

SEPARATE OPINION OF JUDGE BHANDARI

Paragraph 30 of the Schedule to the International Convention for the Regulation of Whaling — Duty of States parties to the Convention to co-operate with the International Whaling Commission and its Scientific Committee is implied by paragraph 30 and its accompanying Guidelines — Duty of co-operation is to be given a broad and purposive construction — Japan's formal compliance with paragraph 30 and the Guidelines does not amount to substantive compliance — Japan has consequently breached paragraph 30 of the Schedule — Characterization of JARPA II as a commercial whaling programme — JARPA II's failure to qualify as a programme for purposes of scientific research under Article VIII, paragraph 1, of the Convention necessarily renders it a commercial whaling programme — Evidentiary record strongly supports the conclusion that JARPA II is a commercial enterprise — The Court ought to have made an affirmative pronouncement that JARPA II is a commercial whaling programme.

INTRODUCTION

1. I generally agree with conclusions reached by the majority, and thus have voted in favour of all but one of the operative clauses contained in the *dispositif* of the present Judgment. However, for reasons I shall expand upon presently, I cannot agree with the majority's conclusion that Japan has complied with paragraph 30 of the Schedule to the International Convention for the Regulation of Whaling (“ICRW” or “Convention”).

2. Moreover, while I concur with the majority that JARPA II is not a programme for purposes of scientific research in accordance with Article VIII, paragraph 1, of the ICRW, I feel that the evidentiary record in these proceedings plainly demonstrates that JARPA II is a commercial enterprise. As I shall endeavour to explain hereunder, in my view it would have been appropriate for the Court to make a formal finding to that effect.

I. PARAGRAPH 30 OF THE SCHEDULE TO THE ICRW

3. Article III of the Convention establishes the International Whaling Commission (“IWC” or “Commission”), which is responsible for, *inter alia*, monitoring and regulating the study of whale stocks and the activities of the whaling industry (Articles IV-VI of the Convention). Since 1950, the Commission has been assisted in the execution of this broad mandate by a body known as the Scientific Committee (Judgment, para. 47).

4. Under paragraph 30 of the Schedule to the Convention, a principal responsibility of the Scientific Committee is to review and comment upon special permits issued pursuant to Article VIII, paragraph 1, of the ICRW. Paragraph 30 reads as follows:

“A Contracting Government shall provide the Secretary to the International Whaling Commission with proposed scientific permits before they are issued and in sufficient time to allow the Scientific Committee to review and comment on them. The proposed permits should specify:

- (a) objectives of the research;
- (b) number, sex, size and stock of the animals to be taken;
- (c) opportunities for participation in the research by scientists of other nations; and
- (d) possible effect on conservation of stock.

Proposed permits shall be reviewed and commented on by the Scientific Committee at Annual Meetings when possible . . . Preliminary results of any research resulting from the permits should be made available at the next Annual Meeting of the Scientific Committee.”

5. According to Article I, paragraph 1, of the ICRW, the Schedule forms an integral part of the Convention. For this reason, paragraph 30, being binding authority, is the primary legal provision governing procedural compliance with the special permit review process. However, this somewhat terse régime has been significantly expanded upon by what is commonly referred to as “Annex P”, a set of procedural “Guidelines” endorsed by the Commission (Judgment, para. 47) through its power to issue recommendations “which relate to whales or whaling and to the objectives and purposes of this Convention” under Article VI of the Convention. Although technically hortatory in nature, because Annex P was adopted by consensus, it provides weighty guidance as to the protocols to be followed in submitting and reviewing prospective scientific permits issued by a State party to the Convention under Article VIII, paragraph 1.

6. The majority has found that JARPA II is in compliance with the timing requirements of paragraph 30 because “Japan submitted the JARPA II Research Plan for review by the Scientific Committee in advance of granting the first permit for the programme”, and because the Parties do not dispute that subsequent permits issued under JARPA II on the basis of that original Research Plan have been reported “at once to the Commission” (*ibid.*, para. 238). As to the substantive components of paragraph 30 (i.e., subparas. (a)-(d)), the majority finds that these have been “set[] forth”(*ibid.*, para. 239) in the Research Plan.

