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, and that “whaling operations should be confined to those species best able to sustain exploitation.” 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” 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 Convention. 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.”

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 Japan. 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.

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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.
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 implies\(^ {14} \), but rather to the specific provisions of Article 65 of that Convention\(^ {15} \). That provision preserves the ability of States and the IWC to regulate whaling more strictly than other marine living resources\(^ {16} \). “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 apply\(^ {18} \).

7. Further, rather than supporting a general international legal requirement of “optimum utilization” the agreements referred to by Japan in support of its contention\(^ {19} \) 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).


\(^{16}\) 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.”


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

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 needs. It is also reinforced by the general principle of international law requiring States to adopt a precautionary approach.

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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 Agreement. 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”.

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* case. 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”. 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” 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

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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).
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 Convention.\(^{28}\)

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 whales.\(^{29}\)

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 ensured."\(^{30}\) 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."\(^{32}\)

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


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”\textsuperscript{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)\textsuperscript{34}.


\textsuperscript{34} Ibid, p. 3.