DISSENTING OPINION OF JUDGE OWADA

1. To my greatest regret, I cannot associate myself with the present Judgment in terms of the conclusions stated in paragraphs 2, 3, 5 and 7 of its operative part, as well as the reasoning stated in the reasoning part. My disagreement lies with the understanding of the Judgment on the basic character of the International Convention for the Regulation of Whaling (hereinafter "the Convention"), with the methodology the Judgment employs for interpreting and applying the provisions of the Convention, and thus with a number of conclusions that it reaches.

2. In this opinion, I shall try to deal with some of the salient aspects of these points of disagreement. In view of the fundamental disagreement on some basic points, I shall be setting out my understanding on these points to clarify the differences that I have with the Judgment, rather than focusing on each and every concrete point on which I disagree.

I. Jurisdiction of the Court

3. With regard to jurisdiction, while I maintain certain reservations on some aspects of the reasoning of the Judgment, I am not going to discuss this issue in this opinion, inasmuch as I have concurred with the conclusion of the Judgment that the Court has jurisdiction in this case. I wish, however, to place on record my reservation that under the somewhat unfortunate procedural circumstances, the Parties were not provided in the proceedings with ample opportunities to develop their respective arguments on the issue of jurisdiction, with the result that I could not but come to the conclusion that the Respondent has not succeeded in establishing that the Court lacks the jurisdiction to hear the present case under the Optional Clause declarations of the two Parties.

II. The object and purpose of the Convention

4. It is my view that this case has come to present controversies on which the opinions of Judges have come to be divided, mainly due to the difference between the Parties on the perceived evolution in the situation surrounding whales and whaling that has come to emerge during the period between the time when the Convention was concluded and the present. A discrepancy in perception has come to develop between two opposing views. It is argued on the one hand that there has been an evolution in the economic-social vista of the world surrounding whales and whaling over the years since 1946, and that this is to be reflected in the interpretation and the application of the Convention. It is argued, on the other hand, that the juridico-institutional basis of the Convention has not changed since it was drafted, based as it was on the well-established principles of international law relating to the conservation and management of fishing resources, including whales, and that this basic character of the Convention should essentially be maintained. This to my mind is the fundamental divide that separates the legal positions of the Applicant, Australia, and New Zealand as an intervener under Article 63 of the Statute, and that of the Respondent, Japan.

5. In order to have a proper understanding of the dispute, therefore, one has to look to the essential characteristics of the legal régime created under the Convention, in light of its object and purpose.

6. The history of modern whaling dates back to the nineteenth century, when many nations of the world, including in particular the United States and Great Britain, were actively participating in catching and killing whales in the oceans, primarily for their oil which was indispensable in those days for civilized urban people who depended upon oil extracted from whales for their

lighting. In the days when natural resources of the sea, especially fishing resources, were thought to be inexhaustible, rampant taking and slaughtering of whales went unchecked all over the world, motivated primarily by the desire for economic gains. Concern about overfishing led whaling nations of the world to conclude the International Agreement for the Regulation of Whaling of 1937, in order to regulate whaling and avoid the depletion of whale stocks. This agreement, however, turned out to be less than effective, lacking a strong regulatory régime on whaling, except for a system basically of monitoring whale catches. It was against such a state of affairs that the Convention of 1946 came to be concluded in order to improve this devastating situation which came to threaten the sustainability of whale stocks and thus the viability of the whaling industry. The basic objective to be attained in concluding this Convention was "to develop a sound conservation program which [will] maintain an adequate and healthy breeding stock" (Chairman Mr. Kellogg, International Whaling Conference, Minutes of the Second Session, 1946, p. 13, para. 137), by calling for a halt to further overfishing of certain whale stocks that were being depleted.

7. The object and purpose of the Convention is to be understood in the context of this situation. It is clearly enunciated in its Preamble. The objectives of the Convention are listed in its Preamble in the following words:

> "The [Contracting] Governments . . .
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> . . . . . .
>
> Considering that the history of whaling has seen over-fishing of one area after another and of one species of whale after another to such a degree that it is essential to protect all species of whales from further over-fishing;
>
> Recognizing that the whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the number of whales which may be captured without endangering these natural resources;
>
> Recognizing that it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress;
>
> . . . . . .
>
> Desiring to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development . . .
>
> . . . . . .
>
> Have agreed as follows: . . ." (Preamble, paras. 3, 4, 5, 7).

8. In explaining the purpose and objectives of the Convention, the Chairman of the Conference, Mr. Kellogg, stated as follows:

> "The Preamble, as is customary, explains the purpose and the objectives of the Convention . . . The Preamble also points out specifically and primarily that the purpose of this Convention is to develop a sound conservation program which will maintain an adequate and healthy breeding stock. By restoring depleted stocks, as, for instance, the blue whale and the humpbacked whale, and by wise management of the existing stocks a maximum sustained yield of this natural resource can be assured.

> That, in a few words, is the general intent of the Preamble." (Minutes of the Second Session, IWC, 1946, p. 13, para. 137.)