7. I regret that I must respectfully dissent from the view of the majority on this point. I can accept that the information provided by Japan, and relied upon by the majority, may at the most constitute *formal* compliance with paragraph 30. However, in view of the significant expansion of this régime by Annex P, I believe that *substantive* compliance with paragraph 30 encompasses an implicit duty to co-operate with the Commission and the Scientific Committee by providing information that is reflective of the evolving character of JARPA II. Indeed, a duty to co-operate emanating from paragraph 30 and Annex P was recognized by both Parties and the intervening State, and was endorsed as an imperative interpretative principle by the Court in the present Judgment (para. 240). Given the broad consensus of opinion on this point, I cannot share the majority's conclusion that Japan's perfunctory compliance with the strict letter of paragraph 30 is consonant with the apparent broad and purposive scope of this duty to co-operate.

8. As I shall explain in the ensuing analysis, I take the position that Japan's failure to abide by its duty to co-operate under paragraph 30 is evident from an analysis of the *chapeau* of that provision and at least three out of its four substantive subparagraphs. I shall address each of these shortcomings in turn.

1. *The Chapeau of Paragraph 30 of the Schedule*

9. The *chapeau* of paragraph 30 requires that “[a] Contracting Government shall provide the Secretary to the International Whaling Commission with proposed scientific permits before they are issued *and in sufficient time to allow the Scientific Committee to review and comment on them*” (emphasis added). It is true that the Parties do not contest the fact that Japan submitted the JARPA II Research Plan in March 2005, that it was reviewed by the Scientific Committee prior to the launch of JARPA II in November 2005, and that the annual issuance of special permits under JARPA II was promptly reported to the Scientific Committee during the life of the programme (Judgment, paras. 109 and 238). However, it is to be recalled that 63 Scientific Committee participants declined to take part in the 2005 review of the JARPA II Research Plan, citing the need for the Committee to complete its final review of the original JARPA programme before the new proposal could be assessed (*ibid.*, para. 241). Indeed, although Japan launched JARPA II in November 2005, it was not until December 2006 that a final review of JARPA by the Committee was conducted (*ibid.*, para. 105).

10. I believe a truly co-operative approach on the part of Japan would have entailed a proper dialogue with the Committee concerning the scientific output of JARPA with the aim of possibly revising JARPA II prior to its launch. Instead, the relevant history evinces what I can only describe as a rush to renew what effectively amounted to a replication of its prior

“scientific” whaling programme — only this time with an indefinite mandate — well before any critical review of said programme could take place. For these reasons, I find that the duty to co-operate implicit in the *chapeau* of paragraph 30 has been violated by Japan.

2. Paragraphs 30 (a) and (b) of the Schedule

11. My review of the evidentiary record leads me to the firm conclusion that Japan has failed in its duty to co-operate with the IWC and its Scientific Committee in accordance with paragraph 30, by not providing timely and accurate information pertaining to the objectives of its ostensible research (subpara. (a)), as well as the quantitative and qualitative dimensions of the whales to be killed pursuant to JARPA II permits (subpara. (b)). To that end, it is to be recalled that the JARPA II Research Plan, promulgated in 2005 and under which Japan has been issuing its special permits until the close of proceedings in this case, has never been altered (Judgment, para. 209). Similarly, the permits issued annually by Japan under this programme have remained identical in their descriptive contents (*ibid.*). This despite the fact that since the inception of JARPA II, the programme has seen a marked decline in the actual output of the programme vis-à-vis its originally stated goals.

