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12 July 2013

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

Dear Sir

With reference to the oral proceedings that opened on 26 June in the case concerning Whaling in the Antarctic (Australia v Japan: New Zealand intervening), I have the honour to refer to your letter 142236 of 8 July 2013 regarding the questions put to New Zealand by Judge Cançado Trindade at the end of the public sitting on 8 July 2013.

I have the honour to enclose the answers from New Zealand to the questions posed by Judge Cançado Trindade.

Yours sincerely

Penelope Ridings
Agent of New Zealand

WHALING IN THE ANTARCTIC

AUSTRALIA v JAPAN (NEW ZEALAND INTERVENING)

RESPONSES OF NEW ZEALAND TO THE QUESTIONS

FROM JUDGE CANÇADO TRINIDADE

ON MONDAY 8 JULY 2013

1. How do you interpret the terms “conservation and development” of whale stocks under the International Convention for the Regulation of Whaling?

1. The terms “conservation and development” must be interpreted by reference to their ordinary meaning in their context and in the light of the object and purpose of the Convention¹.

2. The ordinary meaning of the terms “conservation and development” incorporates the concepts of “preservation and protection” and “restoration or expansion”². This meaning is confirmed by the Preamble to the Convention, which emphasises: “the interest of the nations of the world in safeguarding for future generations the great natural resources represented by whale stocks”³; and that it is “essential to protect all species of whales from overfishing”⁴; in order to allow for the “recovery” of whale stocks⁵.

3. Effective “conservation and development” may lead to circumstances that might allow for the sustainable use of whale stocks⁶. However, in light of the previous excesses of commercial whaling, there needs to be clear scientific evidence of the rebuilding of whale populations before use can be contemplated. This is clearly expressed in the Preamble to the Convention, which provides that whales may be captured only where that is possible “without

¹ Article 31(1) of the *Vienna Convention on the Law of Treaties*.

² “Conservation” means “the action of conserving something, in particular: preservation, protection, or restoration of the natural environment and of wildlife” (*Oxford Dictionaries Online*: <http://oxforddictionaries.com/definition/english/conservation?q=conservation>); synonyms for “development” include “growth”, “increase” or “enlargement” (*Collins English Thesaurus Online*: <http://www.collinsdictionary.com/dictionary/english-thesaurus/development?>)

³ Paragraph 1 of the Preamble to the *Convention*.

⁴ Paragraph 2 of the Preamble to the *Convention*.

⁵ Paragraphs 3 and 5 of the Preamble to the *Convention*.

⁶ Paragraphs 3 and 7 of the Preamble to the *Convention*.

endangering these natural resources”⁷, and that “whaling operations should be confined to those species best able to sustain exploitation”⁸. Further, even if clear evidence were developed that some whale populations had rebuilt to levels at which a sustainable harvest might be possible, the question of whether such a harvest should be undertaken should be weighed carefully in the light of other considerations, consistent with the other provisions of the Convention as a whole.

4. Any such use must be agreed by the parties to the Convention through the collective regulation mechanism of the IWC. That is the essence of the “system of international regulation for the whale fisheries”⁹ established under the Convention, reflected in the function of the Commission to adopt regulations with respect to whaling that are binding on all parties to the Convention¹⁰. Such regulations may be amended and adjusted by the Commission from time to time as provided in Article V. In this way, the Convention gives effect to the general duty under international law for States to cooperate in relation to the conservation of resources having “regard to the rights of other States and the needs of conservation for the benefit of all”¹¹.

5. It is not correct to interpret the terms “conservation and development” to *require* the “optimum utilization” of whale stocks as has been argued by Japan¹². That is clear from the text of the Convention itself. Article V, paragraph 1, refers to “conservation *and* optimum utilization” (emphasis added). Similarly, Article V, paragraph 2(a) refers to “conservation, development *and* optimum utilization” (emphasis added). If “optimum utilization” were intended to be included within the terms “conservation and development” it would not have been necessary to include a specific reference to it in this way. Further, the language of Article V, paragraph 2(a) expressly distinguishes between “optimum utilization” and the object and purpose of the Convention itself.