9. It is clear from this that the object and purpose of the Convention is to pursue the goal of achieving the twin purposes of the sustainability of the maximum sustainable yield ("MSY") of the stocks in question and the viability of the whaling industry. Nowhere in this Convention is to be found the idea of a total permanent ban on the catch of whales. That this was not the intention of the 1982 proposal for a moratorium can be confirmed by the Verbatim Record of the International Whaling Commission which voted for the Moratorium (IWC 34th Annual Meeting, 19-24 July 1982, pp. 72-86). In introducing this proposal, the Chairman of the Technical Committee stated:

> "[The sponsor of the proposal] regards the whales as a trust for the future and has looked for rational management, but this has been difficult to attain. There is scientific uncertainty and lack of data, some of which are not fully available. Recognising the disruption to the whaling industry and the communities involved it proposed a phasing out over a fixed period of time during which there would be a diminution of whaling and catches based on scientific advice. This took the form of a new clause to paragraph 10 of the Schedule which has the effect of introducing a three-year period for the industry to accommodate, noting that block quotas will end in 1985." (IWC 34th Annual Meeting, Verbatim Record, 19-24 July 1982, p. 72.)

10. The concept of "conservation of fisheries resources" contains the element of "maximum/optimum sustainable yield" as its integral part as employed in the Convention. This is in line with the accepted approach to high-sea fisheries in general, which is well-established in the contemporary international law on fisheries. For example, the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas defines the term "conservation of the living resources of the high seas" as "the aggregate of the measures rendering possible the *optimum sustainable yield* from those resources *so as to secure a maximum supply of food and other marine products*" (Art. 2; emphasis added).

11. It is therefore of cardinal importance that the Court understands this object and purpose of the Convention in its proper perspective, which defines the essential characteristics of the régime established under the Convention. In this sense, the proper grasp of the essential characteristics of the régime created by the Convention should be the starting-point that constitutes the key to the proper understanding of the precise nature and structure of the regulatory régime contained in the concrete provisions of the Convention, and the legal scope of the rights and obligations prescribed for a contracting State engaging in scientific activities under Article VIII as its central element.

12. In other words, the present Judgment has failed in my view to engage in analysing the essential characteristics of the régime of the Convention. The Judgment in its subsection on "General Overview of the Convention" (paragraphs 42-50), does no more than reproduce what is contained in the provisions of the Convention, without trying to analyse the raison d'être of the Convention as reflected in its Preamble, except for the laconic statement that "[t]he functions conferred on the Commission have made the Convention *an evolving instrument*" (Judgment, paragraph 45; emphasis added). It does not specify what this implies. Any international agreement can be evolving inasmuch as it is susceptible to modification by the agreement of the parties. The fact that the Commission is given the power to adopt amendments to the Schedule as

an integral part of the Convention, which can become binding upon those States parties which do not raise an objection, and that the Commission has amended the Schedule many times in this sense would not support the thesis that the Convention is an "evolving instrument" as such. The Convention is not malleable as such in the legal sense, according to the changes in the surrounding socio-economic environments.

III. The essential characteristics of the regulatory régime under the Convention

13. For the purpose of understanding the essential characteristics of the régime established under the Convention, the structure of the Convention has to be analysed in somewhat greater detail. It can be summarized roughly as follows:

(1) the Contracting Governments have created an International Whaling Commission (hereinafter "IWC") as its executive organ (Art. III). The IWC can take a decision by a three-fourths majority, if action is required in pursuance of Article V;

(2) under Article V, the IWC may amend the provisions of the Schedule, which forms an integral part of the Convention (Art. I), by adopting regulations with respect to the conservation and utilization of whale resources (Art. V, para. 1), with the conditions that these amendments of the Schedule, *inter alia*, *(a)* shall be such as are necessary to carry out the objectives and purposes of the Convention and to provide for the conservation, development, and optimum utilization of the whale resources; *(b)* shall be based on scientific findings; and *(c)* shall take into consideration the interests of the consumers of whale products and the whaling industry (Art. V, para. 2). Each of such amendments shall become effective with respect to those Contracting Governments which have not presented objection, but shall not be effective with respect to a Government which has so objected until such date as the objection is withdrawn (Art. V, para. 3);

(3) the IWC may also make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of the Convention (Art. VI);

(4) notwithstanding anything contained in the Convention, a Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research, subject to such restrictions as to number, and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking and treating of whales in accordance with the provisions of Article VIII shall be exempt from the operation of the Convention (Art. VIII, para. 1).

14. It seems fair to conclude from what has been summarized above that the Convention has created a kind of self-contained regulatory régime on whales and whaling — somewhat comparable to the self-contained system of an intergovernmental international organization with its own administrative autonomy — equipped with its regulatory régime for matters within the purview of its jurisdiction. It goes without saying that such a system providing for the autonomy of the Parties, while created *inter se*, is not free from the process of judicial review by the Court in accordance with the power given to it for interpreting and applying its constitutional document, namely, the Convention.

15. Within this self-contained regulatory régime, no power of decision-making by a majority is given to the IWC automatically to bind the Contracting Parties, except through a mechanism of consent to be given by each of the Parties as specified in Article V, paragraph 3. In this regulatory

régime created by the Parties, no amendments to the Schedule will become effective in relation to the Contracting Party who objects to the amendments in question. Nor can any recommendation adopted by the IWC acquire a binding character in relation to a Contracting Party.