12. Indeed, the JARPA II Research Plan, in its stated pursuit of a programme that would, *inter alia*, engage in “[m]onitoring of the Antarctic ecosystem”¹ and construct a “[m]odelling competition among whale species”², mandates a perennial take of 850 minke whales (plus or minus ten per cent), 50 fin whales and 50 humpback whales. However, in reality, during the entire lifespan of the programme JARPA II has taken *zero* humpback whales (Judgment, para. 201). As to fin whales, JARPA II took a paltry *combined* total of 18 during the *first seven seasons* of the programme, and a mere zero to three were captured annually in subsequent years (*ibid.*). Moreover, while Japan caught 853 minke whales during the inaugural 2005-2006 pelagic season under JARPA II in accordance with the stated objectives of the programme, these numbers have dropped precipitously in recent years. At the time of the close of proceedings in this case, the evidentiary record revealed that an average of approximately 450 minke whales (or barely half the target established under the original and unchanged Research Plan) had been killed each year under JARPA II, with those numbers plummeting in the latter years of the programme (to wit, 170 minke whales were killed in the 2010-2011 season and 103 minke whales were killed in the 2012-2013 season) (*ibid.*, para. 202).

13. In my opinion, the manifest and repetitive failure of JARPA II to achieve its ambitiously stated original objectives warrants more than a

¹ Memorial of Australia, Vol. III, Ann. 105, p. 160.

² *Ibid.*, p. 161.

rote annual recitation of what are now clearly outmoded catch projections as contained in the original 2005 Research Plan. Consequently, I find that the duty to co-operate implied in paragraphs 30 (a)-(b) and Annex P requires, *at the very least*, the submission by Japan of a revised JARPA II Research Plan and/or revised annual special permits bearing some semblance with the reality of the programme's performance. Consequently, Japan's failure to do either constitutes a material breach of this duty.

3. Paragraph 30 (c) of the Schedule

14. Paragraph 30 (c) of the Schedule states that proposed scientific permits to be issued pursuant to Article VIII, paragraph 1, of the Convention shall state what opportunities for participation by scientists of other nations have been provided for in the research programme. The majority acknowledges that in the course of these proceedings, Japan has adduced no evidence of any co-operation with scientists of other nations under JARPA II (Judgment, para. 222), yet stops short of any finding that Japan has failed to comply with paragraph 30. Rather, the majority admonishes Japan that "some further evidence of co-operation between JARPA II and other . . . international research institutions could have been expected" (*ibid.*).

15. Contrary to the view of the majority, I believe that the conspicuous dearth of peer review by scientists of other nations seriously undermines any conclusion that Japan has complied with its duty to co-operate under paragraph 30 (c) of the Schedule. In this regard, I endorse the opinion of the witness-expert for Australia, Professor Mangel, who testified that "scientific opinion can be wrong, but reliable science responds to valid criticism, which is how science advances"³. I further find that the following submission by Australia captures the situation succinctly:

"Peer review in scientific research . . . leads to a *continuous process of revision and amendment of the research* as necessary. *There is no indication of Japan adopting any such approach.* Japan commenced JARPA II without proper peer review, and continues it without substantial adjustment, despite serious and sustained criticism from members of the scientific community that its objectives and methods are flawed and likely to fail. It is thus unsurprising that JARPA II has produced a paucity of peer reviewed results, as did its predecessor JARPA."⁴

³ Memorial of Australia, Vol. 1, para. 5.83 and note 687.

⁴ *Ibid.*, para. 5.83; emphasis added.

16. In my respectful view, the majority ought to have concluded that JARPA II's failure to collaborate in any meaningful way with the scientists of other nations fails to satisfy the broad and purposive duty to co-operate that arises under paragraph 30 (c).

4. *Conclusion regarding Japan's Violation of Paragraph 30 of the Schedule*

17. In sum, I consider that the following factors clearly establish that Japan has not complied with its duty to co-operate with the Commission and the Scientific Committee pursuant to paragraph 30 and Annex P:

- (i) JARPA II was launched before a review of JARPA had taken place.
- (ii) Despite the fact that the quantity and quality of data gathered over the lifespan of JARPA II differs in significant respects from the original design of the programme as envisaged in the Research Plan, Japan has never submitted a revised plan nor altered its special permits in observance of these changes.
- (iii) Whereas the JARPA II Research Plan was designed, *inter alia*, to conduct a "modelling of the Antarctic ecosystem" in conjunction with a multi-species competition programme, not a single humpback whale was taken during the duration of the programme and a negligible amount of fin whales were captured. This leaves minke whales as the only remaining species actually taken in meaningful quantities under the programme, and Japan has neither satisfactorily explained how its multi-species Antarctic ecosystem research can be salvaged under such circumstances, nor has it adapted the objectives of the programme to reflect changing circumstances.
- (iv) Japan has not provided any evidence of international scientific co-operation under JARPA II.

