do[es] not constitute a blanket exemption for special permit whaling from all aspects of the Convention". New Zealand pointed out that the provision in paragraph 1 setting out that the taking of whales in accordance with Article VIII is "exempt from the operation of this Convention" "would have been unnecessary if the opening words of the paragraph, 'notwithstanding anything in the Convention', were intended to cover all aspects of Special Permit whaling".

55. The Court notes that Article VIII is an integral part of the Convention. It therefore has to be interpreted in light of the object and purpose of the Convention and taking into account other provisions of the Con-

vention, including the Schedule. However, 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 Schedule concerning the moratorium on the catching of whales for commercial purposes, the prohibition of commercial whaling in the Southern Ocean Sanctuary and the moratorium relating to factory ships.

B. The relationship between Article VIII and the object and purpose of the Convention

56. The Preamble of the ICRW indicates that the Convention pursues the purpose of ensuring the conservation of all species of whales while allowing for their sustainable exploitation. Thus, the first preambular paragraph recognizes "the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks". In the same vein, the second paragraph of the Preamble expresses the desire "to protect all species of whales from further overfishing", and the fifth paragraph stresses the need "to give an interval for recovery to certain species now depleted in numbers". However, the Preamble also refers to the exploitation of whales, noting in the third paragraph that "increases in the size of whale stocks will permit increases in the number of whales which may be captured without endangering these natural resources", and adding in the fourth paragraph that "it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress" and in the fifth that "whaling operations should be confined to those species best able to sustain exploitation". The objectives of the ICRW are further indicated in the final paragraph of the Preamble, which states that the Contracting Parties "decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry". Amendments to the Schedule and recommendations by the IWC may put an emphasis on one or the other objective pursued by the Convention, but cannot alter its object and purpose.

57. In order to buttress their arguments concerning the interpretation of Article VIII, paragraph 1, Australia and Japan have respectively emphasized conservation and sustainable exploitation as the object and purpose of the Convention in the light of which the provision should be interpreted. According to Australia, Article VIII, paragraph 1, should be interpreted restrictively because it allows the taking of whales, thus providing an exception to the general rules of the Convention which give

effect to its object and purpose of conservation. New Zealand also calls for "a restrictive rather than an expansive interpretation of the conditions in which a Contracting Government may issue a Special Permit under Article VIII", in order not to undermine "the system of collective regulation under the Convention". This approach is contested by Japan, which argues in particular that the power to authorize the taking of whales for purposes of scientific research should be viewed in the context of the freedom to engage in whaling enjoyed by States under customary international law.

58. 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".

C. The issuance of special permits

59. Japan notes that, according to Article VIII, paragraph 1, the State of nationality of the person or entity requesting a special permit for purposes of scientific research is the only State that is competent under the Convention to issue the permit. According to Japan, that State is in the best position to evaluate a programme intended for purposes of scientific research submitted by one of its nationals. In this regard it enjoys discretion, which could be defined as a "margin of appreciation". Japan argues that this discretion is emphasized by the part of the paragraph which specifies that the State of nationality may grant a permit "subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit".

60. According to Australia, while the State of nationality of the requesting entity has been given the power to authorize whaling for pur-

poses of scientific research under Article VIII, this does not imply that the authorizing State has the discretion to determine whether a special permit for the killing, taking and treating of whales falls within the scope of Article VIII, paragraph 1. The requirements for granting a special permit set out in the Convention provide a standard of an objective nature to which the State of nationality has to conform. New Zealand also considers that Article VIII states "an objective requirement", not "something to be determined by the granting Contracting Government".

61. The Court 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. However, 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.

D. The standard of review

62. The Court now turns to the standard that it will apply in reviewing 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.

63. Australia maintains that the task before the Court in the present case is to determine whether Japan's actions are consistent with the ICRW and the decisions taken under it. According to Australia, the Court's power of review should not be limited to scrutiny for good faith, with a strong presumption in favour of the authorizing State, as this would render the multilateral régime for the collective management of a common resource established by the ICRW ineffective. Australia urges the Court to have regard to objective elements in evaluating whether a special permit has been granted for purposes of scientific research, referring in particular to the "design and implementation of the whaling programme, as well as any results obtained".

64. New Zealand maintains that the interpretation and application of Article VIII entail the "simple question of compliance" by Contracting Governments with their treaty obligations, a question which is to be decided by the Court. New Zealand also emphasizes objective elements, stating that the question whether a programme is for purposes of scientific research can be evaluated with reference to its "methodology, design and characteristics".

65. Japan accepts that the Court may review the determination by a State party to the ICRW that the whaling for which a special permit has been granted is "for purposes of scientific research". In the course of the written and oral proceedings, Japan emphasized that the Court is limited, when exercising its power of review, to ascertaining whether the determi-

nation was "arbitrary or capricious", "manifestly unreasonable" or made in bad faith. Japan also stressed that matters of scientific policy cannot be properly appraised by the Court. It added that the role of the Court therefore is "to secure the integrity of the process by which the decision is made, [but] not to review the decision itself".

66. Near the close of the oral proceedings, however, Japan refined its position regarding the standard of review to be applied in this case as follows:

> "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'".

67. 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. Relevant elements of a programme's design and implementation are set forth below (see paragraph 88).

68. In this regard, the Court notes that the dispute before it arises from a decision by a State party to the ICRW to grant special permits under Article VIII of that treaty. Inherent in such a decision is the determination by the State party that the programme's use of lethal methods is for purposes of scientific research. It follows that the Court will look to the authorizing State, which has granted special permits, to explain the objective basis for its determination.

69. 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.

E. Meaning of the phrase "for purposes of scientific research"

70. The Parties address two closely related aspects of the interpretation of Article VIII — the meaning of the terms "scientific research" and "for

purposes of" in the phrase "for purposes of scientific research". Australia analysed the meaning of these terms separately and observed that these two elements are cumulative. Japan did not contest this approach to the analysis of the provision.

71. In the view of the Court, the two elements of the phrase "for purposes of scientific research" 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.

72. The Court first considers the arguments of the Parties and the intervening State regarding the meaning of the term "scientific research" and then turns to their arguments regarding the meaning of the term "for purposes of" in the phrase "for purposes of scientific research".

(a) *The term "scientific research"*

73. At the outset, the Court notes that the term "scientific research" is not defined in the Convention.

74. Australia, relying primarily on the views of one of the scientific experts that it called, Mr. Mangel, 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. In support of these criteria, Australia also draws on resolutions of the Commission and the Guidelines related to the review of special permits by the Scientific Committee (see paragraph 47 above).

75. Japan does not offer an alternative interpretation of the term "scientific research", and stresses that the views of an expert cannot determine the interpretation of a treaty provision. As a matter of scientific opinion, the expert called by Japan, Mr. Walløe, agreed in certain respects with the criteria advanced by Mr. Mangel, while differing on certain important details. Japan disputes the weight that Australia assigns to resolutions of the Commission that were adopted without Japan's support, and notes that resolutions are recommendatory in nature.

76. The Court makes the following observations on the criteria advanced by Australia with regard to the meaning of the term "scientific research".

77. As to the question whether a testable or defined hypothesis is essential, the Court observes that the experts called by both Parties agreed that scientific research should proceed on the basis of particular ques-

tions, which could take the form of a hypothesis, although they disagreed about the level of specificity required of such a hypothesis. In short, the opinions of the experts reveal some degree of agreement, albeit with important nuances, regarding the role of hypotheses in scientific research generally.

78. As to the use of lethal methods, Australia asserts that Article VIII, paragraph 1, authorizes the granting of special permits to kill, take and treat whales only when non-lethal methods are not available, invoking the views of the experts it called, as well as certain IWC resolutions and Guidelines. For example, Australia refers to resolution 1986-2 (which recommends that when considering a proposed special permit, a State party should take into account whether "the objectives of the research are not practically and scientifically feasible through non-lethal research techniques") and to Annex P (which provides that special permit proposals should assess why non-lethal methods or analyses of existing data "have been considered to be insufficient"). Both of these instruments were approved by consensus. Australia also points to resolution 1995-9, which was not adopted by consensus, and which recommends that the killing of whales "should only be permitted in exceptional circumstances where the questions address critically important issues which cannot be answered by the analysis of existing data and/or use of non-lethal research techniques".

79. Australia claims that IWC resolutions must inform the Court's interpretation of Article VIII because they comprise "subsequent agreement between the parties regarding the interpretation of the treaty" and "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", within the meaning of subparagraphs *(a)* and *(b)*, respectively, of paragraph 3 of Article 31 of the Vienna Convention on the Law of Treaties.

80. Japan disagrees with the assertion that special permits authorizing lethal methods may be issued under Article VIII only if non-lethal methods are not available, calling attention to the fact that Article VIII authorizes the granting of permits for the killing of whales and thus expressly contemplates lethal methods. Japan states that it does not use lethal methods "more than it considers necessary" in conducting scientific research, but notes that this restraint results not from a legal limitation found in the ICRW, but rather from "reasons of scientific policy". Japan notes that the resolutions cited by Australia were adopted pursuant to the Commission's power to make recommendations. Japan accepts that it has a duty to give due consideration to these recommendations, but emphasizes that they are not binding.

81. New Zealand asserts that special permits must be granted in a "reasonable and precautionary way", which requires that "whales may be killed only where that is necessary for scientific research and it is not possible to achieve the equivalent objectives of that research by non-lethal means". Like Australia, New Zealand refers to IWC resolutions and Guidelines to support this assertion.

82. The Court observes that, as a matter of scientific opinion, the experts called by the Parties agreed that lethal methods can have a place in scientific research, while not necessarily agreeing on the conditions for their use. Their conclusions as scientists, however, must be distinguished from the interpretation of the Convention, which is the task of this Court.

83. Article VIII expressly contemplates the use of lethal methods, and the Court is of the view that Australia and New Zealand overstate the legal significance of the recommendatory resolutions and Guidelines on which they rely. First, many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of subparagraphs *(a)* and *(b)*, respectively, of paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties.

Secondly, as a matter of substance, the relevant resolutions and Guidelines that have been approved by consensus call upon States parties to take into account whether research objectives can practically and scientifically be achieved by using non-lethal research methods, but they do not establish a requirement that lethal methods be used only when other methods are not available.