16. Following the 1982 meeting of the IWC, when an amendment proposed by the Seychelles and supported by Australia and several other Member States was adopted, amending paragraph 10 of the Schedule to ban commercial whaling of all species beginning in the 1985-1986 season, Japan did eventually exercise this right to raise objection under Article V, which it later withdrew under pressure from the United States. The argument advanced with regard to this situation by the Applicant, and developed further by the Intervener, that the Convention has gone through an evolution during these 60 years in accordance with the change in the environment surrounding whales and whaling, and especially in the growth in the community interest of the world that whales be preserved as precious animals, would seem to be an argument that would be tantamount to an attempt to change the rules of the game as provided for in the Convention and accepted by the Contracting Parties in 1946. (The argument could be qualitatively different, if it were advanced on the ground, based on scientific evidence, that whales were being overfished to severe depletion or even extinction and that therefore precautionary measures would have to be taken to prevent this happening — an argument which would legitimately fall within the ambit of the Convention. It is my understanding, however, that such an argument has not been seriously advanced by the Applicant with supporting credible scientific evidence in the present case.)

17. The Respondent claims that, faced with this new situation of the adoption of a moratorium on whaling for commercial purposes, it became necessary for the Respondent to advance a programme of activities for purposes of scientific research so that scientific evidence could be collected for the consideration of the IWC (or its Scientific Committee), with a view to enabling the IWC to lift or review the moratorium, which professedly was a measure adopted to be of not unlimited duration and subject to future review. The moratorium explicitly provided that the provision setting catch limits at zero "will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits" (Schedule, para. 10 *(e)*). It would seem difficult to see anything wrong in the Respondent's course of action.

18. Setting aside passing judgment on this argument of the Respondent, it is to be noted that the Convention prescribes that

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

(2) "any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research" (Art. VIII, para. 1).

In this sense what the Respondent embarked upon under JARPA and JARPA II is prima facie to be regarded as being in conformity with the Convention and the revised Schedule, including its subparagraph 10 *(e)*.

Thus the whole question of the legality of the whaling activities of Japan under JARPA, and JARPA II as its continuation, has come to hinge upon the question of whether these activities of the Respondent could fall under the activities "for purposes of scientific research" within the meaning of Article VIII of the Convention.

IV. The interpretation of Article VIII

19. The essential character of the Convention as examined above lies in the fact that the Contracting Parties have created a self-contained regulatory régime for the regulation of whales and whaling. The prescription contained in Article VIII of the Convention in my view is one important component of this regulatory régime. It would be wrong in this sense to characterize the power recognized to a Contracting Party to grant to its nationals special permits "to kill, take and treat whales for purposes of scientific research" (Convention, Art. VIII, para. 1) as nothing else than an exception to the regulatory régime established by the Convention — namely as an exception recognized in deference to the traditional notion of sovereign right to engage in hunting whales under the freedom of high-sea fisheries. The Contracting Party which is granted this prerogative under Article VIII is in effect carrying out an important function within this regulatory régime by collecting scientific materials and data required for the promotion of the objectives and purposes of the Convention, such as the New Management Procedure ("NMP") or the Revised Management Procedure ("RMP") discussed in the IWC for the proper management of the whaling stocks. It is for this reason that the Contracting Party in question, endowed under the Convention with the discretion to determine what types of scientific research it intends to conduct and how the research should be implemented, will be subjected to the subsequent process of review and critical comment by its executive organ, the IWC, and more specifically, its scientific subdivision, the Scientific Committee. These are the organs entrusted in this regulatory régime with the task of conducting the process of review and critical comment on these activities, from the viewpoint of achieving the object and purpose of the Convention on the basis of scientific assessment. It is to be noted that there is no provision, either in this Article or in any other part of the Convention, that empowers the IWC or the Scientific Committee legally to restrict the exercise of this prerogative of a Contracting Party to grant special permits in any specific way, except that the granting of special permits has to be "for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit" (Convention, Art. VIII, para. 1). In other words, under this regulatory régime of the Convention the power to determine such questions as what should be the components of the scientific research, or how the scientific research should be designed and implemented in a given situation, is primarily left to the discretionary decision of the granting Government. The Contracting Government is obligated to exercise this discretionary power only for purposes of scientific research in good faith and to be eventually accountable for its activities of scientific research before the executive organs of the Convention, the IWC and the Scientific Committee. These organs have the responsibility to ensure that this will be the case by reviewing and raising critical comments from a scientific point of view.

20. As I stated earlier, this does not mean that the Court, as the judicial institution entrusted with the task of interpreting and applying the provisions of the Convention, has no role to play in this whole process, while paying full respect to the internal autonomy of the Convention. The function of the Court as a court of law gives it the power to interpret and apply the provisions of the Convention from a legal point of view. Given the nature and the specific characteristics of the regulatory framework created by the Convention, however, this power of the Court has to be exercised with a certain degree of restraint, to the extent that what is involved is *(a)* related to the application of the regulatory framework of the Convention, and *(b)* concerned with the techno-scientific task of assessing the merits of scientific research assigned by the Convention to the Scientific Committee.