⁷ Paragraph 3 of the Preamble to the *Convention*.

⁸ Paragraph 5 of the Preamble to the *Convention*.

⁹ Paragraph 6 of the Preamble to the *Convention*.

¹⁰ Article V of the *Convention*.

¹¹ As recognized in the *Fisheries Jurisdiction (United Kingdom v Iceland)*, *Merits, Judgment*, I.C.J. Reports 1974, p. 31., para 72; *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)*, *Merits, Judgment*, I.C.J. 1974, p. 200, para 64. The role of the Convention in respect of the duty of cooperation is further reflected in Article 65 of the 1982 *United Nations Convention on the Law of the Sea*.

¹² CR 2013/13, p. 42, para 11 (Boyle); CR 2013/13, p. 59, para 31, 32 & 63 (Boyle).

6. Nor is Japan's emphasis on a requirement of "optimum utilization" in relation to whales correct as a matter of general international law. Contrary to Japan's assertion that "there is nothing here that distinguishes whales from other marine living resources covered by the Law of the Sea Convention or the Fish Stocks Agreement"¹³, whaling is not subject to the fisheries management provisions of the Law of the Sea Convention as Japan implies¹⁴, but rather to the specific provisions of Article 65 of that Convention¹⁵. That provision preserves the ability of States and the IWC to regulate whaling more strictly than other marine living resources¹⁶. "The regime to be implemented with respect to marine mammals is a conservation regime; it does not have the dual role of exploitation and conservation as the other regimes for transboundary marine fisheries resources do."¹⁷ Accordingly, the norm of optimum utilization does not apply¹⁸.

7. Further, rather than supporting a general international legal requirement of "optimum utilization" the agreements referred to by Japan in support of its contention¹⁹ are in fact evidence of the:

*"limits placed by international law on the rate of use or manner of exploitation of natural resources, including those that are shared or in an area beyond national jurisdiction. These standards cannot have an absolute meaning. Rather their interpretation is, or should be, implemented by States acting co-operatively, or by decisions of international organizations [...]"*²⁰. (emphasis added)

¹³ CR 2013/13 p. 54, para 45 (Boyle).

¹⁴ CR 2013/13, p. 49, para 31, 42 & 45 (Boyle)

¹⁵ Nordquist ed. *UN Convention on the Law of the Sea 1982: A Commentary* Vol II (2002, Kluwer Law International) at pp. 663-664, para 65.11(c) & (d). See also Article 120 of the 1982 *United Nations Convention on the Law of the Sea* which applies Article 65 to the conservation and management of marine mammals in the high seas.

¹⁶ The provision reads: "Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study."

¹⁷ Ellen Hey "The Provisions of the United Nations Law of the Sea Convention on Fisheries Resources and Current International Fisheries Management Needs" in Hey, Burke, Ponzoni, Sumi *The Regulation of Driftnet Fishing on the High Seas: Legal Issues* (FAO Legislative Study 47, Rome, 1991) at p. 7.

¹⁸ Francisco Orrega Vicuna *The Changing International Law of High Seas Fisheries* (Cambridge University Press, 1999) p. 37 citing P W Birnie & A E Boyle *International Law and the Environment* (1st ed: Clarendon, 1992) at 533; and see similarly P W Birnie, A E Boyle & C Redgwell *International Law and the Environment* (3ed: Oxford University Press, 2009) at 724 "[Article 65] removes all marine mammals from the full application of Part V in that optimum utilization is not required".

¹⁹ CR 2013/13, pp 50-52, para 34-41, pp. 54-56, para 48-53 (Boyle).

²⁰ Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law*, 3rd ed, (Cambridge University Press, 2012), at p. 213.

2. In your view, can a programme that utilizes lethal methods be considered “scientific research” in line with the object and purpose of the International Convention for the Regulation of Whaling?

1. Article VIII, paragraph 1, provides that a Contracting Government may issue a Special Permit authorizing its nationals to “kill, take and treat whales for purposes of scientific research”. The terms of the Article therefore recognize that the killing of whales may be permitted “for purposes of scientific research”.

