



**Australian Government**  
**Attorney-General's Department**

**Office of International Law**

19 July 2013

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

Dear Mr Couvreur

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

I have the honour to refer to the opportunity accorded Australia by the Court to comment on the responses provided by Japan in the course of the oral proceedings to questions asked of Japan by Judges of the Court. This opportunity applies in circumstances where the relevant questions were responded to by Japan after the completion of Australia's oral pleadings to the Court.

The comments of Australia on the responses of Japan to the following questions are attached:

- Questions from Judge Donoghue on 2 July 2013 (CR 2013/12, p.64)
- Questions from Judge Greenwood on 4 July 2013 (CR 2013/16, p.62)
- Question from Judge Donoghue on 4 July 2013 (CR 2013/16, p.62)
- Question from Judge Cançado Trindade on 8 July 2013 (CR 2013/17, p.49)
- Question from Judge Cançado Trindade on 8 July 2013 (CR 2013/17, p.49)
- Question from Judge *ad hoc* Charlesworth on 8 July 2013 (CR 2013/17, p.50)

In line with the instructions of the Court referred to in your letter of 10 July 2013 we assume, in the absence of any request for further clarification by the Court, that the attached comments of Australia will complete the process of response and comment from the Parties to these questions.

Yours sincerely

A handwritten signature in black ink, appearing to read 'W.M. Campbell'.

W M Campbell QC  
Agent of Australia

## Australian responses to Japan's answers to Judges' questions

On 2 July 2013, Judge Donoghue asked Japan the following questions:<sup>1</sup>

*"What analysis of the feasibility of non-lethal methods did Japan conduct prior to the setting of sample sizes for each year of JARPA II?" and*

*"How did any such analysis bear upon those sample sizes?"*

Japan offered an initial response in its first round,<sup>2</sup> to which Australia responded in its second round.<sup>3</sup>

Japan offered a further response to the question in its second round, on 15 July, involving the presentation of new documents.<sup>4</sup> Professor Boyle referred Judge Donoghue to extracts of "cruise reports", set out at Tab 19 of the Judges' Folder (Japan, Volume 3, Second Round). It is plain that the "cruise reports" extracted at Tab 19 do not contain any analysis of the feasibility of non-lethal methods. They do no more than offer an account of non-lethal samples obtained between 1987/88 and 2012/13.

Further, Professor Boyle informed the Court that a "further analysis of the use of lethal and non-lethal methods was carried out in 2007", referring to an article at Tab 20 of the Judges' Folder (Japan, Volume 3, Second Round).<sup>5</sup>

Australia notes that the document has not previously been put forward in these proceedings and is undated. Australia further notes that the document does not respond to Judge Donoghue's question as it relates to JARPA,<sup>6</sup> is general in its approach, and mainly addresses issues of practicality and the need "to fund ... some cost recovery".<sup>7</sup> The article notes that 'the ability to utilize the resource is also a factor' in weighing up lethal and non-lethal methods.<sup>8</sup>

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<sup>1</sup> CR 2013/12, p. 64 (Judge Donoghue).

<sup>2</sup> CR 2013/15, pp. 69-70, paras. 95-97 (Boyle).

<sup>3</sup> CR 2013/19, pp. 46-47, para. 56 (Sands).

<sup>4</sup> CR 2013/22, p. 28, para. 64 (Boyle).

<sup>5</sup> *Ohsumi, S., Goto, M., and Otani, S., "Necessity of combining lethal and non-lethal methods for whale population research and their application in JARPA", doc. SC/59/O2 (2007), available at: <http://www.icrwhale.org/pdf/SC-59-O2.pdf>, accessed 14 July 2013*

<sup>6</sup> *Ibid.*, Table 2, p. 5

<sup>7</sup> *Ibid.*, p.3.

<sup>8</sup> *Ibid.*, p.3 and table at p.5

The response offered by Professor Boyle indicates that Japan has been unable to offer the Court evidence that it conducted an analysis of the feasibility of non-lethal methods prior to the setting of sample sizes for each year of JARPA II.