The Court however observes that the States parties to the ICRW have a duty to co-operate with the IWC and the Scientific Committee and thus should give due regard to recommendations calling for an assessment of the feasibility of non-lethal alternatives. The Court will return to this point when it considers the Parties' arguments regarding JARPA II (see paragraph 137).

84. As to the criterion of peer review advanced by Australia, even if peer review of proposals and results is common practice in the scientific community, it does not follow that a programme can be said to involve scientific research only if the proposals and the results are subjected to peer review. The Convention takes a different approach (while certainly not precluding peer review). Paragraph 30 of the Schedule requires prior review of proposed permits by the Scientific Committee and the current Guidelines (Annex P) also contemplate Scientific Committee review of ongoing and completed programmes.

85. Regarding the fourth criterion advanced by Australia, Japan and New Zealand agree with Australia that scientific research must avoid an adverse effect on whale stocks.

Thus, the Parties and the intervening State appear to be in agreement in respect of this criterion. In the particular context of JARPA II, however, Australia does not maintain that meeting the target sample sizes would have an adverse effect on the relevant stocks, so this criterion does not appear to be of particular significance in this case.

86. Taking into account these observations, 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. As formulated by Australia, these criteria appear largely to reflect what one of the experts that it called regards 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".

(b) *The meaning of the term "for purposes of" in Article VIII, paragraph 1*

87. The Court turns next to the second element of the phrase "for purposes of scientific research", namely the meaning of the term "for purposes of".

88. The stated research objectives of a programme are the foundation of a programme's design, but the Court need not 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.

In order to ascertain whether a programme's use of lethal methods is for purposes of scientific research, the Court will consider whether the elements of a programme's design and implementation are reasonable in relation to its stated scientific objectives (see paragraph 67 above). As shown by the arguments of the Parties, 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 (see paragraphs 129-132; 149; 158-159; 203-205; 214-222 below).

89. The Parties agree that the design and implementation of a programme for purposes of scientific research differ in key respects from

commercial whaling. The evidence regarding the programme's design and implementation must be considered in light of this distinction. For example, according to Japan, in commercial whaling, only species of high commercial value are taken and larger animals make up the majority of the catch, whereas in scientific whaling "species of less or no commercial value" may be targeted and individual animals are taken based on random sampling procedures.

90. Australia raises two features of a programme that, in its view, bear on the distinction between the grant of a special permit that authorizes whaling "for purposes of" scientific research and whaling activities that do not fit within Article VIII and thus, in Australia's view, violate paragraphs 7 *(b)*, 10 *(d)* and 10 *(e)* of the Schedule.

91. First, Australia acknowledges that Article VIII, paragraph 2, of the Convention allows the sale of whale meat that is the by-product of whaling for purposes of scientific research. That provision states:

> "Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted."

However, Australia considers that the quantity of whale meat generated in the course of a programme for which a permit has been granted under Article VIII, paragraph 1, and the sale of that meat, can cast doubt on whether the killing, taking and treating of whales is for purposes of scientific research.

92. Japan states in response that the sale of meat as a means to fund research is allowed by Article VIII, paragraph 2, and is commonplace in respect of fisheries research.

93. On this point, New Zealand asserts that Article VIII, paragraph 2, can be read to permit the sale of whale meat, but that such sale is not required.

94. 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.

95. Secondly, Australia asserts that a State's pursuit of goals that extend beyond scientific objectives would demonstrate that a special permit granted in respect of such a programme does not fall within Article VIII. In Australia's view, for example, the pursuit of policy goals such as providing employment or maintaining a whaling infrastructure would indicate that the killing of whales is not for purposes of scientific research.

96. Japan accepts that "special permits may be granted only for whaling that has scientific purposes, and not for commercial purposes". Japan points to the fact that the Schedule provision establishing the moratorium on commercial whaling, paragraph 10 *(e)*, calls for the "best scientific advice" in order for the moratorium to be reviewed and potentially lifted. Japan further asserts that a State party is within its rights to conduct a programme of scientific research that aims to advance its objective of resuming commercial whaling on a sustainable basis.

97. 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

98. The Court will now apply the approach set forth in the preceding section to enquire into whether, based on the evidence, the design and implementation of JARPA II are reasonable in relation to achieving its stated objectives.

99. JARPA II was preceded by the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA). The legality of JARPA is not at issue in this case. In the course of presenting their views about JARPA II, however, the Parties draw a variety of comparisons between JARPA II and the predecessor programme. Therefore, the Court begins with a description of JARPA.

A. Description of the programmes

(a) *JARPA*

100. In 1982, the IWC amended the Schedule to adopt a moratorium on commercial whaling. Japan made a timely objection to the amendment, which it withdrew in 1986. Australia asserts that Japan withdrew that objection under pressure from other countries, and, in particular, in light of the prospect of trade sanctions being imposed against Japan by the United States. Following withdrawal of the objection, the moratorium entered into force for Japan after the 1986-1987 whaling season. Japan commenced JARPA in the next season. Like JARPA II, JARPA was a programme for which Japan issued special permits pursuant to Article VIII, paragraph 1, of the Convention.

101. Australia takes the position that JARPA was conceived in order to continue commercial whaling under the "guise" of scientific research. It points to various statements that Japanese authorities made after the adoption of the commercial whaling moratorium. For example, in 1983 a Japanese official stated that the Government's goal in the face of the adoption of the commercial whaling moratorium was "to ensure that our whaling can continue in some form or another". In 1984, a study group commissioned by the Government of Japan recommended that Japan pursue scientific whaling "in order to continue whaling in the Southern Ocean".

102. Japan rejects Australia's characterization of the factors that led to the establishment of JARPA and asserts that Australia has taken the statements by Japanese authorities out of context. It explains that JARPA was started following Japan's acceptance of the commercial whaling moratorium because "the justification for the moratorium was that data on whale stocks was inadequate to manage commercial whaling properly" and it was therefore "best to start the research program as soon as possible".

103. JARPA commenced during the 1987-1988 season and ran until the 2004-2005 season, after which it was followed immediately by JARPA II in the 2005-2006 season. Japan explains that JARPA was launched "for the purpose of collecting scientific data to contribute to the 'review' and 'comprehensive assessment'" of the moratorium on commercial whaling, as envisaged by paragraph 10 *(e)* of the Schedule. It was designed to be an 18-year research programme, "after which the necessity for further research would be reviewed".

104. 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". It 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 (1987-1988 to 1993-1994). 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. More than 6,700 Antarctic minke whales were killed over the course of JARPA's 18-year history.

105. In January 2005, during JARPA's final season, Japan independently convened a meeting, outside the auspices of the IWC, to review the then-available data and results from the programme. In December 2006, the Scientific Committee held a "final review" workshop to review the entirety of JARPA's data and results and to assess the extent to which JARPA had accomplished or made progress towards its stated objectives; several recommendations were made for the further study and analysis of the data collected under JARPA. Japan submitted its Research Plan for JARPA II to the IWC in March 2005, and launched JARPA II, in November 2005, after the January 2005 meeting convened by Japan but prior to the December 2006 final review of JARPA by the Scientific Committee.

106. Australia describes the "primary purpose" of JARPA as the estimation of the natural mortality rate of Antarctic minke whales (i.e., the chance that a whale will die from natural causes in any particular year). Australia also maintains that Japan purported to be collecting biological data that it viewed as relevant to the New Management Procedure (the "NMP") — the model in use by the Commission to regulate whaling activity at the time of JARPA's launch — but abandoned its initial approach after five years. According to Australia, the goal to estimate natural mortality was "practically unachievable" and the "irrelevance" of JARPA was confirmed in 1994 when the Commission agreed to replace the NMP with another management tool, the Revised Management Procedure (the "RMP"), which did not require the type of information that JARPA obtained by lethal sampling.

107. The RMP requires a brief explanation. The Parties agree that the RMP is a conservative and precautionary management tool and that it

remains the applicable management procedure of the IWC, although its implementation has not been completed. Australia maintains that the RMP "overcomes the difficulties faced by the NMP" — the mechanism that the Commission previously developed to set catch limits — because it takes uncertainty in abundance estimates into account and "does not rely on biological parameters that are difficult to estimate". Japan disputes this characterization of the RMP and argues that its implementation requires "a huge amount of scientific data" at each step. Thus, the Parties disagree on whether data collected by JARPA and JARPA II contribute to the RMP.

108. With regard to JARPA, Australia asserts that the Scientific Committee was unable to conclude at the final review workshop held in 2006 that any of JARPA's stated objectives had been met, including an adequately precise estimate of natural mortality rate. Japan maintains that recommendations made in the course of JARPA's final review led to further analysis of the JARPA data and that in 2010 the Scientific Committee accepted an estimate of natural mortality rate based on those data. Overall, the Parties disagree whether JARPA made a scientific contribution to the conservation and management of whales. The Court is not called upon to address that disagreement.

(b) *JARPA II*

109. In March 2005, Japan submitted to the Scientific Committee a document entitled "Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) — Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources" (hereinafter the "JARPA II Research Plan"). Following review of the JARPA II Research Plan by the Scientific Committee, Japan granted the first set of annual special permits for JARPA II in November 2005, after which JARPA II became operational. 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. The evidence indicates that the Institute of Cetacean Research has historically been subsidized by Japan and that Japan exercises a supervisory role over the institute's activities. Japan has granted special permits to that institute for JARPA II for each season since 2005-2006.

110. The JARPA II Research Plan describes key elements of the programme's design: the research objectives, research period and area, research methods, sample sizes, and the expected effect on whale stocks. As further discussed below, the programme contemplates the lethal sampling of three whale species: Antarctic minke whales, fin whales and

humpback whales (see paragraph 123). This Judgment uses the terms "Antarctic minke whales" and "minke whales" interchangeably.

111. Minke whales, fin whales and humpback whales are all baleen whales, meaning they have no teeth; baleen whales instead use baleen plates in the mouth to filter their food from sea water. Antarctic minke whales are among the smallest baleen whales: an average adult is between 10 and 11 metres long and weighs between 8 and 10 tons. The fin whale is the second largest whale species (after the blue whale): an average adult is between 25 and 26 metres long and its body mass is between 60 and 80 tons. Humpback whales are larger than minke whales but smaller than fin whales: adults are between 14 and 17 metres long.

112. The Court will now outline the key elements of JARPA II, as set forth in the Research Plan and further explained by Japan in these proceedings.