21. On the first aspect of the problem relating to the application of the regulatory framework of the Convention (*(a)* above, para. 20 of this opinion), good faith on the part of the Contracting State, acting as an agent within the framework of this regulatory régime, has necessarily to be presumed. The function of the Court in this respect is to see to it that the State in question is pursuing its activities in good faith and in accordance with the requirements of the regulatory régime for the purposes of scientific research that is conducive to scientific outcomes which would help promote the object and purpose of the Convention. The concrete modalities of the activities for scientific research to be conducted by the State, including the programme's design and implementation, however, should by its nature not be the proper subject of review by the Court. Article VIII expressly grants to the Contracting Government the primary power to decide on this, by providing that "[n]otwithstanding anything contained in this Convention any Contracting Government may grant . . . a special permit . . . subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit" (Convention, Art. VIII, para. 1). It clearly grants the State in question the power prima facie to determine concrete modalities of research activities to be undertaken under Article VIII, although under this regulatory régime, these modalities, to be determined by the State in question, would be subjected to assessment by the IWC and the Scientific Committee through the review process.

22. Allegations made by the Applicant that the activities were designed and implemented for purposes other than scientific research under the cover of scientific research thus cannot be presumed, and will have to be established by hard conclusive evidence that could point to the existence of bad faith attributable to the State in question. Such serious charges of bad faith, either explicit or implicit, against a sovereign State can never be presumed and should not be accepted by this Court unless the Applicant can establish them by conclusive and indisputable evidence. This is an established principle of international law (see, e.g., *Lac Lanoux Arbitration (France* v. *Spain), RIAA*, Vol. 12, p. 281). Ulterior motives harboured by some individuals involved in the action, whatever their position may be, if any, should not be treated as relevant in principle, unless it is established by convincing evidence that such motives played the decisive role in formulating and embarking on the programme, constituting the real legal source *(fons et origo)* of the activities undertaken.

23. On the second aspect of the problem relating to the determination of what constitutes activities "for purposes of scientific research" (*(b)* above, para. 20 of this opinion), I do not agree with the approach pursued by the Judgment to distinguish between "scientific research" as such and "[activities] for purposes of scientific research" (Judgment, paragraphs 70-71). It is true that the Judgment, after spending so many paragraphs (paragraphs 73-86) attempting to define what constitutes "scientific research", seems to have abandoned this effort in the end, rejecting the criteria advanced by the Applicant on the basis of its expert's testimony. The Judgment nevertheless seems to dwell upon this distinction between "scientific research" and activities "for purposes of scientific research" with a view to establishing that an activity that may contain elements of "scientific research" cannot always be accepted as an activity "for purposes of scientific research". To me such a distinction is so artificial that it loses any sense of reality when applied to a concrete situation. The Court should focus purely and simply on the issue of the scope of what constitutes activities "for purposes of scientific research" according to the plain and ordinary meaning of the phrase.

24. On the question of what constitutes activities "for purposes of scientific research", it must first of all be said in all frankness that this Court, as a court of law, is not professionally qualified to give a scientifically meaningful answer, and should not try to pretend that it can, even though there may be certain elements in the concept that the Court may legitimately and usefully offer as salient from the viewpoint of legal analysis.

25. What is "scientific research" is a question on which qualified scientists often have a divergence of opinion and are not able to come to a consensus view. The four criteria advanced by one of the experts who testified before the Court and relied upon by the Applicant have not been accepted by the present Judgment as a useful framework to determine whether the activities of the Respondent in JARPA/JARPA II are for purposes of scientific research. Nonetheless the Judgment, in applying the test of objective reasonableness as its standard of review, *does* get into the "scientific assessment" of the Court itself on various substantive aspects of JARPA/JARPA II activities, in order to come to its final conclusion that these activities under the programme of JARPA II, especially focusing on the issue of the lethal taking of whales, cannot qualify as activities conducted "for purposes of scientific research", because they cannot be regarded as objectively reasonable according to the scientific assessment of the Court on its own. As the Judgment itself makes clear, the Judgment engages in a substantive assessment of its own on these activities in the name of objectively examining their "reasonableness". The question which immediately arises, however, is "in what context is this reasonableness to be judged?" Is it the legal context or is it the scientific context that the Court claims to be engaged in? If we are speaking of the legal context, the answer is clear. We have the answer in the Convention itself. The Convention leaves this point, at any rate at the level of the law, primarily to the good faith appreciation of the party which undertakes the research in question. If we are speaking of the scientific context, it would be impossible for the Court to establish that certain activities are objectively reasonable or not, from a scientific point of view, without getting into a techno-scientific examination and assessment of the design and implementation of JARPA/JARPA II, a task which this Court could not and should not attempt to do. This is the second reason why the Court should not engage in this exercise. I shall elaborate this point in the following section in connection with the issue of the scope and the standard of review.