The responses to Judge Donoghue's questions are that:

**(1) on the basis of the evidence before the Court Japan has conducted no analysis of the feasibility of non-lethal methods prior to the setting of sample sizes for each year of JARPA II; and**

**(2) the adoption of sample sizes for each year of the JARPA II programme is not informed in any way by any such analysis.**

On 4 July 2013, Judge Greenwood asked Japan the following questions:<sup>9</sup>

*"(1) What emerged from Japan's analysis of the results from JARPA that led it to conclude that the sample size for Antarctic minke whales employed in JARPA was inadequate and that it was necessary to employ in JARPA II a much larger sample size for Antarctic minke whales, while the sample size for humpback and fin whales remained unchanged?" and*

*"(2) Why did Japan proceed with the higher JARPA II sample size for Antarctic minke whales before the Scientific Committee had the opportunity to study the final results from JARPA?"*

On 15 July, Professor Boyle attempted to respond to the first question.<sup>10</sup> He told the Court that "JARPA II is not simply an extension of JARPA" and that its "new objectives ... requires a larger sample size". He asserted that the matter was "a little complicated", and referred the Court to a one page document ("Reasons for Enlarging Sample Size", at Tab 15-6 in the Judges' Folder (Japan, Volume 3, Second Round)). Contrary to its title, that document does not provide any chain of reasoning. It merely lists asserted facts under headings such as "Research Items", "Expected Outcomes" and "Research Periods" leaving it to the reader to deduce what the actual reason for the higher take might be.

Professor Boyle did not point to any "analysis of the results from JARPA", or any evidence to explain how Japan concluded that "the sample size for Antarctic minke whales employed in JARPA was inadequate and that it was necessary to employ in JARPA II a much larger sample size for Antarctic minke whales".

As regards fin and humpback whales, Professor Boyle stated that "the JARPA programme did not include the taking of fin or humpback whales since it did not cover multi-species modelling, so there is no comparison therefore between the sample sizes for those species from one programme to the other".<sup>11</sup> He offered no convincing explanation, let alone evidence, to the Court to indicate the basis upon which Japan determined that "multi-species modelling" met a critical research need. Professor Boyle's explanation of Japan's decision to adopt different parameters and choices in setting sample sizes for fin and humpback whales,

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<sup>9</sup> CR 2013/16, p.62 (Judge Greenwood)

<sup>10</sup> CR 2013/22, p. 32, paras. 78-81 (Boyle).

<sup>11</sup> *Ibid.*, para. 80.

as compared with minke whales, was unconvincing and offered no basis for his assertion that that “the sample sizes were calculated on the basis of carefully selected parameters, using a standard scientific formula”. Moreover, neither he nor any other counsel made any substantiated case to maintain the killing of any fin or humpback whales in the future. Indeed, in its second round, counsel for Australia noted that the part of the JARPA II programme “appears on the basis of the first round, to all intents and purposes, to have been abandoned”,<sup>12</sup> and it was notable that no counsel for Japan, nor its Agent, clearly and consistently contradicted that conclusion. In a contradictory fashion, Professor Boyle asserted that the taking of fin and humpback whales were both “not essential” and “crucially important”, but he offered no evidence to support the killing of any fin or humpback whales, and neither he nor any other counsel sought to deal with the concerns expressed by Professor Walløe over the inclusion of humpback and fin whales in JARPA II.<sup>13</sup> These assertions were made by Professor Boyle without any evidence or authority, beyond a vague and unreferenced assertion in the JARPA II Plan.<sup>14</sup> Professor Pellet more or less confirmed that the taking of these species were not required when he rationalised the killing of no humpbacks and only a very small number of fin whales by stating: « Cette limitation va dans le sens de la politique d’apaisement qu’a poursuivie le Japon au sein de la CBI ». <sup>15</sup>