(i) *Research objectives*

113. The JARPA II Research Plan identifies four research objectives: (1) Monitoring of the Antarctic ecosystem; (2) Modelling competition among whale species and future management objectives; (3) Elucidation of temporal and spatial changes in stock structure; and (4) Improving the management procedure for Antarctic minke whale stocks.

114. *Objective No. 1.* The JARPA II Research Plan states that JARPA II will monitor changes relating to whale abundance and biological parameters, prey density and abundance, and the effects of contaminants on cetaceans, and the cetaceans' habitat, in three whale species — Antarctic minke whales, humpback whales and fin whales — and that "[t]he obtained data will be indicators of changes in the Antarctic ecosystem". The Research Plan stresses the importance of detecting changes in the whale populations and their habitat "as soon as possible" in order "to predict their effects on the stocks, and to provide information necessary for the development of appropriate management policies". Specifically, JARPA II will monitor "changes in recruitment, pregnancy rate, age at maturity and other biological parameters by sampling survey", while "abundance" will be monitored through "sighting surveys". JARPA II will also monitor prey consumption and changes in blubber thickness over time, as well as contaminant accumulation and the effects of toxins on cetaceans.

115. *Objective No. 2.* The second objective refers to "modelling competition among whale species and future management objectives". The

JARPA II Research Plan states that "[t]here is a strong indication of competition among whale species in the research area" and that JARPA II therefore seeks to explore "hypotheses related to this competition". The Research Plan refers to the "krill surplus hypothesis". As presented to the Court, this hypothesis refers to two interrelated ideas: first, that the previous overhunting of certain whale species (including fin and humpback whales) created a surplus of krill (a shared food source) for other predators, including the smaller minke whale, which led to an increase in the abundance of that species; and, secondly, that a subsequent recovery in the humpback and fin whale populations (since the commercial catch of those species was banned in 1963 and 1976, respectively) has resulted in increased competition among these larger whales and minke whales for krill. The JARPA II Research Plan suggests that Antarctic minke whale stocks may decrease as a result of current conditions.

116. Japan explains that "JARPA II . . . does not purport to verify the validity of the krill surplus hypothesis" but instead seeks "to incorporate data on other animals/fish that prey on krill in order to develop a 'model of competition among whale species'" that may help to explain changes in the abundance levels of different whale species. In Japan's view, the "krill surplus hypothesis" is just one of several ideas (in addition to, for example, the effects of climate change) that JARPA II is designed to explore in connection with its construction of "an ecosystem model" for the Antarctic. The JARPA II Research Plan further explains that such a model may contribute to establishing "new management objectives" for the IWC, such as finding ways to accelerate the recovery of blue and fin whales, and will examine "the possible effects of the resumption of commercial whaling on the relative numbers of the various species and stocks". Mr. Mangel, the expert called by Australia, referred to the "krill surplus hypothesis" as the "only clearly identifiable hypothesis" in JARPA II.

117. *Objective No. 3.* The third objective concerns stock structure. With regard to fin whales, the programme's objective is to compare current stock structure to historic information on that species. With regard to humpback whales and Antarctic minke whales, the plan describes a need "to investigate shifts in stock boundaries" on a yearly basis.

118. *Objective No. 4.* The fourth objective concerns the management procedure for Antarctic minke whale stocks and builds upon the other three objectives. The JARPA II Research Plan states that the first objective will provide information on biological parameters "necessary for managing the stocks more efficiently under a revised RMP", the second

objective "will lead to examining a multi-species management model for the future", and the third "will supply information for establishing management areas in the Antarctic Ocean". According to the Research Plan, the information relating to the "effects arising from inter-species relationships among the whale species" could demonstrate that the determination of a catch quota for Antarctic minke whales under the RMP would be too low, perhaps even set unnecessarily at zero. As noted above (see paragraph 107), the Parties disagree about the type of information necessary to implement the RMP.

(ii) *Research period and area*

119. Japan explains that JARPA II is "a long-term research programme and has no specified termination date because its primary objective (i.e., monitoring the Antarctic ecosystem) requires a continuing programme of research". JARPA II is structured in six-year phases. After each six-year phase, a review will be held to consider revisions to the programme. The first such six-year phase was completed after the 2010-2011 season. Following some delay, the first periodic review of JARPA II by the Scientific Committee is scheduled to take place in 2014.

120. The JARPA II Research Plan operates in an area that is located within the Southern Ocean Sanctuary established in paragraph 7 *(b)* of the Schedule to the Convention.

(iii) *Research methods and sample size*

121. The Research Plan indicates that JARPA II is designed to use a mix of lethal and non-lethal methods to pursue the research objectives, a point that Japan also made in these proceedings.

122. Japan asserts that lethal sampling is "indispensable" to JARPA II's first two objectives, relating to ecosystem monitoring and multi-species competition modelling. The JARPA II Research Plan explains that the third objective will rely on "genetic and biological markers" taken from whales that have been lethally sampled in connection with the first two objectives, as well as non-lethal methods, namely biopsy sampling from blue, fin and humpback whales.

123. The Research Plan provides that in each season the sample sizes for fin and humpback whales will be 50 and the sample size for Antarctic minke whales will be 850, plus or minus 10 per cent (i.e., a maximum of 935 per season). These target sample sizes are discussed in greater detail below (see paragraphs 157-198).

124. With regard to non-lethal methods, the JARPA II Research Plan describes the intended use of biopsy sampling and satellite tagging in addition to whale sighting surveys. According to Japan, it makes exten-

sive use of non-lethal methods to obtain data and information to the extent practicable.

125. As to JARPA II's operation, Japan explains that JARPA II vessels follow "scientifically determined tracklines", including in areas "where the density of the target species is low", to obtain a proper distribution of samples and observations. Whales from the targeted species are taken if they are encountered within 3 nautical miles of the predetermined trackline being followed by a JARPA II vessel. If a lone whale is encountered, it will be taken; if a school of whales is encountered, two whales will be taken at random.

(iv) *Effect on whale stocks*

126. The JARPA II Research Plan sets out the bases for Japan's conclusion that the lethal sample sizes described above are designed to avoid having any adverse effect on the targeted 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. Japan also explains that the JARPA II Research Plan used conservative estimates of Antarctic minke whale abundance to assess the effects of the target sample size for that species.

B. Whether the design and implementation of JARPA II are reasonable in relation to achieving the programme's stated research objectives

127. The Court observes that the JARPA II Research Plan describes areas of inquiry that correspond to four research objectives and presents a programme of activities that involves the systematic collection and analysis of data by scientific personnel. The research objectives come within the research categories identified by the Scientific Committee in Annexes Y and P (see paragraph 58 above). Based on the information before it, the Court thus finds that the JARPA II activities involving the lethal sampling of whales can broadly be characterized as "scientific research". There is no need therefore, in the context of this case, to examine generally the concept of "scientific research". Accordingly, the Court's examination of the evidence with respect to JARPA II will focus on whether the killing, taking and treating of whales in pursuance of JARPA II is *for purposes of* scientific research and thus may be authorized by special permits granted under Article VIII, paragraph 1, of the Convention. To this end and in light of the applicable standard of review (see paragraph 67 above), the Court will examine whether the design and implementation of JARPA II are reasonable in relation to achieving the programme's stated research objectives, taking into account the elements identified above (see paragraph 88).

(a) *Japan's decisions regarding the use of lethal methods*

128. Lethal methods are central to the design of JARPA II. However, it should be noted that the Parties disagree as to the reasons for that.

129. Japan states that it does not use lethal methods more than it considers necessary to meet research objectives and that lethal methods are "indispensable" in JARPA II because the programme's first two objectives require data that can only realistically be obtained from internal organs and stomach contents. Japan accepts that non-lethal biopsies and satellite tagging have been used for certain larger species of whales but states that these methods are not practical for minke whales. Japan also points out that, while certain relevant data may be obtainable by non-lethal means, such data would be of lesser quality or reliability, and, in some cases, would involve "unrealistic" amounts of time and expense.

130. By contrast, Australia maintains that Japan has an "unbending commitment to lethal take" and that "JARPA II is premised on the killing of whales". According to Australia, JARPA II, like JARPA before it, is "merely a guise" under which to continue commercial whaling. One of the experts called by Australia, Mr. Mangel, stated that JARPA II "simply assert[s] but [does] not demonstrate that lethal take is required". Australia further contends that a variety of non-lethal research methods, including satellite tagging, biopsy sampling and sighting surveys, are more effective ways to gather information for whale research and that the available technology has improved dramatically over the past quarter century since JARPA was first launched.

131. As previously noted, Australia does not challenge the use of lethal research methods per se. Australia accepts that there may be situations in which research objectives can, in fact, require lethal methods, a view also taken by the two experts that it called. However, it maintains that lethal methods must be used in a research programme under Article VIII only when "no other means are available" and the use of lethal methods is thus "essential" to the stated objectives of a programme.

132. In support of their respective contentions about the use of lethal methods in JARPA II, the Parties address three points: first, whether non-lethal methods are feasible as a means to obtain data relevant to the JARPA II research objectives; secondly, whether the data that JARPA II collects through lethal methods are reliable or valuable; and thirdly, whether before launching JARPA II Japan considered the possibility of

making more extensive use of non-lethal methods. The Court considers these points in turn.

133. The Court notes that the Parties agree that non-lethal methods are not a feasible means to examine internal organs and stomach contents. The Court therefore considers that the evidence shows that, at least for some of the data sought by JARPA II researchers, non-lethal methods are not feasible.

134. Turning to the reliability and value of data collected in JARPA II, the Court heard conflicting evidence. For example, the experts called by Australia questioned the reliability of age data obtained from ear plugs and the scientific value of the examination of stomach contents, given pre-existing knowledge of the diet of the target species. The expert called by Japan disputed Australia's contentions regarding the reliability and value of data collected in JARPA II. This disagreement appears to be about a matter of scientific opinion.

135. Taking into account the evidence indicating that non-lethal alternatives are not feasible, at least for the collection of certain data, and given that the value and reliability of such data 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 is necessary to look more closely at the details of Japan's decisions regarding the use of lethal methods in JARPA II, discussed immediately below, and the scale of their use in the programme, to which the Court will turn at paragraph 145 below.