18. As the majority affirms, paragraph 30 of the Schedule to the Convention implies a duty of co-operation for all States parties when submitting permits to the Scientific Committee to be reviewed for compliance with Article VIII, paragraph 1, of the Convention. However, for the reasons I have outlined above, I cannot share the majority's conclusion that Japan's formal compliance with paragraph 30 constitutes satisfactory substantive compliance with that provision. Given my view that the duty to co-operate is a broad and purposive obligation that entails an ongoing dialogue with the Scientific Committee, I conclude that Japan has failed to comply with this duty in respect of the *chapeau* and subparagraphs (a)-(c) of paragraph 30, as elucidated by the Guidelines promulgated in Annex P.

19. Consequently, I respectfully dissent in respect of the conclusion reached by the majority in paragraph 247 (6) of the present Judgment.

II. JARPA II AS A COMMERCIAL WHALING PROGRAMME

20. Apart from the dissent I have expressed immediately above, I join the majority with respect to all remaining subparagraphs of the *dispositif*. Specifically, I concur that the evidence on record establishes that JARPA II is not a programme for purposes of scientific research within the meaning of Article VIII, paragraph 1, of the ICRW, and therefore the lethal methods employed under said programme violate Japan's international legal obligations pursuant to paragraphs 7 (*b*) (the establishment of the "Southern Ocean Sanctuary"), 10 (*d*) (the "factory ship moratorium"), and 10 (*e*) (the "moratorium on commercial whaling") of the Schedule to the Convention.

21. In my estimation there is ample evidence on the record to support the conclusion that JARPA II is not a programme for purposes of scientific research, but in fact, a commercial whaling programme. While an exhaustive account of the rationales underpinning my conclusion is not feasible for present purposes, I wish to seize upon the following four salient considerations: (*a*) the inevitable logical conclusion that JARPA II's failure to qualify as a programme for purposes of scientific research requires its classification as one for commercial purposes; (*b*) the historical context in which JARPA and JARPA II came into existence and continued to operate; (*c*) the indefinite duration of JARPA II; and (*d*) compelling evidence that the lethal take of minke whales under JARPA II is responsive to market forces, as well as efforts by the Government of Japan to stimulate the domestic market for minke whale meat under the broader auspices of that programme.

1. ICRW only Allows for Three Mutually Exclusive Categories of Whaling

22. As a preliminary matter, I find that a proper reading of the Convention envisages only three exhaustive and mutually exclusive purposes for whaling: (i) scientific research; (ii) commercial enterprise; and (iii) aboriginal subsistence. It is uncontested that aboriginal subsistence whaling is not a live issue in this case. It therefore stands to reason that a finding by this Court that JARPA II is not a programme for purposes of scientific research necessarily leads to the corollary that it is a commercial whaling programme.

23. The deductive approach I have adopted above is but the first pillar upholding my conclusion that JARPA II is a commercial whaling pro-

gramme. As I shall now explain, this conclusion is further buttressed by numerous inductive inferences available from the evidence adduced during these proceedings. For present purposes, I find it sufficient to focus on three of the most prominent types of evidence, though by no means do I consider the foregoing to constitute an exhaustive treatment of the subject.

2. *Historical Context Surrounding JARPA and JARPA II*

24. I begin by considering the historical context surrounding the adoption and operation of the original JARPA programme. In so doing, I am fully cognizant that the legality of this programme per se is not under consideration by the Court. That being said, I believe the evidentiary record abundantly sustains the inference that JARPA II is essentially a *de facto* extension of JARPA, for all intents and purposes. Given, *inter alia*, the uninterrupted lineage between JARPA and JARPA II as well as their numerous commonalities, I believe a more holistic appraisal of the entire “scientific whaling” scheme practised by Japan over the past several decades is appropriate.