Professor Hamamoto responded to Judge Greenwood’s second question on the same day.<sup>16</sup> He offered a chronology, which helpfully confirms that Japan proceeded with the higher JARPA II sample size for Antarctic minke whales before the Scientific Committee had the opportunity to study the final results from JARPA (Judges’ Folder, Japan, Volume 3, Second Round, Tab 23). Furthermore, not one of the five points made by Professor Hamamoto in his oral introduction of the chronology<sup>17</sup> addresses the question from Judge Greenwood. All of the five points he made are matters that arose after the commencement of JARPA II. As such they provide no explanation of the reasons of Japan existing at the time the decision was taken to proceed with JARPA II before its review was complete. The points are merely an *ex post facto* justification, of no support to Japan.

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<sup>12</sup> CR 2013/19, p. 54, para. 78 (Sands).

<sup>13</sup> CR 2013/22, p. 26, para. 53 (Boyle).

<sup>14</sup> Government of Japan, “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”, 2005, SC/57/O1 (JARPA II Plan), [MA, Annex 105], pp.13-14.

<sup>15</sup> CR 2013/23, p. 24, para. 24 (Pellet).

<sup>16</sup> CR 2013/22, pp. 41-46, paras. 2-15 (Hamamoto).

<sup>17</sup> CR 2013/22, p. 45, para. 12 (Hamamoto).

Professor Hamamoto stated that the decision to so proceed was taken « pour assurer la cohérence et la continuité des données obtenues dans la zone de recherché ... en lançant un nouveau programme de recherche qui suivrait JARPA sans interruption ». <sup>18</sup>

Australia notes the obvious inconsistency between the responses offered by Professors Boyle and Hamamoto: the former presents JARPA II as a completely new program,<sup>19</sup> whereas Professor Hamamoto refers to the need for continuity between JARPA and JARPA II to ensure that any break in the collection of data might be avoided. Professor Boyle asserted (without the benefit of any supporting evidence) that the sample size had to be increased because JARPA II was a new programme with new objectives. This supports the conclusion that there was no need to commence JARPA II before the review of JARPA was complete. Professor Hamamoto, on the other hand, asserted that JARPA II had to be initiated before the Scientific Committee had studied the final results from JARPA because of the need to ensure continuity between the JARPA and JARPA II programmes (an assertion that was also unsupported by any evidence).

Australia further notes that Japan's expert, Professor Lars Walloe, was unable to offer a basis to understand how Japan selected its sample sizes in JARPA II, or why it chose to proceed with JARPA II before the results of JARPA could be studied.

The response to Judge Greenwood's questions is that:

**(1) Japan has provided no convincing explanation, let alone any evidence, to indicate any scientific basis for Japan "to conclude that the sample size for Antarctic minke whales employed in JARPA was inadequate" or for Japan's decision "to employ in JARPA II a much larger sample size for Antarctic minke whales"; and**

**(2) Japan has not provided a convincing explanation, let alone evidence, to indicate any scientific basis for the decision to "proceed with the higher JARPA II sample size for Antarctic minke whales before the Scientific Committee had the opportunity to study the final results from JARPA".**

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<sup>18</sup> CR 2013/22, pp. 46, para. 13 (Hamamoto).

<sup>19</sup> CR 2013/22, pp. 32, para. 78 (Boyle).

On 4 July, Judge Donoghue asked Japan the following question:<sup>20</sup>

*“Today, tab 58-12 of the judges’ folder contains some information about Japan’s catch levels before the moratorium. I would like some more precise information, please, as follows. For the ten years before the commercial moratorium took effect for Japan, what was the annual commercial catch of each of the three JARPA II target species (minke whales, fin whales and humpback whales) by Japanese vessels in the JARPA and JARPA II research areas? If it is not possible to give a precise answer as to the JARPA and JARPA II research areas, please provide annual catch figures for each species with respect to a larger area, e.g., the Southern Hemisphere. In such a case, you are invited to offer any observations about the extent to which one can extrapolate from catch figures relating to the larger area, in order to gain an appreciation of the pre-moratorium catch figures relevant to the JARPA and JARPA II research areas.”*

Professor Hamamoto responded to this question on 15 July<sup>21</sup> and used a number of graphs in doing so (Judges’ Folder, Japan, Volume 3, Second Round).