136. The Court next examines a third aspect of the use of lethal methods in JARPA II, which is the extent to which Japan has considered whether the stated objectives of JARPA II could be achieved by making greater use of non-lethal methods, rather than by lethal sampling. The Court recalls that the JARPA II Research Plan sets lethal sample sizes at 850 minke whales (plus or minus 10 per cent), 50 fin whales and 50 humpback whales (see paragraph 123 above), as compared to a lethal sample size in JARPA of 400 minke whales (plus or minus 10 per cent) and no whales of the other two species (see paragraph 104 above).

137. As previously indicated, the fact that a programme uses lethal methods despite the availability of non-lethal alternatives does not mean that a special permit granted for such a programme necessarily falls outside Article VIII, paragraph 1 (see paragraph 83). There are, however, 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 new programme. First,

IWC resolutions and Guidelines call upon States parties to take into account whether research objectives can be achieved using non-lethal methods. Japan has accepted that it is under an obligation to give due regard to such recommendations. Secondly, as noted above (see paragraphs 80 and 129), 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. This implies the undertaking of some type of analysis in order to ascertain that lethal sampling is not being used to a greater extent than is necessary in relation to achieving a programme's stated research objectives. Thirdly, 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. It stands to reason that a research proposal that contemplates extensive lethal sampling would need to analyse the potential applicability of these advances in relation to a programme's design.

138. The Court did not hear directly from Japanese scientists involved in designing JARPA II. During the oral proceedings, however, a Member of the Court asked Japan what analysis it had conducted of the feasibility of non-lethal methods prior to setting the sample sizes for each year of JARPA II, and what bearing, if any, such analysis had had on the target sample sizes. In response, Japan referred to two documents: (1) Annex H to the 1997 interim review of JARPA by the Scientific Committee and (2) an unpublished paper that Japan submitted to the Scientific Committee in 2007.

139. The first of these documents is not an analysis of JARPA II and is not a study by Japan. It is a one-page summary by the Scientific Committee of opposing views within the Committee on the need to use lethal methods to collect information relating to stock structure. Japan stated that this document "formed the basis of section IX of the 2005 JARPA II Research Plan". Section IX, entitled "Necessity of Lethal Methods", comprises two short paragraphs that contain no reference to feasibility studies by Japan or to any consideration by Japan of developments in non-lethal research methods since the 1997 JARPA review. Japan identified no other analysis that was included in, or was contemporaneous with, the JARPA II Research Plan.

140. The 2007 document to which Japan refers the Court discusses the necessity of lethal methods in JARPA, not JARPA II. It states in summary format the authors' conclusions as to why certain biological parameters (listed in relation to particular JARPA objectives) required (or did

not require) lethal sampling, without any analysis and without reference to the JARPA II objectives.

141. Thus, there is no evidence of studies 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. There is no evidence that Japan has examined whether it would be feasible to combine a smaller lethal take (in particular, of minke whales) and an increase in non-lethal sampling as a means to achieve JARPA II's research objectives. The absence of any evidence pointing to consideration of the feasibility of non-lethal methods was not explained.

142. Decisions about the use of lethal methods in JARPA II must also be evaluated in light of the Court's previous conclusion that a programme for purposes of scientific research may not use lethal methods on a larger scale than is reasonable in relation to achieving its stated objectives in order to fund that research (see paragraph 94 above).

143. The 2007 paper that Japan called to the Court's attention (see paragraphs 138 and 140 above) states that JARPA's research objectives, which required the examination of internal organs and a large number of samples, meant that non-lethal methods were "impractical, cost ineffective and prohibitively expensive". It also states that "whale research is costly and therefore lethal methods which could recover the cost for research [are] more desirable". No analysis is included in support of these conclusions. There is no explanation of the relative costs of any methods or a comparison of how the expense of lethal sampling, as conducted under JARPA (or under JARPA II, which by 2007 was already operational), might be measured against the cost of a research programme that more extensively uses non-lethal alternatives.

144. The Court concludes that the papers to which Japan directed it reveal little analysis of the feasibility of using non-lethal methods to achieve the JARPA II research objectives. Nor do they point to consideration of the possibility of making more extensive use of non-lethal methods in order to reduce or eliminate the need for lethal sampling, either when JARPA II was proposed or in subsequent years. Given the expanded use of lethal methods in JARPA II, as compared to JARPA, this is difficult to reconcile with Japan's obligation to give due regard to IWC resolutions and Guidelines and its statement that JARPA II uses lethal methods only to the extent necessary to meet its scientific objectives. In addition, the 2007 paper to which Japan refers the Court suggests a preference for lethal sampling because it provides a source of funding to offset the cost of the research.

(b) *The scale of the use of lethal methods in JARPA II*

145. The scale of lethal methods used in JARPA II is determined by sample sizes, that is, the number of whales of each species to be killed each year. The Parties introduced extensive evidence on this topic, relying in particular on the JARPA II Research Plan, the actions taken under it in its implementation, and the opinions of the experts that each Party called.

146. Taking into account the Parties' arguments and the evidence presented, the Court will begin by comparing the JARPA II sample sizes to the sample sizes set in JARPA. It will then describe how sample sizes were determined in the JARPA II Research Plan and present the Parties' views on the sample sizes set for each of the three species. Finally, the Court will compare the target sample sizes set in the JARPA II Research Plan with the actual take of each species during the programme. Each of these aspects of the sample sizes selected for JARPA II was the subject of extensive argument by Australia, to which Japan responded in turn.

(i) *A comparison of JARPA II sample sizes to JARPA sample sizes*

147. The question whether the lethal sampling of whales under JARPA was "for purposes of scientific research" under Article VIII, paragraph 1, of the Convention is not before the Court. The Court draws no legal conclusions about any aspect of JARPA, including the sample sizes used in that programme. However, the Court notes that Japan has drawn comparisons between JARPA and JARPA II in addressing the latter programme and, in particular, the sample sizes that were chosen for JARPA II.

148. As noted above (see paragraph 104), JARPA originally proposed an annual sample size of 825 minke whales per season. This was reduced to 300 at JARPA's launch, and after a number of years was increased to 400 (plus or minus 10 per cent). Thus, the JARPA II sample size for minke whales of 850 (plus or minus 10 per cent) is approximately double the minke whale sample size for the last years of JARPA. As also noted above (see paragraph 110), JARPA II also sets sample sizes for two additional species — fin and humpback whales — that were not the target of lethal sampling under JARPA.

149. To explain the larger minke whale sample size and the addition of sample sizes for fin and humpback whales in JARPA II generally, Japan stresses that the programme's research objectives are "different and more sophisticated" than those of JARPA. Japan also asserts that the emergence of "a growing concern about climate change, including global

warming, necessitated research whaling of a different kind from JARPA". In particular, Japan argues that "JARPA was focused on a one-time estimation of different biological parameters for minke whales, but JARPA II is a much more ambitious programme which tries to model competition among whale species and to detect changes in various biological parameters and the ecosystem". It is on this basis, Japan asserts, that the "new objectives" of JARPA II — "notably ecosystem research" — dictate the larger sample size for minke whales and the addition of sample size targets for fin and humpback whales.

150. Given Japan's emphasis on the new JARPA II objectives — particularly ecosystem research and constructing a model of multi-species competition — to explain the larger JARPA II sample size for minke whales and the addition of two new species, the comparison between JARPA and JARPA II deserves close attention.

151. At the outset, the Court observes that a comparison of the two Research Plans reveals considerable overlap between the subjects, objectives, and methods of the two programmes, rather than dissimilarity. For example, the research proposals for both programmes describe research broadly aimed at elucidating the role of minke whales in the Antarctic ecosystem. One of the experts called by Australia, Mr. Mangel, stated that JARPA II "almost exclusively focuses data collection on minke whales", which, the Court notes, was also true of JARPA. Specifically, both programmes are focused on the collection of data through lethal sampling to monitor various biological parameters in minke whales, including, in particular, data relevant to population trends as well as data relating to feeding and nutrition (involving the examination of stomach contents and blubber thickness). JARPA included both the study of stock structure to improve stock management and research on the effect of environmental change on whales (objectives that were not included in the original research proposal for JARPA, but were added later), and JARPA II also includes the study of these issues.

152. The Court notes that Japan states that "the research items and methods" of JARPA II are "basically the same as those employed for JARPA", which is why "the explanation for the necessity of lethal sampling provided regarding JARPA also applies to JARPA II". Australia makes the point that "in practice Japan collects the same data" under JARPA II "that it collected under JARPA". Japan also asserts broadly that both programmes "are designed to further proper and effective management of whale stocks and their conservation and sustainable use".

153. Taken together, the overall research objectives of JARPA and JARPA II, as well as the subjects of study and methods used (i.e., extensive lethal sampling of minke whales) thus appear to have much in common, even if certain aspects differ. 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.

154. There is another reason to question whether the increased minke whale sample size in the JARPA II Research Plan is accounted for by differences between the two programmes. As previously noted, Japan launched JARPA II without waiting for the results of the Scientific Committee's final review of JARPA. Japan's explanation to the Court was that "it was important to keep the consistency and continuity in data obtained in the research area" and that waiting to commence JARPA II only following the final review of JARPA would have meant "no survey in one or two years". The JARPA II Research Plan also frames the monitoring of whale abundance trends and biological parameters as designed "to secure continuity with the data collected in JARPA".

155. This emphasis on the importance of continuity confirms the overlap in the focus of the two programmes and further undermines Japan's reliance on JARPA II's objectives to explain the larger minke whale sample size in JARPA II. Japan does not explain, for example, why it would not have been sufficient to limit the lethal take of minke whales during the "feasibility" phase of JARPA II (its first two years) to 440 minke whales, the maximum number of minke whales that were targeted during the final season of JARPA. Instead, 853 minke whales were taken during the first year of JARPA II, in addition to ten fin whales. This also meant that JARPA II began using the higher sample size for minke whales, and similar research methods (e.g., the examination of ear plugs to obtain age data and the examination of blubber thickness to assess nutritional conditions) without having yet received the benefit of any feedback from the final review of JARPA by the Scientific Committee.

156. These 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. These weaknesses also give weight to the contrary theory advanced by Australia — that Japan's priority was to maintain whaling operations without any pause, just as it had done previously by commencing JARPA in the first year after the commercial whaling moratorium had come into effect for it.

(ii) *Determination of species-specific sample sizes*

157. Bearing in mind these observations regarding Japan's general explanation for the difference between the JARPA and JARPA II sample sizes, the Court turns next to the evidence regarding the way that Japan determined the specific target sample sizes for each of the three species in JARPA II.