V. The scope of review by the Court

26. According to the structure of the Convention as interpreted in light of its object and purpose, the Contracting Parties expressly recognize the need and the importance of scientific research for the purpose of supporting the "system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks" (Preamble, para. 7) as established by the Convention, which "provide[s] for the proper conservation of whale stocks and thus make[s] possible the orderly development of the whaling industry" (Preamble, para. 8). It is for this reason that the Conference which was convened for the conclusion of the Convention in 1946 stressed the critical importance of scientific research by scientific organizations engaged in research on whales. In this regard, the statement of its Chairman, which makes the following points, is highly relevant:

> "it is not our [i.e., the Contracting Parties'] intention or our belief that this commission [IWC] would usurp any of the previous prerogatives . . . of these various scientific organizations that have been engaged in research on whales . . . [W]e are in the main dependent on the factual information and on the work of their staff . . . [T]he Conference should bear in mind the great debt we owe to these research organizations . . ." (Minutes of the Third Session, IWC/20, p. 11, para. 117.)

While Article VIII, paragraph 1, was taken from the language of Article X of the International Agreement for the Regulation of Whaling of 1937, the Chairman pointed out that "the two sentences reading, 'each contracting Government shall report to the Commission all such authorizations which it has been *(sic)* granted' are new" and that "[t]he remainder of Article VIII stresses the importance of scientific research and encourages dissemination of the resultant information" (Minutes of Seventh Session, IWC/32 p. 23, paras. 322-323).

27. It becomes evident from what is quoted above that the intention of the Contracting Parties, in agreeing on the language of Article VIII of the Convention, was to provide for the right of a Contracting Government to grant to its nationals special permits to take whales for purposes of scientific research. This is a prerogative given to the Contracting Government by Article VIII of the Convention, and the Contracting Government may take this action without prior consultations with, or approval of, the IWC or its Scientific Committee. This is amply illustrated by the comments of one of the delegates during the drafting process, who suggested a contrary proposal "to require a contracting government to [issue permits for scientific research] *after* consultation with the commission, and not independently of it" (Minutes of Third Session, IWC/20, p. 11, para. 115; emphasis added). This proposal was not adopted.

28. This of course is not to say that a Contracting Government has unlimited discretion in granting a special permit as an exercise of its sovereign freedom of action. The prerogative recognized under Article VIII is prescribed as part of the Convention, and more specifically as part of the regulatory régime established by the Convention. While in my view the assessment of scientific merits of research activities such as the JARPA/JARPA II programme, including the scientific assessment of their design and implementation, for achieving the purposes of the Convention is a matter assigned specifically to the organs of the Convention, especially the IWC and its Scientific Committee, there are certain aspects of this process of assessment which are to be subjected to the legal scrutiny of the Court in its exercise of its power of review for the interpretation and application of the Convention.

Within this delimited context, it is the role of the Court to examine from a legal point of view whether the procedures expressly prescribed by the regulatory régime of the Convention (i.e., the procedural requirements for the Contracting Party under Article VIII) are scrupulously observed. Without getting into the task of techno-scientific analysis of what should constitute in substance scientific research and without making the concrete assessment of each aspect of the activities involved — a task assigned to the Scientific Committee — the Court can also review whether the activities in question can be regarded as meeting the generally accepted notion of "scientific research" (the substantive requirement for the Contracting Party under Article VIII). This process involves the determination of the standard of review to be applied by the Court.

VI. The standard of review by the Court

29. In determining the standard of review, the Judgment sums up the positions of the Parties in the following manner.

First, for the position of the Applicant, the Court states the following:

> "According to Australia, the Court's power of review should not be limited to scrutiny for good faith, with a strong presumption in favour of the authorizing State, as this would render the multilateral régime for the collective management of a common resource established by the ICRW ineffective. Australia urges the Court to have regard to objective elements in evaluating whether a special permit has been granted for purposes of scientific research, referring in particular to the 'design and implementation of the whaling programme, as well as any results obtained'." (Judgment, paragraph 63.)

30. Second, the Judgment juxtaposes this position of the Applicant with the following quotation from the statement of the Respondent in the oral proceedings as representing the position of the Respondent:

> "Japan agrees with Australia and New Zealand in regarding the test as being whether a State's decision is objectively reasonable, or 'supported by coherent reasoning and respectable scientific evidence and . . ., in this sense, objectively justifiable'" (Judgment, paragraph 66).

31. Based on these two statements of the Parties, the Judgment concludes as its own position on the issue of the standard of review, as follows:

> "When reviewing the grant of a special permit authorizing the killing, taking and treating of whales, the Court will assess, first, whether the programme under which these activities occur involves scientific research. Secondly, the Court will consider if the killing, taking and treating of whales is 'for purposes of' scientific research by examining whether, in the use of lethal methods, the programme's design and implementation are reasonable in relation to achieving its stated objectives. This standard of review is an objective one." (Judgment, paragraph 67.)

32. With regard to this conclusion of the Judgment on the question of the standard of review, it has to be pointed out that there is a jump in logic in the reasoning between what is summarized as the respective positions of the Parties in paragraphs 63 and 66, and what is stated in this last quoted paragraph 67 as the conclusion of the Court which the Judgment claims to have been drawn from the respective positions of the Parties. In other words, the Judgment, ignoring the differences between the Parties on the question of the scope and the standard of review and without further explanation, would seem to endorse the position of one of the Parties, namely that of the Applicant. In paragraph 67 it declares, almost abruptly and *extra cathedra*, as it were, that the Court will assess "whether, in the use of lethal methods, the programme's design and implementation are reasonable", thus employing the formula advanced by the Applicant on the scope of the review and linking it with the standard of review seemingly conceded by the Respondent, as if to suggest that the application of this standard of objective reasonableness had been accepted as the common ground among the Parties in relation to the overall scope of the review, whereas, in reality, there was a wide difference of position between the Parties, especially in relation to the scope of the review. It has to be said that this conclusion as formulated by the Judgment is clearly a gross misrepresentation of what each of the Parties was prepared to accept as a common ground for the scope and the standard of review to be applied in the present context.