Putting to one side the other information contained in the graphic found at Tab 15-12 of the Judges’ Folder, Australia does not dispute the total figures for Japanese commercial catches of Antarctic minke whales between 1977 – 86 represented by the yellow bars on that graphic.

Australia also stands by the accuracy of the graphic entitled “Commercial catch numbers in the JARPA II Areas in the 10 seasons prior to the Moratorium coming into effect for Japan”, which is located at Tab 44 of the Judges’ Folder (Australia, Second round of oral arguments). This was presented by Professor Crawford during the second round of oral argument by Australia on 10 July.<sup>22</sup> This graphic contains a line depicting the maximum target catch of 935 minke whales per year. The graphic at Tab 15-23 of the Judges’ Folder (Japan, Volume 3, Second Round) may have given the impression, by reference to a line described as “average per annum”, that the maximum target figure of 935 should be halved. That impression, if conveyed, is wrong. The maximum target figure for JARPA II remains 935.

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<sup>20</sup> CR 2013/16, p. 62 (Judge Donoghue).

<sup>21</sup> CR 2013/22, pp. 49 – 50, paras. 27 – 32 (Hamamoto).

<sup>22</sup> CR 2013/20, p. 24, para. 61 (Crawford).

The response to Judge Donoghue's question is that:

**the relevant total figures are reflected in the yellow bars on the graphic found at Tab 15-12 of the Judges' Folder of Japan for the Second Round and, in respect of the area covered by JARPA II, also at Tab 44 of the Judges' Folder of Australia for the Second Round.**

On Monday 8 July, Judge Cançado Trindade asked Japan the following question:<sup>23</sup>

*“To what extent would the use of alternative non-lethal methods affect the objectives of the JARPA-II programme?”*

Professor Hamamoto sought to respond to this question on Monday 15 July.<sup>24</sup> He did so by general assertions unsupported by evidence.

As already shown by Australia, the objectives of JARPA II (i) are so vague and general as to be unachievable,<sup>25</sup> (ii) do not address critical research needs,<sup>26</sup> and (iii) on their own terms cannot be attained because they are premised on the use of lethal methods on three species of whales, and in fact no humpbacks and only a limited number of fins have been taken.<sup>27</sup> As a result of these aspects, the objectives of JARPA II cannot be achieved in any case, irrespective of the methods that are selected for use. Accordingly, the use of alternative non-lethal methods cannot adversely affect the objectives of the JARPA II programme.

Professor Hamamoto asserts that «ce sont les objectifs de recherche qui dictent les méthodes, et non pas l'inverse», and that «En outre, il n'existe pas de méthode non létale «alternative» puisque certaines données indispensables ne peuvent être obtenues que par des méthodes létales.»<sup>28</sup> Once again, Japan offers no evidence to explain how the objectives of JARPA II were elaborated, or how those objectives took into account alternative, non-lethal methods. Professor Hamamoto simply asserts that the objectives dictated the methods but offers no evidence to substantiate the claim. In the absence of such evidence, it appears that the objectives were adopted – and are applied – so as to allow the killing of whales. That is, the methods dictate the objectives, and not the other way around.

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<sup>23</sup> CR 2013/17, p. 49 (Judge Cançado Trindade).

<sup>24</sup> CR 2013/22, pp. 47-49, paras. 16-26 (Hamamoto).