158. As a general matter, Australia asserts that Japan has failed to provide "a coherent scientific rationale" for the JARPA II sample sizes. One of the experts called by Australia, Mr. Mangel, took the view that "[i]t is very difficult to understand the statistical basis for setting the level of lethal take" in JARPA II. He focused in particular on the determination of the particular sample sizes that would be required to study different parameters, stating that "a range is given and then a particular number is picked without any explanation for that number". In Australia's view, the JARPA II Research Plan fails adequately to provide the rationales for the choices made therein and employs inconsistent methodologies. In essence, Australia's contention is that Japan decided that it wished to take approximately 850 minke whales for purposes other than scientific research and then "retro-fitted" individual sample sizes to justify the overall sample size.

159. Japan asserts that, contrary to Australia's characterization of the programme, the JARPA II sample sizes "were calculated on the basis of carefully selected parameters, using a standard scientific formula, whilst also taking into account the potential effects of research on whale populations". Japan also argues that the sample sizes are based on "norms used by the Scientific Committee", which has never expressed "any specific concern about the JARPA II sample size".

The expert called by Japan, Mr. Walløe, also addressed the setting of sample sizes in JARPA II. He stated that "Japanese scientists have not always given completely transparent and clear explanations of how sample sizes were calculated or determined". He indicated, however, that the minke whale sample size seemed to be "of the right magnitude" on the basis of his own calculations (which were not provided to the Court). In addition, Professor Walløe stated his impression that JARPA II sample sizes had been "influenced by funding considerations", although he found this unobjectionable.

160. Based on Japan's arguments and the evidence that it has presented, including, in particular, the JARPA II Research Plan, the Court discerns five steps to this process of sample size determination.

161. The first step is to identify the types of information that are relevant to the broader objectives of the research. Japan refers to these as "research items". For example, the research items of interest in JARPA II

include pregnancy rate, the age at which whales reach sexual maturity and feeding patterns.

162. The second step is to identify a means to obtain the data relevant to a given research item. For example, Japan maintains that it is necessary to collect ear plugs from whales in order to determine age, that stomach contents can be examined to evaluate eating habits, and that measuring blubber thickness is a means to study changes in prey conditions (e.g., the availability of krill as a food source).

163. After it has been determined that information relevant to a research item is to be obtained from lethal sampling, the third step is to determine how many whales are necessary in order to have a sufficiently large number of samples to detect changes relevant to the particular research item. For several research items, the determination of this number takes into account at least three variables: (i) the level of accuracy sought; (ii) the change to be measured; and (iii) the research period (i.e., the time within which a change is to be detected). This means that the number of whales needed for a particular research item depends, for example, on how accurate the results are required to be, on whether the change to be measured is large or small, and on the period over which one seeks to detect that change.

164. For a given research item, a standard equation is used to perform a calculation that shows the effect that differences in these variables would have on sample size. Australia did not challenge Japan's use of that equation.

165. To illustrate this third step, the Court calls attention to one example from the JARPA II Research Plan that shows how the researchers approached the selection of a sample size for a particular research item: the change in the proportion of pregnant minke whales in the population of mature female whales. The relevant table from the Research Plan, which appears as Table 2 to Appendix 6 ("Sample sizes of Antarctic minke, humpback and fin whales required for statistical examination of yearly trend in biological parameters") to that document, is reproduced below. The far-left column shows that the JARPA II researchers considered using either a six-year or a 12-year research period and the second column shows that they considered using either of two estimates of the "initial rate" (i.e., whether the proportion of pregnant minke whales in the population of mature female whales at the start of the research was 80 or 90 per cent). The researchers then calculated how many whales would be required — depending on the research period and the estimated "initial rate" — to detect different rates of change in the proportion of pregnant minke whales (shown in percentages in the top row of the chart). The table is set forth below:

Table 2. Total sample size of Antarctic minke whales required for statistical examination of yearly trend [in the proportion of pregnant minke whales in the population of mature female whales]

Research period	Initial rate (%)	Rate of change									
		+1%	–1%	+1.5%	–1.5%	+2%	–2%	+2.5%	–2.5%	+3%	–3%
6 years	80	2022	2544	984	1089	618	591	462	369	402	249
	90	912	1617	609	663	–	348	–	210	–	138
12 years	80	189	312	129	132	–	72	–	45	–	30
	90	–	213	–	87	–	45	–	27	–	18

(*Source:* Counter-Memorial of Japan, Vol. IV, Ann. 150, App. 6.)

166. This table illustrates how the selection of a particular value for each variable affects the sample size. For example, the decision to use a particular research period has a pronounced effect on the sample size. In order to detect a rate of change of minus 1.5 per cent and assuming an initial rate of 90 per cent (which were the criteria ultimately chosen by JARPA II researchers), a six-year period requires an annual sample size of 663 whales while the 12-year period requires an annual sample size of 87 whales. The table also illustrates that small differences in the rate of change to detect can have a considerable effect on sample size. For example, in order to detect a change of minus 1 per cent over a six-year period (assuming an initial rate of 90 per cent), the required yearly sample size is 1,617 whales. To detect a change of minus 2 per cent under the same circumstances, the required yearly sample size is 348 whales.

167. The fourth step is the selection of a particular sample size for each research item from the range of sample sizes that have been calculated depending on these different underlying decisions relating to level of accuracy, rate of change and research period. With respect to the above example, the JARPA II researchers recommended a sample size in the range of 663 to 1,617 whales in order to detect a rate of change from minus 1 to minus 1.5 per cent within a six-year period.

168. Based on the evidence presented by Japan, after the JARPA II researchers select a particular sample size for each research item, the fifth and final step in the calculation of sample size is to choose an overall sample size in light of the different sample sizes (or ranges of sample sizes, as in the above example) required for different aspects of the study. Because different research items require different sample sizes, it is necessary to select an overall sample size for each species that takes into account these different research requirements.

169. To determine the overall sample size for Antarctic minke whales in JARPA II, for example, Japan asserts that it looked at the possible sample size ranges for each research item and selected the sample size of 850 (plus or minus 10 per cent) because that number of whales can provide sufficient data on most research items with "a reasonable level of statistical accuracy overall", but "will cause no harm to the stock".

170. It is important to clarify which steps in the above-described process give rise to disagreement between the Parties, in order to bring into focus the reasons for the Parties' detailed arguments in relation to sample sizes. As discussed above, there is disagreement about whether lethal methods are warranted and whether the information being gathered through the use of lethal methods is reliable and valuable (the first and second steps), but that disagreement is addressed elsewhere in this Judgment (see paragraphs 128-144). The proceedings revealed some areas of methodological agreement in respect of the third step. For example, the equation and the calculations used to create tables like the one shown above are not in dispute. There is also agreement that researchers need to make choices about variables such as the rate of change to detect or the length of a research period as part of the design of a scientific programme.

171. For present purposes, the critical differences between the Parties emerge at the fourth and fifth steps of the process of setting sample sizes. These differences are reflected in the arguments of the Parties summarized above (see paragraphs 157-159).

172. In considering these contentions by the Parties, the Court reiterates that it does not seek here 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" (see paragraphs 88 and 127 above). With regard to the setting of sample sizes, the Court is also not in a position to conclude whether a particular value for a given variable (e.g., the research period or rate of change to detect) has scientific advantages over another. Rather, the Court seeks here only to evaluate whether the evidence supports a conclusion that the sample sizes are reasonable in relation to achieving JARPA II's stated objectives.

173. The Court begins by considering the way that Japan set the target sample sizes for fin and humpback whales.

(1) *Fin and humpback whales*

174. For fin whales and humpback whales, the annual JARPA II lethal sample size is 50 per species. The JARPA II Research Plan states that the

same conditions and criteria were used to set sample sizes for the two species, so the Court considers them together.

175. Sample sizes for both species were calculated on the basis of two "research items": apparent pregnancy rate and age at sexual maturity. The JARPA II Research Plan describes these research items, which according to Japan involve the examination of ear plugs and reproductive organs, as essential to the objectives of the programme. The Research Plan does not indicate the reason for using only two parameters to establish the sample sizes for these two species, as compared to the larger number of parameters used to calculate the minke whale sample size (see paragraph 182 below). As noted above, however (see paragraphs 165-166), a review of the JARPA II Research Plan establishes that decisions concerning, for example, the particular rate of change to detect, among other relevant variables, have a pronounced impact on the resulting sample size.

176. Although the JARPA II Research Plan sets forth possible sample sizes for fin and humpback whales that contemplate both six-year and 12-year research periods, the plan explains that researchers chose to use the 12-year research period for both species. It states that a six-year period would be "preferable since the research programme will be reviewed every six years" but would require "large" sample sizes. The Research Plan states that a 12-year period was thus chosen as a "precautionary approach". In the oral proceedings, Japan offered an additional reason for the choice of a 12-year period: that a shorter period is unnecessary for these two species because implementation of the RMP for fin and humpback whales is not yet under consideration.

177. The Court does not need to decide whether a particular research period, taken in isolation, is more or less appropriate for a given species of whales. The selection of a 12-year period for two of three species, however, must be considered in light of other aspects of the design of JARPA II, including the selection of a six-year research period for detecting various changes in minke whales. In particular, Japan emphasizes multi-species competition and ecosystem research as explanations for the minke whale sample size of 850, as well as for including fin and humpback whales in the programme. JARPA II was designed with a six-year "research phase" after which a review will be held and revisions may be made. It is difficult to see how there could be a meaningful review of JARPA II in respect of these two critical objectives after six years if the research period for two of three species is 12 years.

178. Thus, the selection of a 12-year research period for fin whales and humpback whales is one factor that casts doubt on the centrality of the

objectives that Japan highlights to justify the minke whale sample size of 850 (plus or minus 10 per cent).

179. Another factor casts doubt on whether the design of JARPA II is reasonable in relation to achieving the programme's stated objectives. The overall sample sizes selected for fin and humpback whales — 50 whales of each species per year — are not large enough to allow for the measurement of all the trends that the programme seeks to measure. Specifically, the JARPA II Research Plan states that at least 131 whales of each species should be taken annually to detect a particular rate of change in age at sexual maturity. The Research Plan does not indicate whether the researchers decided to accept a lower level of accuracy or instead adjusted the rate of change that they sought to detect by targeting fewer whales, nor did Japan explain this in the present proceedings. In light of the calculations of its own scientists, JARPA II does not appear designed to produce statistically relevant information on at least one central research item to which the JARPA II Research Plan gives particular importance.