25. The record demonstrates that the Government of Japan has a long history of strenuous objection to the adoption and continuation of a complete moratorium on commercial whaling. To begin, I would recall that Japan was one of only seven countries to unsuccessfully vote against the imposition of the moratorium when it was adopted at the IWC’s Thirty-Fourth Annual Meeting on 23 July 1982⁵. It was also one of only four countries to subsequently lodge a formal objection to the amendment when it did so on 4 November 1982⁶, thus exempting itself from the application of the moratorium by the time it went into full effect in 1986⁷. I would further recall that the Court received considerable evidence, by way of statistics and political declarations made by representatives of the Japanese Government, which strongly indicate that Japan’s resistance to the imposition of the moratorium was motivated by a perceived need to aggressively protect critical socio-economic, cultural and historical links between the fabric of Japanese society and a deeply-rooted commercial whaling industry dating back centuries⁸.

26. This position was encapsulated when Japan’s formal notification of its objection to the moratorium expressly underscored “the important role played by the whale products and the whaling industry in the Japa-

⁵ Memorial of Australia, Vol. I, para. 2.57 and note 82; para. 3.6. At the meeting, 25 countries voted in favour of the moratorium, seven against, and five abstained.

⁶ *Ibid.*, para. 2.60 and notes 84-87; para. 3.8. In addition to Japan, those countries lodging objections were Peru, Norway and the Union of Soviet Socialist Republics.

⁷ *Ibid.*, paras. 2.57-2.60.

⁸ *Ibid.*, paras. 3.5-3.8.

nese traditional diet and in the socio-economy of certain local communities in Japan”⁹. A more expansive expression of this impetus can be found in a statement made by the Japanese Prime Minister when speaking before the national legislative body of Japan just a few months prior to the lodging of the objection. On that occasion, he explained how

*“Japan’s whaling industry has an extremely long history and it also occupies an important place in the Japanese diet . . . [L]ately we have seen . . . the anti-whaling movement driven by environmental protection organizations and other groups grow larger and larger worldwide . . . [T]hey are . . . trying to use their numbers to lead the IWC in the direction of a ban on whaling. The situation is truly regrettable . . . The Government intends to place even greater efforts than it has to date into the protection and growth of the whaling industry into the future.”*¹⁰

This theme was prevalent again when, speaking just days after the adoption of the commercial moratorium, Japan’s Minister for Agriculture, Forestry and Fisheries reported to his national legislature how

*“[i]t is the Prime Minister’s view that precisely since the problems facing whaling in Japan are so extremely significant, and as there are so many people who are reliant primarily on this industry for their livelihood, we must actively continue to build an environment where whaling can be practiced . . . [The Prime Minister] was of the view that we ought to push harder ahead with a response on whaling . . . And so, for my part too, since there are people who are unable to get jobs elsewhere in the fishing industry other than in whaling . . . I intend to redouble efforts in actively dealing with the whaling problem and to live up to the expectations which have been placed upon me.”*¹¹

A year after the adoption of the moratorium, this position remained resolute. As Japan’s Director-General of its Fisheries Agency recounted to the legislature:

“at last year’s IWC, a decision was taken to invoke a total ban on commercial whaling with a grace period of three years. Japan has filed an objection to this decision . . . Our basic position is that this moratorium has no basis in science . . . What’s more, should it come to pass that Japan’s whaling industry would be finished by this, being mindful of the people who work directly in whaling and the large number of

⁹ Memorial of Australia, Vol. II, Ann. 53, p. 186.

¹⁰ *Ibid.*, Vol. III, Ann. 88, pp. 69-70; emphasis added.