<sup>25</sup> CR 2013/8, p. 56, para. 4 (Sands); see also: M Mangel, “An Assessment of Japanese Whale Research Programs Under Special Permit in the Antarctic (JARPA, JARPA II) as Programs for Purposes of Scientific Research in the Context of Conservation and Management of Whales”, April 2011, Appendix 2 to AM (Mangel, **Original Expert Opinion**), paras. 5.4-5.10; M Mangel, “Supplement to An Assessment of Japanese Whale Research Programs Under Special Permit in the Antarctic (JARPA, JARPA II) as Programs for Purposes of Scientific Research in the Context of Conservation and Management of Whales”, 15 April 2013 (Mangel, **Supplementary Expert Opinion**), paras. 3.1-3.10, 6.1-6.9; N Gales, “Statement by Dr Nick Gales”, 15 April 2013 (Gales, **Expert Statement**), para. 43.13, 3.18-3.24

<sup>26</sup> CR 2013/10, p. 16 (Gales); CR 2013/10, pp. 36-37 (Sands); CR 2013/19, p. 47, para. 59 (Sands); CR 2013/19, pp. 52-53, para. 74 (Sands); Mangel, **Supplementary Expert Opinion**, para. 7.2.

<sup>27</sup> CR 2013/19, p. 25, para. 4 (Sands); CR 2013/19, p. 53, para. 74 (Sands); Mangel, **Supplementary Expert Opinion**, paras. 5.15 and 5.36-37.

<sup>28</sup> CR 2013/22, p. 47, para. 17 (Hamamoto).

Beyond these general observations, Australia makes the following comments in relation to Japan's response as it relates to each objective:

### *Objective 1*

In relation to Objective 1 (monitoring of the Antarctic ecosystem), Professor Hamamoto asserts that « ... on observe et examine un éventail d'éléments comme le taux de conception, l'âge de la maturité sexuelle, les changements annuels de la quantité des proies consommées, l'épaisseur de graisse ou l'accumulation des polluants », and that, « [I]es données relatives à ces éléments ne peuvent pas être obtenues au moyen des méthodes non létales... ».<sup>29</sup> Australia has made clear that this objective is nothing more than monitoring and data collection, neither of which are to be “considered research since there is no focused question or hypothesis”.<sup>30</sup> The objective is premised on the collection of lethal data from three species, yet Japan effectively only collects lethal data from one species: since the objective cannot be met in any case,<sup>31</sup> the use of non-lethal means would have no adverse effect.

### *Objective 2*

In relation to Objective 2 (modeling competition among whale species and developing future management objectives), Professor Hamamoto asserts that «les données relatives aux tendances des contenus stomacaux, en particulier de leurs quantités, sont indispensables pour atteindre cet objectif et ne peuvent être obtenues qu'au moyen de méthodes létales».<sup>32</sup> The Scientific Committee has expressed serious doubts as to whether stomach contents can provide useful information about the feeding behavior of whales,<sup>33</sup> and about the reliability of the stomach contents data arising from JARPA and JARPA II.<sup>34</sup> The Scientific Committee's approach to ecosystem modeling does not require lethal data.<sup>35</sup> Further, and as with Objective 1, a multi-species programme cannot be undertaken by reference to a single

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<sup>29</sup> CR 2013/22, p. 47, para. 18 (Hamamoto).

<sup>30</sup> Mangel, Original Expert Opinion, para 5.9; see also: CR 2013/9, p. 18, paras. 20-21 (Sands); Mangel, Supplementary Expert Opinion, paras 3.6, 6.3.

<sup>31</sup> CR 2013/19, p. 25, para. 4 (Sands); CR 2013/19, p. 53, para. 74 (Sands); CR 2013/9, p. 18, para. 20 (Sands).

<sup>32</sup> CR 2013/22, pp. 47-48, para. 19 (Hamamoto).