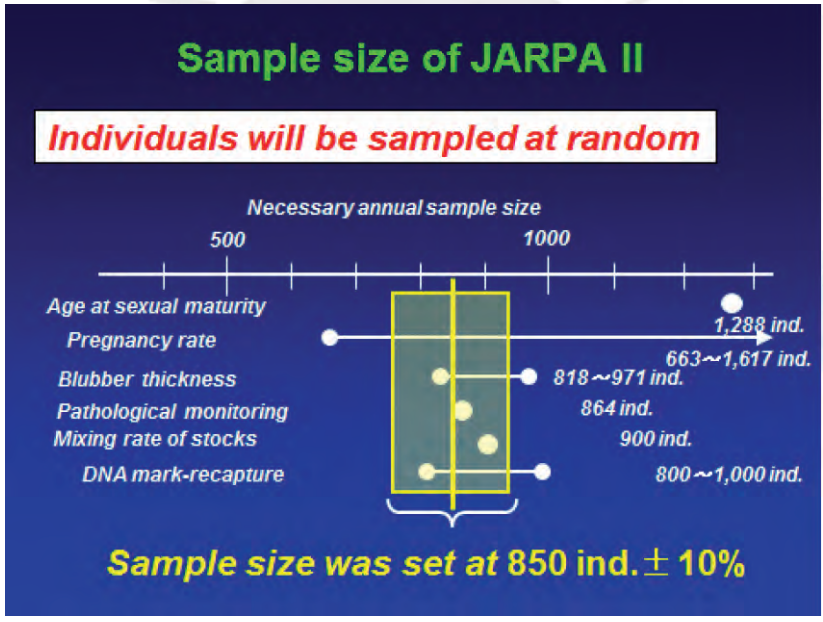
180. The Court also notes that the expert called by Japan, Mr. Walløe, raised concerns about the fin whale component of JARPA II that go beyond the sample size. Mr. Walløe testified that the fin whale proposal was "not very well conceived" for two reasons. He stated that random sampling of fin whales within the JARPA II research area is not possible, first, because the main fin whale population is beyond the JARPA II research area — further to the north — and, secondly, because the JARPA II vessels can only accommodate the lethal take of smaller fin whales (a point also raised by Australia). The Court recalls that Japan identified random sampling as an element of a programme for purposes of scientific research.

181. The Court finds that the JARPA II Research Plan overall provides only limited information regarding the basis for the decisions used to calculate the fin and humpback whale sample size. These sample sizes were set using a 12-year period, despite the fact that a shorter six-year period is used to set the minke whale sample size and that JARPA II is to be reviewed after each six-year research phase. Based on Japan's own calculations, the sample sizes for fin and humpback whales are too small to produce statistically useful results. These shortcomings, in addition to the problems specific to the decision to take fin whales, as noted in the preceding paragraph, are important to the Court's assessment of whether the overall design of JARPA II is reasonable in relation to the programme's objectives, because Japan connects the minke whale sample size (discussed below) to the ecosystem research and multi-species competition objectives that, in turn, are premised on the lethal sampling of fin and humpback whales.

(2) *Antarctic minke whales*

182. The Court turns next to the design of the sample size for Antarctic minke whales in JARPA II. The JARPA II Research Plan indicates that the overall sample size for minke whales was chosen following Japan's calculation of the minimum sample size for a number of different research items, including age at sexual maturity, apparent pregnancy rate, blubber thickness, contaminant levels, mixing patterns between different stocks and population trends. The plan further states that for most parameters "the sample sizes calculated were in a range of 800-1,000 animals with more than 800 being desirable". Japan describes the process that it followed to determine the overall sample size for minke whales with reference to the following illustration that appears as Figure 5-4 in its Counter-Memorial:

— Figure 5-4: "Necessary annual sample sizes for respective research items under JARPA II, which was calculated by the established statistical procedures (*source:* Institute of Cetacean Research)."



(*Source:* Counter-Memorial of Japan, Vol. I, p. 261.)

183. As depicted in this illustration, the overall sample size falls within a range that corresponds to what the JARPA II Research Plan sets forth as the minimum requirements for most of the research that JARPA II is designed to undertake. Japan asserts that for this reason, the overall

annual lethal sample size was set at 850 (plus or minus 10 per cent, which allows for a maximum of 935 minke whales per year). As noted above (see paragraphs 159 and 169), Japan considered this number of whales to be sufficient for purposes of research, taking into account the need to avoid causing harm to the stocks.

184. In contrast, in Australia's view, Japan started with the goal of establishing a sample size of approximately 850 minke whales per year and then "retro-fitted" the programme's design by selecting values designed to generate sample sizes for particular research items that corresponded to Japan's desired overall sample size. Australia emphasizes that the JARPA II Research Plan is not clear in stating the reasons for the selection of the particular sample size appertaining to each research item. Australia also notes that different choices as to values for certain variables would have led to dramatically smaller sample sizes, but that, in general, the JARPA II Research Plan provides no explanation for the underlying decisions to use values that generate larger sample sizes. These shortcomings, in Australia's view, support its conclusion that the minke whale sample size was set not for purposes of scientific research, but instead to meet Japan's funding requirements and commercial objectives.

185. In light of these divergent views, the Court will consider the evidence regarding Japan's selection of the various minimum sample sizes that it chose for different individual research items, which form the basis for the overall sample size for minke whales. As noted above (see paragraph 172), the purpose of such an inquiry is not to second-guess the scientific judgments made by individual scientists or by Japan, but rather to examine whether Japan, in light of JARPA II's stated research objectives, has demonstrated a reasonable basis for annual sample sizes pertaining to particular research items, leading to the overall sample size of 850 (plus or minus 10 per cent) for minke whales.

186. In the JARPA II Research Plan, individual sample size calculations are presented with respect to each of the items referred to in the above illustration: age at sexual maturity, apparent pregnancy rate, blubber thickness, pathological monitoring (i.e., monitoring of contaminant levels), mixing patterns between different stocks, and "DNA mark-recapture", which Japan describes as a method for researching population trends.

187. The Court notes at the outset that the JARPA II Research Plan states that for all parameters, "a sample size needed to detect changes in a six-year period . . . has been adopted as the pertinent criterion". The JARPA II Research Plan does not explain the reason for this threshold decision, but Japan offered some explanations during these proceedings, which are discussed below (see paragraph 192).

188. The evidence shows that the JARPA II Research Plan lacks transparency in the reasons for selecting particular sample sizes for individual research items. This is a matter on which the experts called by the two Parties agreed, as described above (see paragraphs 158-159). With the exception of one variable (discussed in the next paragraph), the JARPA II Research Plan provides very limited information regarding the selection of a particular value for a given variable. For example, in the Court's view, there is no consistent effort to explain why, for the various research items relating to the monitoring of biological parameters, JARPA II is designed to detect one particular rate or degree of change over another that would result in a lower sample size. These shortcomings of the JARPA II Research Plan have particular prominence in light of the fact that the particular choices of rate and degree of change consistently lead to a sample size of approximately 850 minke whales per year.

189. An exception to this pattern is arguably the discussion of the sample size applicable to the study of the age at sexual maturity of minke whales, as to which the JARPA II Research Plan furnishes some details about the factors that Japan considered in selecting the particular rate of change to detect. For this research item, the Research Plan also offers an indication of the relationship between the data sought and the first two JARPA II research objectives. The Court finds no comparable reasoning given as to the five other research items that were expressly used to set the overall sample size of 850 whales (i.e., those research items set forth in Figure 5-4 from Japan's Counter-Memorial above). This highlights the absence of evidence, at least in the JARPA II Research Plan, that could support a finding that the sample size for the lethal take of minke whales, a key component of the design of JARPA II, is reasonable in relation to achieving the programme's objectives.

190. The Court also recalls that one of the experts called by Australia, Mr. Mangel, asserted that nearly the same level of accuracy that JARPA II seeks could be obtained with a smaller lethal take of minke whales and further posited that a smaller take and higher margin of error might be acceptable, depending on the hypothesis under study. Japan did not refute this expert opinion.

191. The Court turns next to the evidence regarding Japan's decision to use a six-year period to calculate the sample sizes for research items corresponding to minke whales, rather than a 12-year period as was used for fin and humpback whales. That decision has a considerable effect on sample size because the shorter time-period generally requires a higher figure, as the JARPA II Research Plan demonstrates (see paragraph 165 above).

192. Japan, in discussing one research item (age at sexual maturity) in the Counter-Memorial, attributes the use of a six-year period to the need

to obtain at least three data points from each JARPA II research area (since whales are taken from each area in alternating seasons), because it would be "highly uncertain" to detect a trend on the basis of only two data points. Japan also refers to the desirability of detecting change "as promptly as possible". In the oral proceedings, Japan offered two different rationales for the six-year period. After initially suggesting that the six-year period was intended to coincide with JARPA II's six-year review by the Scientific Committee, Japan withdrew that explanation and asserted that the six-year period for minke whales was chosen because it "coincides with the review period for the RMP". This corresponds to the explanation given by the expert called by Japan, Mr. Walløe, in his oral testimony, although Mr. Walløe also described the use of a six-year period to calculate sample sizes as "arbitrary".

193. In light of the evidence, the Court has no basis to conclude that a six-year research period for minke whales is not reasonable in relation to achieving the programme's objectives. However, the Court finds it problematic that, first, the JARPA II Research Plan does not explain the reason for choosing a six-year period for one of the whale species (minke whales) and, secondly, Japan did not offer a consistent explanation during these proceedings for the decision to use that research period to calculate the minke whale sample size.

194. Moreover, Japan does not address how disparate research time frames for the three whale species are compatible with JARPA II's research objectives relating to ecosystem modelling and multi-species competition. JARPA II is apparently designed so that statistically useful information regarding fin and humpback whales will only be available after 12 years of research (and the evidence indicates that, even after 12 years, sample sizes would be insufficient to be statistically reliable based on the minimum requirements set forth in the JARPA II Research Plan). As noted above (see paragraph 181), this casts doubt on whether it will be meaningful to review the programme in respect of its two primary objectives after six years of operation, which, in turn, casts doubt on whether the minke whale target sample size is reasonable in relation to achieving the programme's objectives.