In the course of deciding that the Judgment, for whatever reason that has not been explained, is going to apply the yardstick that the programme must be objectively reasonable as the standard of review, the Judgment brings in to this process an entirely new element of "design and implementation" of the whaling programme (Judgment, paragraph 67), which relates to the scope of the review. This is an element which the Applicant has been insisting on introducing in support of its contention. The Judgment provides no explanation as to why it is legitimate or appropriate for the Court to expand the scope of the review by engaging in the examination of these substantive aspects of the JARPA II programme.

33. A careful examination of the arguments of the Parties as developed through the written and oral proceedings in the present case reveals that the genesis of this standard of review would appear to derive its origin from the jurisprudence of the Appellate Body of the World Trade Organization (WTO), which has had to face a number of cases which involve the issue of judicial review of sovereign decisions of Member States over scientifically controversial issues, as one of the Parties noted in its pleadings.

34. When one examines more closely the quoted jurisprudence of the WTO Appellate Body in its context, it becomes clear that this general proposition in favour of the test of objective reasonableness, has its basis in the Appellate Body's carefully reasoned argument for the demarcation line to be drawn between science and law in the context of the judicial review of a situation where there is no clear-cut consensual or even majority view of scientists on which jurists can rely. The rationale of the decision in question, which came before the WTO Appellate Body at the final phase of the *United States — Continued Suspension of Obligations in the EC-Hormones Dispute* case (hereinafter *"EC-Hormones"*), illustrates this point. It is my view that the present Judgment takes this magic formula of objective reasonableness out of the context in which this standard was employed and applies it somewhat mechanically for our purposes, without giving proper consideration to the context in which this standard of review was applied.

35. The Respondent tried to clarify its position on the issue of the standard of review by explaining how this standard of objective reasonableness could be relevant to the present case, in the following words:

> "Yes: the Court can ask, could a reasonable State regard this as a properly-framed scientific inquiry. But it can no more impose a line separating science from non-science than it could decide what is and what is not 'Art'. In Japan's view, *the correct question is, could a State reasonably regard this as scientific research?*
>
> That is why Japan agrees with Australia and New Zealand in regarding the test as being whether a State's *decision is objectively reasonable, or 'supported by coherent reasoning and respectable scientific evidence and . . ., in this sense, objectively justifiable'*." (CR 2013/22, p. 60, paras. 20-21 (Lowe); emphasis added.)

What this part of the argument of the Respondent is relying on is the quotation, word-for-word, from the decision of the WTO Appellate Body in the final phase of the *EC-Hormones* case. It is for this reason important to examine the precise context in which this quoted passage appears.

36. The decision of the WTO Appellate Body contained in its final report of 16 October 2008, reviewing and setting aside the earlier decision of its Dispute Settlement Panel, states as follows:

> "[S]o far as fact-finding by [the WTO] panels is concerned, the applicable standard is 'neither *de novo* review as such, nor "total deference", but rather the "objective assessment of facts"' . . .
>
> It is the WTO Member's task to perform the risk assessment. The panel's task is to review that risk assessment. Where a panel goes beyond this limited mandate and *acts as a risk assessor*, it would be substituting its own scientific judgment for that of the risk assessor and making a *de novo* review and, consequently, would exceed its functions under Article 11 of the [Dispute Settlement Understanding of the WTO]. Therefore, *the review power of a panel is not to determine whether the risk assessment undertaken by a WTO Member is correct, but rather to determine whether that risk assessment is supported by coherent reasoning and respectable scientific evidence* and is, in this sense, objectively justifiable." (WT/DS320/AB/R, p. 246, paras. 589-590; emphasis added.)

Here we find a well-defined exposé of the essential rationale for the standard of review developed in the jurisprudence that the Respondent quotes in agreeing to the test of objective reasonableness. The Appellate Body decision is very specific in clarifying that "a panel may not rely on the experts to go beyond its limited mandate of review" and that "[t]he panel may seek the experts' assistance in order to identify the scientific basis of the . . . measure [taken] and to verify that this scientific basis comes from a qualified and respected source, irrespective of whether it represents minority or majority scientific views" (WT/DS320/AB/R, p. 247, para. 592).