¹¹ *Ibid.*, Ann. 89, p. 74; emphasis added.

people who work in related industries . . . the Government will make the utmost efforts to obtain the understanding of the countries concerned to ensure that our whaling can continue in some form or another."¹²

27. The staunch commitment of the Government of Japan to these "utmost efforts" is encapsulated by a Whaling Issues Study Group Report published by the Japanese Ministry of Agriculture, Forestry and Fisheries in 1984, which recommended that "[t]he continuation of whaling ought rightly to be accepted"¹³. During legislative hearings held at the time of the Report's release, numerous high-ranking Japanese officials affirmed their commitment to its recommendation to continue Japan's whaling programme to the greatest extent possible. For instance, the Head of the Ocean Fisheries Department of the Fisheries Agency proclaimed that

"[t]he Fisheries Agency's view is that this report has given us valuable recommendations for future solutions in this extremely challenging environment. *Our intention is to use the report as a reference and . . . to make our utmost efforts to ensure that our whaling will be able to continue both in the Antarctic and coastal whaling, in some form or another.*"¹⁴

In remarks made that same day, the Head of the Marine Fisheries Department of the Fisheries Agency reassured legislators that "we intend to make our utmost efforts to ensure the continuation of whaling *in some form or another*"¹⁵. The next day, the Director-General of the Fisheries Agency explained how

"after the moratorium commences, *the path to ensure the continuation of whaling would be, for Southern Ocean whaling, to position it as a research whaling activity which has a scientific nature, and, for coastal whaling, to position it as whaling which is absolutely essential to the livelihood of regional communities from the perspectives of their societies, economies and cultures*"¹⁶.

¹² Memorial of Australia, Vol. III, Ann. 90, p. 77; emphasis added.

¹³ *Ibid.*, Ann. 98, p. 111.

¹⁴ *Ibid.*, Ann. 91, p. 82; emphasis added.

¹⁵ *Ibid.*, p. 83; emphasis added.

¹⁶ *Ibid.*, Ann. 92, p. 88; emphasis added.

Lest there be any doubt about the consistency of the Government of Japan's intentions, this view was again reinforced when the Japanese Minister for Agriculture, Forestry and Fisheries took the floor and personally vowed that: "*I intend to do my utmost to ensure that Japanese whaling continues in some form or another.*"¹⁷

28. Finally, I must underscore that the foregoing examples are merely illustrative of considerable other evidence contained in the record of these proceedings demonstrating Japan's political hostility toward the commercial whaling moratorium and its resultant resolve to work around the moratorium to ensure the continuation of the Japanese whaling industry "in some form or another".

29. A review of subsequent events only further strengthens this conclusion. While the Government of Japan did eventually accede on 1 July 1986 to a gradual elimination of its objection to the moratorium by 1 April 1988¹⁸, a sizable body of evidence indicates that Japan took this step very reluctantly and in the face of persistent international pressure, by way of, *inter alia*, highly punitive economic sanctions, emanating in particular from the United States¹⁹, a prized trading partner. Against the backdrop of the rather serendipitous launch of the original JARPA programme following the 1986-1987 whaling season, just as the moratorium was entering into force for Japan (Judgment, para. 100), the record reveals that in an interview given on 1 June 1986, the Secretary-General of the Japan Whaling Association made the following trenchant remarks:

"Japan's decision to withdraw from whaling came after the resolution of the 1982 IWC annual meeting to invoke the moratorium on commercial whaling, followed by pressure from the United States . . . However, *Japanese whaling is an industry with a long history and tradition and it has a firm place in our diet. When I think of the livelihoods of the 50,000 people affected, those who work in whaling-related industries and their families, as someone involved in the industry it is only natural that I would want to find some way of enabling the industry to stay alive.*"²⁰

Similarly, in an interview conducted in 1997, the former Director-General of the Japan Fisheries Agency, who was responsible for pivotal international negotiations involving the implementation of scientific whaling, reflected as to how "[t]he implementation of scientific whaling was viewed

¹⁷ Memorial of Australia, Vol. III, Ann. 92, p. 89; emphasis added.

¹⁸ *Ibid.*, Vol. I, para. 2.63.

¹⁹ *Ibid.*, paras. 3.9-3.12; Vol. III, Ann. 89, p. 73; Ann. 95, pp. 99-100.