195. The Court thus identifies two overarching concerns with regard to the minke whale sample size. First, Figure 5-4 shows that the final sample size of 850 minke whales (plus or minus 10 per cent) falls within a range derived from the individual sample sizes for various research items, but there is a lack of transparency regarding the decisions made in selecting those individual sample sizes. The Court notes that a lack of transparency in the JARPA II Research Plan and in Japan's subsequent efforts to defend the JARPA II sample size do not necessarily demonstrate that the

decisions made with regard to particular research items lack scientific justification. In the context of Article VIII, however, the evidence regarding the selection of a minimum sample size should allow one to understand why that sample size is reasonable in relation to achieving the programme's objectives, when compared with other possible sample sizes that would require killing far fewer whales. The absence of such evidence in connection with most of the sample size calculations described in the JARPA II Research Plan lends support to Australia's contention that a predetermined overall sample size has dictated the choice of the research period and the rate of change to be detected, rather than the other way around.

196. Secondly, as noted above (see paragraph 149), Japan justifies the increase in the minke whale sample size in JARPA II (as compared to the JARPA sample size) by reference to the research objectives relating to ecosystem research and multi-species competition. However, the evidence suggests that the programme's capacity to achieve these objectives has been compromised because of shortcomings in the programme's design with respect to fin and humpback whales. As such, it is difficult to see how these objectives can provide a reasonable basis for the target sample size for minke whales in JARPA II.

197. In addition, the Court recalls that Japan describes a number of characteristics that, in its view, distinguish commercial whaling from research whaling. Japan notes, in particular, that high-value species are taken in commercial whaling, whereas species of both high value and of less or no commercial value (such as sperm whales) may be taken in research whaling (see paragraph 89 above). The use of lethal methods in JARPA II focuses almost exclusively on minke whales. As to the value of that species, the Court takes note of an October 2012 statement by the Director-General of Japan's Fisheries Agency. Addressing the Subcommittee of the House of Representatives Committee on Audit and Oversight of Administration, he stated that minke whale meat is "prized because it is said to have a very good flavour and aroma when eaten as sashimi and the like". Referring to JARPA II, he further stated that "the scientific whaling program in the Southern Ocean was necessary to achieve a stable supply of minke whale meat". In light of these statements, the fact that nearly all lethal sampling under JARPA II concerns minke whales means that the distinction between high-value and low-value species, advanced by Japan as a basis for differentiating commercial whaling and whaling for purposes of scientific research, provides no support for the contention that JARPA II falls into the latter category.

198. Taken together, the evidence relating to the minke whale sample size, like the evidence for the fin and humpback whale sample sizes, provides scant analysis and justification for the underlying decisions that generate the overall sample size. For the Court, this raises further concerns about whether the design of JARPA II is reasonable in relation to achieving its stated objectives. These concerns must also be considered in light of the implementation of JARPA II, which the Court turns to in the next section.

(iii) *Comparison of sample size to actual take*

199. There is 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. The Parties disagree as to the reasons for this gap and the conclusions that the Court should draw from it.

200. The Court recalls that, for both fin whales and humpback whales, the target sample size is 50 whales, following a two-year feasibility study during which the target for humpback whales was zero and the target for fin whales was ten.

201. As to actual take, the evidence before the Court indicates that 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.

202. Notwithstanding the target sample size for minke whales of 850 (plus or minus 10 per cent), the actual take of minke whales under JARPA II has fluctuated from year to year. During the 2005-2006 season, Japan caught 853 minke whales, a number within the targeted range. Actual take has fallen short of the JARPA II sample size target in all subsequent years. On average, approximately 450 minke whales have been killed in each year. The evidence before the Court indicates that 170 minke whales were killed in the 2010-2011 season and that 103 minke whales were killed in the 2012-2013 season.

203. As to the reasons for the gap between target sample sizes and actual take, Japan states that it decided not to take any humpback whales in response to a request by the then-Chair of the IWC. With respect to fin whales, Japan points to sabotage activities by anti-whaling non-governmental organizations, noting in particular the Sea Shepherd Conservation Society, and to the inability of the main JARPA II research

vessel, the *Nisshin Maru*, to pull on board larger whales. As to minke whales, Japan offers two reasons that actual sample sizes have been smaller than targets: a fire on board the *Nisshin Maru* in the 2006-2007 season and the aforementioned sabotage activities.

204. Japan refers in particular to incidents of sabotage during the 2008-2009 season (the ramming of vessels in February 2009 and the throwing of bottles of acid at Japanese vessels), the unauthorized boarding of the vessel *Shonan-Maru* in February 2010, which resulted in the withdrawal of that vessel from the fleet for the remainder of the 2009-2010 season for crime scene investigation, and additional harassment during the 2012-2013 season. Japan notes that the IWC has condemned such violent sabotage activities in a series of resolutions adopted by consensus.

205. Australia takes issue with Japan's account of the reasons for the gap between target sample sizes and actual take. Australia does not dispute that the decision to take no humpback whales was made in response to a request from the Chair of the IWC, but points out that this was a political decision, not a decision taken for scientific reasons. With respect to fin whales, Australia emphasizes the undisputed fact that Japan's vessels are not equipped to catch larger whales. As to minke whales, Australia points to evidence that, in its view, demonstrates that actual take is a function of the commercial market for whale meat in Japan, not the factors identified by Japan. According to Australia, Japan has adjusted the operations of JARPA II in response to lower demand for whale meat, resulting in shorter seasons and fewer whales being taken. Australia also invokes press reports of statements by Japanese officials indicating that JARPA II's research objectives do not actually require the amount of lethal sampling described in the Research Plan and can be accomplished with a smaller actual take.

206. Taking into account all the evidence, the Court considers that no single reason can explain the gap between the target sample sizes and the actual take. As to humpback whales, the gap results from Japan's decision to accede to a request from the Chair of the IWC but without making any consequential changes to the objectives or sample sizes of JARPA II. The shortfall in fin whales can be attributed, at least in part, to Japan's selection of vessels, an aspect of the design of JARPA II criticized by the expert called by Japan (see paragraph 180 above). As to the fire on board a ship in one season, Japan did not provide information regarding the extent of the damage or the amount of time during which the vessel was compromised. The Court considers it plausible that sabotage activities could have contributed to the lower catches of minke whales in certain seasons, but it is difficult to assess the extent of such a

contribution. In this regard, the Court notes that the actual take of minke whales in the 2006-2007 and 2007-2008 seasons was 505 and 551, respectively, prior to the regrettable sabotage activities that Japan has brought to the Court's attention. In this context, the Court recalls IWC resolution 2011-2, which was adopted by consensus. That resolution notes reports of the dangerous actions by the Sea Shepherd Conservation Society and condemns "any actions that are a risk to human life and property in relation to the activities of vessels at sea".

207. The Court turns next to 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. Australia states that it welcomes the fact that the actual take under JARPA II has been smaller than the programme's target sample sizes. Australia asserts, however, that Japan has made no effort to explain how this discrepancy affects the JARPA II research objectives and has not adapted the programme to account for the smaller actual sample size. Japan also has not explained how the political decision not to take humpback whales, as well as the small number of fin whales that have been killed, can be reconciled with the emphasis of the JARPA II Research Plan on the need for the lethal sampling of those two species. Australia asks how a multi-species competition model can be constructed on the basis of data only from minke whales, if, as stated in the JARPA II Research Plan, information based on lethal sampling is required from all three species to construct such a model or to explore the "krill surplus hypothesis". Australia emphasizes that Japan has asserted that the information it needs can be obtained only by lethal take but that the actual take has been entirely different from the sample sizes on which JARPA II was premised. Citing these factors, Australia describes JARPA II's multi-species competition model goal as "illusory".

208. Japan asserts that the discrepancy between sample size and actual take, at least with regard to minke whales, likely means that "it will take several additional years of research to achieve the required sample sizes before the research objectives can be met". Along these lines, Japan states that "if we conduct the research over a longer time or are willing to accept a lower degree of accuracy then a smaller sample size will also give viable results, but it might delay the ability to detect potentially important changes in a stock's dynamics". Japan also takes the position that the under-take to date of fin and humpback whales "does not preclude existing ecosystem models . . . from being improved by use of data that JARPA II has collected in respect of these species by non-lethal means".

209. 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, two conclusions can be drawn from the evidence regarding the gap between the target sample sizes and actual take. First, Japan suggests that the actual take of minke whales does not compromise the programme, because smaller numbers of minke whales can nonetheless generate useful information, either because the time frame of the research can be extended or because less accurate results could be accepted. The Court recalls, however, that the minke whale sample sizes for particular research items were based on a six-year research period and on levels of accuracy that were not explained in the JARPA II Research Plan or in these proceedings. Japan's statement that the programme can achieve scientifically useful results with a longer research period or a lower level of accuracy thus raises further doubts about whether the target sample size of 850 whales is reasonable in relation to achieving the stated objectives of JARPA II. This adds force to Australia's contention that the target sample size for minke whales was set for non-scientific reasons.

210. Secondly, despite the fact that no humpback whales and few fin whales have been caught during JARPA II, Japan's emphasis on multi-species competition and ecosystem research as the bases for the JARPA II sample sizes for all three species is unwavering. In the view of the Court, the gap between the target sample sizes for fin and humpback whales in the JARPA II Research Plan and the actual take of these two species undermines Japan's argument that the objectives relating to ecosystem research and multi-species competition justify the larger target sample size for minke whales, as compared to that in JARPA.

211. The Court also notes Japan's contention that it can rely on non-lethal methods to study humpback and fin whales to construct an ecosystem model. If this JARPA II research objective can be achieved through non-lethal methods, it suggests that there is no strict scientific necessity to use lethal methods in respect of this objective.

212. 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 the 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 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*

213. The Court now turns to several additional aspects of JARPA II to which the Parties called attention.

(i) *Open-ended time frame*

214. Japan asserts that "JARPA II is a long-term research programme and has no specified termination date because its primary objective (i.e., monitoring the Antarctic ecosystem) requires a continuing programme of research". The programme is organized into six-year "research phases" and "a review will be held and revisions made to the programme if required" after each such period. The first review by the Scientific Committee is scheduled to take place in 2014 (see paragraph 119 above). According to Japan, Article VIII, paragraph 4, of the Convention contemplates such open-ended research when it states that "continuous collection and analysis of biological data . . . are indispensable to sound and constructive management of the whale fisheries".