2. However, that statement of purpose requires that a Special Permit may only be issued to permit lethal research where science requires it. That is, where lethal research methods are the only means available. Further, the use of lethal research methods must be reasonable in proportion to Article VIII’s limited role as a mechanism for the conduct of scientific research within the collective framework of the Convention as a whole. That is, the contribution of the research to the work of the IWC must be sufficient to justify the use of lethal research methods. Finally, lethal research methods may be used only where they create no risk of adverse effect on the stock.

3. This is confirmed by the requirements of Paragraph 30 of the Schedule, which requires that the Scientific Committee review the “objectives of the research”, the “number, sex, size and stock” of the whales to be taken, and “the possible effect on conservation of stock”. It is further confirmed by the resolutions adopted by the IWC, which demonstrate a consistent expectation that whales will be killed “for purposes of scientific research” only where there are no other research methods available and the research is essential to rational management by the IWC or other critical research needs²¹. It is also reinforced by the general principle of international law requiring States to adopt a precautionary approach²².

²¹ IWC Resolution 1986-2 “Resolution on Special Permits for Scientific Research” (adopted by consensus) at paragraphs 5 & 8 (M.A. Ann. 43, Vol II, p. 148); IWC Resolution 1987 “Resolution on Scientific Research Programmes” (adopted by majority vote) at paragraph 1 (MA, Ann 44, Vol II, pp. 150-156); IWC Resolution 1990-5 “Resolution on Redirecting Research towards Non-Lethal Means” (adopted by majority vote) at paragraph 2, <http://iwc.int/resolutions>; IWC Resolution 1995-9 “Resolution on Whaling under Special Permit” (adopted by majority vote) at paragraphs 1 & 6 (MA, Ann. 46, Vol. II pp. 153-154); IWC Resolution 1999-2 “Resolution on Special Permits for Scientific Research” (adopted by majority vote) at paragraph 1 (MA, Annex 47, Vol II, p. 155); IWC Resolution 2003-2 “Resolution on Whaling under Special Permit” (adopted by majority vote) at paragraph 5 (MA, Annex 38, Vol II, p. 143.)

²² *Written Observations of New Zealand*, para 73-75; CR 213/17, pp. 39-41, para 15-18 (Ridings).

4. New Zealand considers that any alternative interpretation would be inconsistent with the object and purpose of the Convention.

3. In your view, does the fact that the International Convention for the Regulation of Whaling is a multilateral treaty, with a supervisory organ of its own, have an impact on the interpretation of its object and purpose?

1. The establishment by the *International Convention for the Regulation of Whaling* (ICRW) of a *permanent commission*, distinguished it from the earlier 1937 Agreement²³. The setting up of a Commission which is empowered to carry out decision-making and recommendatory functions indicates that the parties to the multilateral treaty are to cooperate with each other in good faith in order to achieve the *purposes* for which the *organisation* was established. This interpretation is supported by the *travaux* to the ICRW, in which it was recognised that whale conservation “must be an international endeavour”²⁴.

2. The supervisory powers given to the Commission are evidence of that collective enterprise. As Australia has indicated in its oral presentation, this can be contrasted with a bilateral treaty, such as in the *Pulp Mills* case²⁵. This was recognized by this Court in its Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*. With respect to treaties of this nature, the constituent treaty establishes an organisation to which “the parties entrust the task of realizing common goals”²⁶. Furthermore, as Judge Lachs said in his Separate Opinion in the Advisory Opinion in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the supervisory organ both represents and is subject to the collective will of the members. Although the decisions of the organ may “conflict with the will of its individual members”, the individual member still “shares in the collective interest”²⁷ and must therefore act accordingly.

3. In a Convention such as the ICRW, therefore, the existence of a supervisory organ reinforces that the object and purpose must be interpreted in light of the collective interest of

²³ “Minutes of the Opening Session”, IWC/11 (20 November 1946), JCM Annex 16, Vol. II, pp. 129-131 at p. 129.