<sup>33</sup> CR 2013/19, p. 49, para. 64 (Sands); see also “Report of the Scientific Committee” (2007), *J. Cetacean Res Manage. 10 (Suppl.)*, 2008, available at: <http://iwc.int/scientific-committee-reports>, p.45; “Report of the Scientific Committee” (2011), *J. Cetacean Res Manage. 13 (Suppl.)*, 2012, available at: <http://iwc.int/scientific-committee-reports>, p.51; N Gales, “Statement by Nick Gales in Response to the Expert Statement by Professor Lars Walløe”, 31 May 2013 (**Gales, Response to Prof Walløe**), paras. 4.5-4.10; Gales, Expert Statement, para. 5.9, eighth dot point; Mangel, Supplementary Expert Opinion, para. 3.28.

<sup>34</sup> CR 2013/19, p. 49, para. 64 (Sands); see also Report of the Scientific Committee” (2012), *J. Cetacean Res Manage. 14 (Suppl.)*, 2013, available at: <http://iwc.int/scientific-committee-reports>, p.51.

<sup>35</sup> CR 2013/9, p. 21, para. 27 (Sands); see also: Gales, Expert Statement, para. 4.11.

species:<sup>36</sup> since the objective cannot be met, the use of non-lethal means would have no adverse effect.

### *Objective 3*

In relation to objective 3 (elucidation of temporal and spatial changes in stock structure), everything that is needed to be known about stock structure and whale movements can be achieved through non-lethal techniques, including biopsy samples and attaching satellite tags.<sup>37</sup> Both of these techniques have been shown to be feasible for Antarctic minke whales in the Southern Ocean.<sup>38</sup> Moreover, lethal techniques are inferior in this respect, as they cannot monitor the movement of whales.<sup>39</sup> The use of non-lethal means would have no adverse effect on this objective.

### *Objective 4*

With respect to objective 4 (improving the management procedure for minke whale stocks) Professor Hamamoto has simply referred back to his conclusions on the first three objectives.<sup>40</sup> Professor Hamamoto asserts that « le projet de JARPA II de 2005 indique que des données biologiques, y compris celles relatives à l'âge, sont nécessaires pour améliorer les estimations du taux de rendement maximum de renouvellement, qui est essentiel à la mise en oeuvre de la RMP ». <sup>41</sup> To the extent that Japan relies on its assertions under objectives 1 through 3, the comments above are applicable. On the point of biological data being necessary for parameters such as maximum sustainable yield rate (MSYR), three points may be made: (1) the Scientific Committee came to the conclusion long ago that determining sufficiently precise estimates of MSYR was not possible;<sup>42</sup> (2) the relevant Workshop of the Scientific Committee concluded in 2009 that estimates of MSYR from JARPA and JARPA II data were of "low reliability";<sup>43</sup> and (3) the Scientific Committee at its 2013 meeting again concluded that MSYR estimates derived from JARPA and JARPA II age data, and using the

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<sup>36</sup> CR 2013/19, p. 25, para. 4 (Sands); CR 2013/19, p. 53, para. 74 (Sands); CR 2013/9, p. 20, para. 25 (Sands); Mangel, Supplementary Expert Opinion, paras. 5.15 and 5.36-37.

<sup>37</sup> CR 2013/9, p. 22, para. 28 (Sands); see also: Gales, Expert Statement, para 4.8, third dot point of para. 5.9.

<sup>38</sup> Gales, Expert Statement, paras. 6.15-6.16; Gales, Response to Prof Walløe, paras 2.1-2.18.

<sup>39</sup> Gales, Expert Statement, paras. 3.43, 4.8.

<sup>40</sup> CR 2013/22, p. 48, para. 21 (Hamamoto).

<sup>41</sup> Ibid.

<sup>42</sup> Gales, Expert Statement, paras. 5.4, third dot point of para. 5.8; Gales, Response to Prof Walløe, para. 3.4.

<sup>43</sup> "Report of the Intersessional Workshop on MSYR for Baleen Whales" (SC/61/Rep6), *J. Cetacean Res Manage 11 (Suppl. 2) 2010*, 493-508 (available at: <http://iwc.int/workshop-reports#!year=2009>), at p.502; see also: Gales, Expert Statement, seventh dot point of para 5.9; Gales, Response to Prof Walløe, para. 3.6.