215. Australia draws two conclusions from the absence of any specified termination date in JARPA II. First, Australia contends that this demonstrates that the design of JARPA II is geared towards the perpetuation of whaling by any means until the commercial whaling moratorium is lifted. Secondly, Australia maintains that the open-ended nature of JARPA II precludes a meaningful assessment of whether it has achieved its research objectives, distorts the process of sample size selection, and therefore renders the design of JARPA II unscientific.

216. The Court notes the open-ended time frame of JARPA II and 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.

(ii) *Scientific output of JARPA II to date*

217. Japan maintains that, prior to the periodic review of JARPA II, no meaningful evaluation of JARPA II's scientific output can be made.

Japan does assert, however, that the Scientific Committee has recognized the value of data derived from JARPA II, including genetic data and age data derived from lethal whaling. In addition, the expert called by Japan, Mr. Walløe, testified that in his view JARPA II has already provided valuable information relating to the RMP and the Antarctic ecosystem.

218. Australia acknowledges that JARPA II has produced some results in the form of data that has been considered by the Scientific Committee. The Parties disagree about this output, however, in the sense that Australia argues that the data obtained from lethal sampling and provided to the Scientific Committee has not proven useful or contributed "significant knowledge" relating to the conservation and management of whales.

219. The Court notes that the Research Plan uses a six-year period to obtain statistically useful information for minke whales and a 12-year period for the other two species, and that it can be expected that the main scientific output of JARPA II would follow these periods. It nevertheless observes that the first research phase of JARPA II (2005-2006 to 2010-2011) has already been completed (see paragraph 119 above), but that Japan points to only two peer-reviewed papers that have resulted from JARPA II to date. These papers do not relate to the JARPA II objectives and rely on data collected from respectively seven and two minke whales caught during the JARPA II feasibility study. While Japan also refers to three presentations made at scientific symposia and to eight papers it has submitted to the Scientific Committee, six of the latter are JARPA II cruise reports, one of the two remaining papers is an evaluation of the JARPA II feasibility study and the other relates to the programme's non-lethal photo identification of blue whales. 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 scientific output to date appears limited.

(iii) *Co-operation with other research institutions*

220. Australia points to limited co-operation between JARPA II researchers and other scientists as evidence for its contention that JARPA II is not a programme for purposes of scientific research. One of the experts called by Australia, Mr. Gales, stated that JARPA II "operates in complete isolation" from other Japanese and international research projects concerning the Antarctic ecosystem.

221. In response to a question put by a Member of the Court, Japan cited co-operation with other Japanese research institutions. The expert called by Japan, Mr. Walløe, suggested that co-operation with international research programmes "would be difficult for personal and political reasons", given that the use of lethal methods is contentious among scientists. He acknowledged that co-operation with other Japanese research

institutions, such as the National Institute for Polar Research, could be improved.

222. The Court notes that the evidence invoked by Japan to demonstrate co-operation with Japanese research institutions relates to JARPA, not JARPA II. It 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*

223. In light of the standard of review set forth above (see paragraph 67), and having considered the evidence with regard to the design and implementation of JARPA II and the arguments of the Parties, it is now for the Court to conclude whether the killing, taking and treating of whales under the special permits granted in connection with JARPA II is "for purposes of scientific research" under Article VIII of the Convention.

224. 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. Japan states that this expansion is required by the new research objectives of JARPA II, in particular, the objectives relating to ecosystem research and the construction of a model of multi-species competition. In the view of the Court, however, the target sample sizes in JARPA II are not reasonable in relation to achieving the programme's objectives.

225. 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. In particular, the Court notes the absence of complete explanations in the JARPA II Research Plan for the underlying decisions that led to setting the sample size at 850 minke whales (plus or minus 10 per cent) each year. 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 evi-

dence 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.

226. 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.

227. Taken as a whole, the Court considers that JARPA II involves activities that can broadly be characterized as scientific research (see paragraph 127 above), 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 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

228. The Court turns next to the implications of the above conclusion, in light of Australia's contention that Japan has breached three provi-

sions 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)*).

229. The Court observes that the precise formulations of the three Schedule provisions invoked by Australia (reproduced in pertinent part below, see paragraphs 231-233) 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.

230. The Court therefore proceeds 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. As this conclusion flows from the interpretation of the Convention and thus applies to any special permit granted for the killing, taking and treating of whales that is not "for purposes of scientific research" in the context of Article VIII, paragraph 1, the Court sees no reason to evaluate the evidence in support of the Parties' competing contentions about whether or not JARPA II has attributes of commercial whaling.

231. The moratorium on commercial whaling, paragraph 10 *(e)*, provides:

> "Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985-1986 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits."

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. As stated above (see paragraphs 229-230), the Court considers that all whaling that does not fit within Article VIII of the Convention (other than aboriginal subsistence whaling) is subject to paragraph 10 *(e)* of the Schedule. It follows 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.

232. The factory ship moratorium, paragraph 10 *(d)*, provides:

> "Notwithstanding the other provisions of paragraph 10, there shall be a moratorium on the taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships. This moratorium applies to sperm whales, killer whales and baleen whales, except minke whales."

The Convention defines a "factory ship" as a ship "in which or on which whales are treated either wholly or in part" and defines a "whale catcher" as a ship "used for the purpose of hunting, taking, towing, holding on to, or scouting for whales" (Art. II, paras. 1 and 3). The vessel *Nisshin Maru*, which has been used in JARPA II, is a factory ship, and other JARPA II vessels have served as whale catchers. As stated above (see paragraphs 229-230), the Court considers that all whaling that does not fit within Article VIII of the Convention (other than aboriginal subsistence whaling) is subject to paragraph 10 *(d)* of the Schedule. It follows that 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.

233. Paragraph 7 *(b)*, which establishes the Southern Ocean Sanctuary, provides in pertinent part: "In accordance with Article V (1) *(c)* of

the Convention, commercial whaling, whether by pelagic operations or from land stations, is prohibited in a region designated as the Southern Ocean Sanctuary."

As previously noted, JARPA II operates within the Southern Ocean Sanctuary (see paragraph 120). Paragraph 7 *(b)* does not apply to minke whales in relation to Japan, as a consequence of Japan's objection to the paragraph. As stated above (see paragraphs 229-230), the Court considers that all whaling that does not fit within Article VIII of the Convention (other than aboriginal subsistence whaling) is subject to paragraph 7 *(b)* of the Schedule. It follows 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

234. In its final submissions, Australia asks the Court to adjudge and declare that Japan violated its obligation to comply with paragraph 30 of the Schedule, which 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. Paragraph 30 states that the proposed permits should specify: the objectives of the research, the number, sex, size and stock of the animals to be taken; opportunities for participation in the research by scientists of other nations; and the possible effect on conservation of the stock.

235. Although the alleged violation of paragraph 30 was not framed as a submission in Australia's Memorial, the Memorial addressed the issue, as did Japan's Counter-Memorial.

236. Australia raises two complaints with regard to paragraph 30 — that Japan has failed to provide proposed permits for review prior to the commencement of each season of JARPA II and that the annual permits do not contain the information required by paragraph 30.

237. In response, Japan points out that, prior to the present proceedings, Australia had not complained within the Scientific Committee regarding this alleged breach of paragraph 30. Japan explained that the JARPA II Research Plan was submitted two months in advance of the IWC's June 2005 meeting, prior to the issuance of any special permits for JARPA II, and that the Scientific Committee reviewed and commented on the proposal, in keeping with the then-applicable Guidelines, reflected in Annex Y. Japan asserts that for a multi-year programme such as JARPA II, only the initial proposal is reviewed by the Scientific Committee and that "ongoing unchanged proposals that have already been reviewed" are not subject to annual review. According to Japan, this had

been the practice of the Scientific Committee prior to the submission of the JARPA II Research Plan and it has been formalized by Annex P.

238. 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. 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, which states that "[e]ach Contracting Government shall report at once to the Commission all such authorizations which it has granted". Australia does not contest that Japan has done so with regard to each permit that has been granted for JARPA II.

239. 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. This was also recognized by the Scientific Committee in 2005 in its review of the JARPA II Research Plan. 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 accords with the practice of the Scientific Committee.

240. The Court observes that paragraph 30 and the related Guidelines regarding the submission of proposed permits and the review by the Scientific Committee (currently, Annex P) must be appreciated in light of the duty of co-operation with the IWC and its Scientific Committee that is incumbent upon all States parties to the Convention, which was recognized by both Parties and the intervening State. As has been discussed above (see paragraphs 199-212), the implementation of JARPA II differs in significant respects from the original design of the programme that was reflected in the JARPA II Research Plan. Under such circumstances, consideration by a State party of revising the original design of the programme for review would demonstrate co-operation by a State party with the Scientific Committee.

241. The Court notes that 63 Scientific Committee participants declined to take part in the 2005 review of the JARPA II Research Plan, citing the need for the Scientific Committee to complete its final review of JARPA before the new proposal could be assessed. Those scientists submitted a separate set of comments on the JARPA II Research Plan, which were critical of its stated objectives and methodology, but did not assert that the proposal fell short of Scientific Committee practice under paragraph 30.

242. For these reasons, the Court is persuaded that Japan has met the requirements of paragraph 30 as far as JARPA II is concerned.

* * *

243. In view of the conclusions that the Court has reached regarding the characterization of JARPA II in relation to Article VIII, as well as the implications of these conclusions for Japan's obligations under the Schedule, the Court does not need to address other arguments invoked by Australia in support of its claims.

III. Remedies

244. In addition to asking 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".

245. The Court observes that JARPA II is an ongoing programme. Under these circumstances, measures that go beyond declaratory relief are warranted. The Court therefore will order 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.

246. 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. 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.

* * *

247. For these reasons,

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.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this thirty-first day of March, two thousand and fourteen, in four copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Australia, the Government of Japan and the Government of New Zealand, respectively.

(Signed) Peter TOMKA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judges OWADA and ABRAHAM append dissenting opinions to the Judgment of the Court; Judge KEITH appends a declaration to the Judgment of the Court; Judge BENNOUNA appends a dissenting opinion to the Judgment of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judge YUSUF appends a dissenting opinion to the Judgment of the Court; Judges GREENWOOD, XUE, SEBUTINDE and BHANDARI append separate opinions to the Judgment of the Court; Judge *ad hoc* CHARLESWORTH appends a separate opinion to the Judgment of the Court.

(Initialled) P.T.

(Initialled) Ph.C.