37. Despite the difference that these two cases — one being before the Appellate Body of the WTO, the other being before the ICJ — represent in terms of the law applicable, in the nature of the issue involved and in the context in which the dispute arose, as well as the obvious fact that the WTO decision cannot in any sense constitute a precedent for our purposes, there is nevertheless one common element to which this Court could pay regard. It is the point that when a court of law or a judicial body is engaged in the legal assessment of a scientific matter where scientists hold divergent views, the judicial institution is under an intrinsic limitation on its power and must not exceed its competence as the administrator of the law, by straying into an area which lies beyond its delimited function. Thus under the system in which the judicial body's task is to review the risk assessment conducted by a member State endowed with that power and, to use the expression employed in the WTO jurisprudence, "[w]here [that body] goes beyond this limited mandate and acts as a risk assessor, it would be substituting its own scientific judgement for that of the risk assessor and making a *de novo* review and, consequently, would exceed its functions" (WT/DS320/AB/R, p. 246, para. 590). It is my view that it was in this sense and in this context that the jurisprudence of the WTO decision can be a useful point of reference for this Court in the present case, where the function of the Court "is not to determine whether the . . . assessment undertaken by a WTO Member is correct, but rather to determine whether that . . . assessment is supported by coherent reasoning and respectable scientific evidence and is, in this sense, objectively justifiable" (WT/DS320/AB/R, p. 246, para. 590).

38. In my view, the Judgment has erred in its approach by taking this standard of objective reasonableness out of its context, and by mechanically applying it for the opposite purpose, that is, for the purpose of engaging the Court in making a *de novo* assessment of the activities of the Respondent, when that State is given the primary power under the Convention to determine what should be the modalities of activities for pursuing scientific research and to grant special permits for purposes of scientific research. This discretion given to the State issuing the permit is subject to the process of review and critical comment by the Scientific Committee and by the IWC in accordance with the regulatory framework of the Convention.

39. The concept of "reasonableness" appears from time to time in the jurisprudence of this Court in some of its past decisions. In my view, however, it is not possible nor useful to try to apply this concept of "reasonableness" in a general way as the standard of substantive assessment. No one would dispute the validity of this concept as such, which like the concept of "fairness", is one of the basic principles of international law, or for that matter of law in general, but its concrete interpretation and application as a standard of review will depend entirely upon the context in which the term is to be applied. It is not a standard for substantive assessment, but a yardstick for ascertaining whether a decision or an action is or is not "arbitrary" or patently "out of bounds".

In the case concerning *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, the Court referred to the contention of the Applicant (Costa Rica) which argued that the way the Respondent (Nicaragua) restricted Costa Rica's navigational rights on the San Juan River was "not reasonable". The Court clarified the character of this concept in the following way:

> "The Court notes that Costa Rica, in support of its claim of unlawful action, advances points of fact about unreasonableness by referring to the allegedly disproportionate impact of the regulations. The Court recalls that in terms of well established general principle it is for Costa Rica to establish those points (cf. *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 86, para. 68, and cases cited there). Further, a court examining the reasonableness of a regulation must recognize that *the regulator, in this case the State with sovereignty over the river, has the primary responsibility for assessing the need for regulation and for choosing, on the basis of its knowledge of the situation, the measure that it deems most appropriate to meet that need. It will not be enough in a challenge to a regulation simply to assert in a general way that it is unreasonable.* Concrete and specific facts will be required to persuade a court to come to that conclusion." (*I.C.J. Reports 2009*, p. 253, para. 101; emphasis added.)

40. The position of the Respondent in the present case is analogous in law to that of the respondent under the 1858 Treaty of Limits in the case concerning *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*. The dictum of this Court in the latter case should be applicable to the situation in the present case.

VII. Application of the standard of review in the present case

41. Having thus clarified the scope and the standard of review to be applied by the Court in reviewing the JARPA II activities under Article VIII, I shall refrain from engaging myself in the exercise of refuting the conclusions of the Judgment resulting from its substantive assessment of each of the concrete aspects of the design and implementation of the JARPA II programme, in order to ascertain whether they can be regarded as objectively reasonable, as the Judgment has tried to do in Section II, subsection 3.B (Judgment, paragraphs 127-227). I do so refrain, because in my view to engage oneself in this exercise would be doing precisely what the Court should not have done under the Convention in light of the essential character of the Convention so clearly manifested in its object and purpose, and in particular in light of the legal structure of the regulatory régime created under the Convention, as well as, most importantly, in view of the intrinsic limitation inherent in the power of the Court as a legal institution empowered with review in the present context.

42. Nevertheless, I wish to draw the attention of the Court to one point of law which relates to a question of principle involved throughout the substantive assessment of the programme of JARPA II by the Judgment in its subsection 3.B. My critical comments relate to the methodology that the Judgment employs in applying the standard of objective reasonableness in assessing the concrete activities of JARPA II conducted under Article VIII of the Convention. In my view, the ordinary and plain meaning of Article VIII makes it clear that the Contracting Government has the primary power to grant special permits authorizing to kill, take and treat whales for purposes of scientific research. There is a presumption — a strong, though rebuttable, presumption — that the granting Government, in granting the permits, has made this determination not only in good faith, but also in light of a careful consideration that the activities are carried out for purposes of scientific research. As I have repeatedly emphasized, the function of the Court, engaged in the judicial review of the exercise of power by the Contracting Government, is to assess whether this determination of the Contracting Government in question is objectively reasonable, in the sense that the programme of research is based upon a coherent reasoning and supported by respectable opinions within the scientific community of specialists on whales, even if the programme of research may not necessarily command the support of a majority view within the scientific community involved.