²⁴ Secretary of State Dean Acheson, “Minutes of the Opening Session”, IWC/11 (20 November 1946), JCM Annex 16, Vol. II, pp. 129-131 at p. 130.

²⁵ CR 2013/19, p. 65, para 23 (Crawford).

²⁶ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66 at p. 75 (paragraph 19).

²⁷ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73 at p. 111.

the parties. In the case of the ICRW this means the collective interest of the parties in the conservation and management of whale stocks.

4. **You have stated in your Written Observations (of 4 April 2013) that the object and purpose of the International Convention for the Regulation of Whaling is: “to replace unregulated, unilateral whaling by States with collective regulation as a mechanism to provide for the interests of the parties in the proper conservation and management of whales” (p. 16, para. 33). In your view, is this a widely accepted interpretation nowadays of the object and purpose of the International Convention for the Regulation of Whaling?**

1. The object and purpose of the Convention, as cited above, is drawn from the Preamble to the Convention and is confirmed by the *travaux* to the Convention²⁸.

2. The collective regulation purpose of the IWC was recognised in Article 65 of the United Nations Law of the Sea Convention, which requires States to cooperate with a view to the conservation of marine mammals and to work through the appropriate international organisation. It is widely accepted that the International Whaling Commission is the appropriate organisation for the conservation and management of whales²⁹.

3. This object and purpose of the IWC has been also accepted in recent years by key members of the IWC. For example, at the 58th meeting in 2006, Denmark reminded the Commission that “it is only through international regulation that the long-term conservation of whales can be ensured³⁰.” The following year, the US Chair of the IWC in 2007 stressed “the importance of finding a way for the Commission members to *work together* [...] so as to find a way for the IWC to be the effective organisation for the management and conservation of whales *it was intended to be*” (emphasis added)³¹. At the 60th Annual Meeting, St Kitts and Nevis, known as a ‘pro-whaling’ IWC member, “reminded Parties that whales in the high seas are considered common property that therefore required a collective management approach within the framework of the ICRW”³².

²⁸ CR 2013/17, pp. 17-20; para 4-19 (Finlayson).

²⁹ 1992 United Nations Conference on Environment and Development, Chapter 17 of Agenda 21, paragraph 17.61: “States recognize: (a) The responsibility of the International Whaling Commission for the conservation and management of whale stocks and the regulation of whaling pursuant to the 1946 International Convention for the Regulation of Whaling. http://www.un.org/depts/los/consultative_process/documents/A21-Ch17.htm

³⁰ Chair’s Report of the 58th Annual Meeting, *Annual Report of the International Whaling Commission 2006*, at p. 24; Australia’s Judges’ Folder, Second Round, Day 2, Tab 50.

³¹ Chair’s Report of the 59th Annual Meeting, *Annual Report of the International Whaling Commission 2007*, JCM, Vol II, Annex 66, p. 417. At the same meeting Australia stated [*ibid*, p. 419] that it believed “that the Convention had been brought in to replace unilateral action with the protection of whales through international regulation.”

³² Chair’s Report of the 60th Annual Meeting, *Annual Report of the International Whaling Commission 2008*, JCM, Vol II, Annex 67, p. 425.

4. Although, admittedly, there was no united single view of the purpose of the IWC during the Small Working Group (SWG) process on the Future of the IWC, the Chair of the fourth meeting of the SWG in 2010 urged the SWG to remember that “while respecting individual national interests, all must recognise that a future of good, international conservation and management of whales requires collective responsibility”³³. Furthermore, there was general agreement on the proposed “vision” espoused during the SWG process that: “[T]he IWC will *work co-operatively* to improve the conservation and management of whale populations and stocks on a scientific basis and through agreed policy measures” (emphasis added)³⁴.

³³ *Report of the fourth meeting of the Small Working Group (SWG) on the Future of the IWC, Florida, United States, 2-4 March 2010*, IWC 62/62-6 Rev “Future of the IWC”, p. 3: <http://iwc.int/iwc62docs>

³⁴ *Ibid*, p. 3.