²⁰ *Ibid.*, Ann. 125, p. 306; emphasis added.

as the only method available to carry on with the traditions of whaling”, before explaining that

“[w]hatever the issues for which Japan’s past whaling deserves criticism the [whalers] are not to blame. *I want[ed] to somehow retain the work and workplaces, where these men have spent their whole lives, in the form of scientific whaling.*”²¹

More recently, speaking before a sub-committee of the Japanese national legislature in October 2012, the Director-General of the Japan Fisheries Agency recalled how “[m]inke whale meat is prized because it is said to have a very good flavour and aroma when eaten as sashimi and the like”, and that “*the scientific whaling program in the Southern Ocean was necessary to achieve a stable supply of minke whale meat*”²².

30. When these multiple contemporaneous and retrospective statements are considered against the remainder of the evidentiary record in these proceedings, including the detailed analysis in the Judgment demonstrating JARPA II’s shortcomings as a properly designed and implemented programme for purposes of scientific research, as well as statistics showing that Japan has killed the vast majority of whales under special permit since the inception of the moratorium through the 2010-2011 whaling season²³, in my view the conclusion that JARPA II is a commercial whaling programme becomes inescapable.

3. Indefinite Duration of JARPA II

31. The majority makes passing reference to the indefinite duration of JARPA II, noting the open-ended time frame of the programme and opining 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” (Judgment, para. 216). In keeping with my observations made above regarding the dearth of international peer review made in the context of my analysis of paragraph 30, I believe that in assessing the character of JARPA II, a stronger statement as to the incongruity between a programme of indefinite duration and one that is genuinely established for purposes of scientific research would have been appropriate. To this end, recalling Japan’s well-chronicled intention to carry on a whaling programme “in some form or another” in spite of

²¹ Memorial of Australia, Vol. II, Ann. 75, pp. 346-347 (internal quotations omitted); emphasis added.

²² CR 2013/11, p. 18 (Crawford), para. 60 (28 June 2013), referring to judges’ folder of Australia, First round of oral arguments, 26-28 June 2013, Vol. II, tab 108; emphasis added.

²³ Memorial of Australia, Vol. I, para. 2.69 and note 99; Fig. 1 at p. 37.

the moratorium, I find great merit in Australia's contention that an indefinite programme suggests it is "geared towards the perpetuation of whaling by any means until the commercial whaling moratorium is lifted", and that "the open-ended nature of JARPA II precludes a meaningful assessment of whether it has achieved its research objectives" (Judgment, para. 215).

32. Not only do I find such reasoning persuasive, but aside from positing that JARPA II "has no specified termination date because its primary objective (i.e., monitoring the Antarctic ecosystem) requires a continuing programme of research", and providing a vague promise that "a review will be held and revisions made to the programme if required" (*ibid.*, para. 214), I see no convincing answer to these valid critiques raised by Australia. Indeed, Japan openly concedes that a primary objective of JARPA II is to provide "scientific advice" in order to further the aim of eventually lifting the moratorium (*ibid.*, para. 96).

33. Consequently, I believe the indefinite nature of JARPA II is a useful piece of supplementary evidence that militates in favour of its characterization as a commercial whaling programme.

4. Evidence that JARPA II Is Driven by Market Forces

34. The Court received detailed evidence that the dwindling lethal take of minke whales in the latter years of JARPA II was not only directly correlated with a concomitant decline in demand for whale meat on the Japanese market, but that the Government of Japan, both directly and through parastatal agencies ostensibly mandated to advance scientific objectives — such as the Institute of Cetacean Research — actively promoted the consumption of whale meat amongst the Japanese population²⁴. One particularly illustrative news report from the Japanese press in 2006 captures a compelling overview of the prevailing situation when JARPA II was in its infancy:

"Amid concerns about the surplus of whale meat resulting from the expansion in scientific whaling, *a new whale meat wholesaler company . . . was established on 1 May with assistance from the Japan Fisheries Agency and other organizations. Its charter is to develop new sales channels for whale meat, which has almost disappeared from dining room tables during the 25 years since the commencement of the ban on commercial whaling . . .* While middle-aged and older people retain