43. In particular, with regard to the issue of lethal taking of whales, which forms the central theme in the assessment in the Judgment of whether the programme in its design and implementation can be regarded as objectively reasonable, the Judgment appears to be applying the standard of objective reasonableness in such a way that it is the granting Party that bears the burden of establishing that the scale and the size of the lethal take envisaged under the programme is reasonable in order for the programme to be qualified as a genuine programme "for purposes of scientific research".

44. To place the onus of meeting such a stringent requirement upon the Party granting the special permits in accordance with the provisions of the Convention cannot be in consonance with the plain and ordinary meaning of Article VIII, which provides for an unqualified right of the Contracting Party to "grant . . . special permit[s] authorizing . . . to kill, take and treat whales for purposes of scientific research" as part of the regulatory régime created under the Convention.

45. In the context of the present dispute, and applying the standard of objective reasonableness used by the Judgment as the yardstick for determining whether the activities were "for purposes of scientific research", it should be the Applicant, rather than the Respondent, who has to establish by credible evidence that the activities of the Respondent under JARPA II cannot be regarded as "reasonable" scientific research activities for the purposes of Article VIII of the Convention. Under the Convention, the Respondent is given the presumptive power to grant permits for activities for purposes of scientific research. In my view, the Applicant has failed to establish that the activities carried out pursuant to JARPA II are not "reasonable" scientific activities.

46. It is my belief that, in fact, the activities carried out pursuant to JARPA II can be characterized as "reasonable" activities for purposes of scientific research. It may well be that JARPA II is far from a perfect programme, but the evidence presented to the Court has clearly shown that it provides some useful scientific information with respect to minke whales that has been of substantial value to the Scientific Committee. By way of demonstrating the scientific value of JARPA/JARPA II activities, the Chair of the Scientific Committee stated in 2007 that "[t]he Japanese input into cetacean research in Antarctica is significant, and I would say crucial for the Scientific Committee" (Counter-Memorial of Japan, Ann. 207, Vol. IV, p. 387). It should be pointed out that a major review of JARPA II by the IWC is expected to take place this year (2014) and therefore a fully-fledged evaluation of the programme is premature (which is another reason for the Court not to pass hasty judgment). Although a specific assessment on the contribution of the scientific research conducted by the programme is not yet available for JARPA II itself, the report of the IWC Intersessional Workshop to Review Data and Results from JARPA, which is in many respects substantively similar to JARPA II, expressed the positive appreciation of the JARPA programme in the following words:

> "The results from the JARPA programme, while not required for management under the RMP, have the potential to improve management of minke whales in the Southern Hemisphere in [two] ways . . . The results of analyses of JARPA data could be used . . . perhaps to increase the allowed catch of minke whales in the Southern Hemisphere, without increasing depletion risk above the level indicated by the existing *Implementation Simulation Trials* of the RMP for these minke whales." (Report of the Intersessional Workshop to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic, Tokyo, 4-8 December 2006; Counter-Memorial of Japan, Ann. 113, Vol. III, p. 201; emphasis in the original.)

In other words, this IWC Intersessional Workshop Report expressed the view that the JARPA programme can provide valuable statistical data which could result in a reconsideration of the allowed catch of minke whales under the RMP.

47. What is referred to in this report is precisely the type of data that was envisioned as useful by the Convention. Article VIII of the Convention "[r]ecogniz[es] that continuous collection and analysis of biological data in connection with the operations of factory ships and land stations are indispensable to sound and constructive management of the whale fisheries" and states that "the Contracting Governments will take all practicable measures to obtain such data" (Art. VIII, para. 4). Article V of the Convention further states that amendments to the Schedule "shall be based on scientific findings" (Art. V, para. 2), and the text of the moratorium itself notes, as stated earlier, that it "will be kept under review, based upon the best scientific advice" (Schedule, para. 10 *(e)*).

48. In light of this evidence given with the authority of the findings of the Scientific Committee that the JARPA activities provided some of the very data that the drafters of the Convention found to be "indispensable to sound and constructive management of the whale fisheries" (Art. VIII, para. 4), it is difficult to see how the activities of JARPA and its successor, JARPA II, could be considered "unreasonable."

VIII. Conclusion

49. By way of conclusion, it should be emphasized that the sole and crucial issue at the centre of the present dispute is whether the activities under the programme of JARPA II are "for purposes of scientific research". The issue is not whether the programme of JARPA II has attained a level of excellence as a project for scientific research for achieving the object and purpose of the Convention, which is a matter to be considered and examined by the Scientific Committee. It may also be true that the JARPA II programme is far from being perfect for attaining such objective and may need improvements to achieve that purpose. Such criticism of JARPA II could appropriately be valuable in the review process, with a view to remodelling or redesigning these activities in accordance with what the regulatory framework of the Convention prescribes, but this cannot be the ground for the Court to declare that the activities of the programme are unreasonable for purposes of scientific research. Even if JARPA II contained some defects as a programme for purposes of scientific research, that fact in itself would not turn these activities into activities for commercial whaling. It certainly could not be the reason for this Court to rule that "Japan shall revoke any extant authorization, permit or licence granted in relation to JARPA II" (Judgment, operative part 7, paragraph 247).

(Signed) Hisashi OWADA.