Statistical Catch-at-Age (“SCAA”) model, were “not robust”.<sup>44</sup> It follows that the aims of objective 4 are not being met, and the move to non-lethal means would have no adverse effect.

The response to Judge Cançado Trindade’s question is:

**the use of alternative non-lethal methods by Japan would not affect the objectives of the JARPA-II programme.**

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<sup>44</sup> CR 2013/19, p. 48, para. 62 (Sands); “Report of the Sub-Committee on In-depth Assessments”, Annex G to the “Report of the Scientific Committee Annual Meeting 2013” (available at: <http://iwc.int/screport>), p.2.

On Monday 8 July, Judge Cançado Trindade asked Japan the following question:<sup>45</sup>

*“What would happen to whale stocks if many, or even all States Parties to the International Convention for the Regulation of Whaling, decided to undertake “scientific research” using lethal methods, upon their own initiative, similarly to the modus operandi of JARPA II?”*

Professor Hamamoto sought to respond to this question on 15 July.<sup>46</sup> He avoided offering an answer to the main point of Judge Cançado Trindade’s question, namely “what would happen to the whale stocks” if many or all of States Parties to the ICRW used the “*modus operandi*” of JARPA II. Instead, Professor Hamamoto pointed to a few select factors which might mitigate the effects of multiple programs similar to JARPA II, including: a catch size that does not prejudice the relevant stock; cooperation between programmes; submission of a research programme under Annex P; and taking account of existing data obtained from other programmes.<sup>47</sup>

These factors do not adopt the “*modus operandi*” of JARPA II referred to in the question from Judge Cançado Trindade. An indication offered by Professor Hamamoto as to the true “*modus operandi*” referred to in that question is his statement that « ... tous les programmes de recherche devraient se soumettre aux conditions que le Japon a explicitées dans son contre-mémoire et au cours des audiences. »<sup>48</sup> That *modus operandi*, expressed in Japan’s own words, includes the following :

- “In other words, the ICRW does not regulate special permit whaling: indeed, except for Article VIII itself, the ICRW does not apply to special permit whaling. Special permit whaling cannot be assessed against any criteria in the ICRW”. (In this respect an exception is made in a footnote referring to the Scientific Committee’s role under paragraph 30 of the Schedule to review and comment).<sup>49</sup>
- « Je continue de penser, Monsieur le président, qu’il est difficile d’envisager volonté plus nette de conférer aux Etats parties à un traité une marge d’appréciation plus étendue dans son application. »<sup>50</sup>

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<sup>45</sup> CR 2013/17, p. 49 (Judge Cançado Trindade).

<sup>46</sup> CR 2013/22, p. 49, paras. 23-26 (Hamamoto).

<sup>47</sup> *Ibid*, paras. 24 – 25.

<sup>48</sup> *Ibid*, para. 24.

<sup>49</sup> JCM, para. 7.15.

<sup>50</sup> CR 2013/23, p. 15, para. 5 (Pellet).

- “No other State or body is given the power to impose restrictions or conditions upon the exercise by a Contracting Government of its right to authorise special permit whaling. No other State or body is given the power to overturn decisions taken by a Contracting Government in the exercise of its right to authorise special permit whaling.”<sup>51</sup>
- « *Ergo*: aucun organe de la CBI ne peut s’opposer à la délivrance de permis spéciaux, même s’ils peuvent, bien entendu, les examiner et les commenter. »<sup>52</sup>
- « Je le redis, Mesdames et Messieurs les juges : il ne vous appartient pas – il ne nous appartient par, à nous juristes, de porter un jugement sur le bien-fondé au fond de telle ou telle position scientifique... »<sup>53</sup>

This actual *modus operandi* adopted by Japan, as reflected in Professor Hamamoto’s words, makes it clear that each Contracting Government would be entirely free to decide for itself to issue permits under Article VIII, for the taking of any number of whales, for any purpose that the State itself deemed scientific and without any form of binding review, provided these decisions are not arbitrary or capricious. If many, or all of the Contracting Governments to the ICRW acted on the same basis, there would undoubtedly be adverse effects on fin, humpback and other whale stocks, having regard to the current information available on stocks.