²⁴ Memorial of Australia, Vol. I, paras. 6.18-6.23; Vol. III, Ann. 135, p. 336; Ann. 136, pp. 338-341; Ann. 137, pp. 343-344; Ann. 139, p. 352; Ann. 141, p. 356; Ann. 143, pp. 364-369; Ann. 145, pp. 373-374; Ann. 147, p. 380; Ann. 148, pp. 382-384; Ann. 152, pp. 396-398.

a fondness for whale meat, it is far less familiar to the younger generation . . . The aim is to encourage its use mixed with other meats and extol its nutritional superiority as a high-protein low-fat meat . . . With the negative image of whaling and the drift away from whale meat among young people, *the key question is whether during such adverse times it will be possible to protect Japan's traditional culture of eating whale meat and carrying out whaling . . . The majority of the budget for scientific whaling is earned from sales of whale meat — courtesy of the Institute of Cetacean Research.*"²⁵

In another report published that same year, we are told that the

"Shimonoseki Marine Sciences Academy . . . has become a major shareholder in Kyodo Senpaku . . . *Japan's only scientific whaling enterprise . . . [and] will use the data [gathered] on whales . . . [to] lend further support towards the resumption of commercial whaling.*"²⁶

And yet another report from later that year informs us that

"[a]n unexpected excess sees a forgotten taste gain 'regular' status on pub menus and targeted at school lunches. *The number of food companies and eateries using whale meat is on the rise.* But while whale meat for culinary purposes is being placed on the market, whale meat inventories have also been expanding. *The people involved with whaling are trying hard to expand consumption. Whale meat sales are a very important financial source for research whaling.* Future research whaling is likely to be obstructed unless whale meat consumption increases, and *this is why industry insiders see it as an emergency issue . . . The Institute of Cetacean Research and other related organizations are aiming to expand sales channels [of] whale meat . . . There is also the fact that Japan is seeking the resumption of commercial whaling at the International Whaling Commission.* At the Annual Meeting, which was held in June this year, the joint declaration put forward by Japan and other pro-whaling nations . . . included the statement that *the temporary ban on commercial whaling was 'no longer necessary'.*"²⁷

In my opinion, the evidence on record (of which the above quotations constitute only an illustration) plainly supports the conclusion that the output of JARPA II was not only responsive to market forces, but in fact

²⁵ Memorial of Australia, Vol. III, Ann. 130, pp. 321-322; emphasis added.

²⁶ *Ibid.*, Ann. 131, p. 325; emphasis added.

²⁷ *Ibid.*, Vol. III, Ann. 133, pp. 329-331; emphasis added.

the broader auspices of the programme were used as a tool to stimulate the commercial consumption of minke whale meat amongst the Japanese population. These explicitly commercial attributes only further entrench the conclusion that JARPA II is a commercial whaling programme.

5. Conclusion regarding JARPA II as a Commercial Whaling Programme

35. In sum, the analysis above regarding the commercial nature of JARPA II may be distilled into the following propositions:

- (i) A correct reading of the ICRW requires that a programme that is not for purposes of scientific research (or aboriginal subsistence) must necessarily be one for commercial purposes.
- (ii) The history of JARPA and JARPA II demonstrates a strenuous and persistent opposition to the IWC's moratorium on commercial whaling by the Government of Japan, and a correlative sustained effort on its part to protect whaling as a sacrosanct component of Japanese society "in some form or another".
- (iii) The indefinite duration of JARPA II is suggestive of its role as an interim measure to promote some vestige of Japan's whaling industry until the ultimate objective of lifting the moratorium on commercial whaling can be achieved.
- (iv) The correlation between JARPA II output and market demand for minke whale meat, as well as the use of ostensibly scientific government agencies operating under the banner of JARPA II, to actively promote whale meat consumption amongst the Japanese populace are by their very nature quintessential hallmarks of commercial enterprise.

36. For these reasons, I am clearly of the opinion that JARPA II is not a programme for purposes of scientific research, but a commercial whaling programme.

(Signed) Dalveer BHANDARI.