The response to Judge Cançado Trindade’s question is that:

**if many, or even all States parties, decided to undertake “scientific research” using a similar *modus operandi* to JARPA II there would undoubtedly be adverse effects on whale stocks, having regard to current numbers.**

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<sup>51</sup> JCM, para. 7.16.

<sup>52</sup> CR 2013/23, p. 16, para. 7 (Pellet).

<sup>53</sup> CR 2013/23, p. 23, para. 21 (Pellet).

On Monday 8 July, Judge *ad hoc* Charlesworth asked Japan the following question:<sup>54</sup>

*“In Japan’s view, are there any objective elements in the phrase ‘for the purposes of scientific research’ as used in Article VIII of the Convention, or is the definition of scientific research solely a matter for the determination of those Contracting Governments that issue special permits under Article VIII?”*

Professor Lowe responded to this question on 15 July.<sup>55</sup> He expressly stated, “Yes: Japan thinks that there are objective elements.”<sup>56</sup> In this context he also noted that Japan’s position was not “very far apart” from Australia’s, quoting Australia’s submission that the task of the Court was to “determine objectively whether JARPA II is a program for the purpose of scientific research pursuant to Article VIII.”<sup>57</sup>

This represents a significant change of position on the part of Japan, in contrast to that previously adopted. In Japan’s first round Professor Lowe submitted that “the limits imposed by Article VIII do no more than require that Japan comply with the procedural obligations set out in the Convention”.<sup>58</sup> He also stated that “[t]he role of the Court... is to ensure the integrity of the process by which the decision is made, and not review the decision itself. Unless there is evidence that Japan acted in bad faith, there is no basis for holding that Japan’s decision to authorize JARPA II amounts to a violation of the Convention.”<sup>59</sup> By the conclusion of the proceedings Japan had abandoned that extreme and untenable position, and conceded that JARPA II must be “objectively justifiable” on a scientific basis.<sup>60</sup> Nevertheless, and contradictorily, it appears to hold the view that, in the absence of bad faith, the determination of compliance with those objective elements is, in the final analysis, a matter for Japan itself.

Australia is not wedded to any particular form of words. What matters substantively is that to be “objectively justifiable” as a program “for purposes of scientific research” under Article VIII, JARPA II must meet the essential characteristics of scientific research identified by Professor Mangel – as minimum standards – consistent with generally accepted contemporary

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<sup>54</sup> CR 2013/17, p.50 (Judge *ad hoc* Charlesworth).

<sup>55</sup> CR 2013/22, pp. 58 – 60, paras. 14 – 22 (Lowe).

<sup>56</sup> *Ibid*, para. 14.

<sup>57</sup> *Ibid*, paras. 12-13.

<sup>58</sup> CR 2013/15, p. 15, para. 9 (Lowe).

<sup>59</sup> CR 2013/15, p. 24, para. 54 (Lowe).

<sup>60</sup> CR 2013/22, p. 58, para. 12 (Lowe).

scientific practice and the Guidelines on Special Permit Whaling adopted by the IWC. These are essential characteristics with which Japan's own expert, Professor Walløe, offered testimony that he largely agreed.<sup>61</sup>

The response to Judge *ad hoc* Charlesworth's question is that:

- (1) there are objective elements in the phrase “for purposes of scientific research”;**
- (2) the objective elements are reflected in the essential characteristics identified by Professor Marc Mangel, with which Professor Walløe largely agrees; and**
- (3) the objective elements are a matter for the Court to identify and apply to the facts of this case; they are not matters solely for a Contracting Party to the Convention.**

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<sup>61</sup> CR 2013/14, p. 53.