Environment — Marine environment — Whaling — International Convention for the Regulation of Whaling, 1946 — International Whaling Commission — Schedule to the Convention — Moratorium on commercial whaling — Article VIII of the Convention — Exemption for whaling carried out for purposes of scientific research — Dispute between Australia and Japan concerning Japan's continued pursuit of large-scale whaling programme — Japanese Whale Research Program under Special Permit in the Antarctic ("JARPA II") — Effect on whale stocks — Whether Japan breaching its obligations under the Convention — Whether Japan breaching its other international obligations for preservation of marine mammals and marine environment

Treaties — Interpretation — International Convention for the Regulation of Whaling, 1946, Article VIII(1) — Scope of Article VIII(1) — Whether special permits granted by Japan in connection with Japanese Whale Research Program under Special Permit in the Antarctic ("JARPA II") "for purposes of scientific research" — Object and purpose — Whether restrictive or expansive interpretation justified — Discretion of State Party — Standard of review — Whether, in using lethal methods, programme's design and implementation reasonable to achieve stated objectives — Task of Court — Meaning of phrase "for purposes of scientific research" — Schedule to Convention — Duty of cooperation with International Whaling Commission and Scientific Committee — Whether Japan breaching its obligations under International Convention for the Regulation of Whaling, 1946 — Whether Japan breaching its other international obligations for preservation of marine mammals and marine environment — Remedies

International Court of Justice — Intervention — Article 63(2) of Statute conferring right to intervene as a non-party in proceedings — Declaration of Intervention filed by New Zealand in case between Australia and Japan regarding whaling — Whether Declaration fulfilling requirements of Article 63 of Statute and Article 82 of Rules — Whether Declaration admissible

International Court of Justice — Jurisdiction — Optional clause — Reservations — Reciprocity — Whaling dispute between Australia and Japan — Whether falling within Australia's reservation

Whaling in the Antarctic

(Australia *v.* Japan: New Zealand Intervening)[1]

International Court of Justice

Order on Declaration of Intervention of New Zealand. 6 *February* 2013

(Tomka, *President*; Sepúlveda-Amor, *Vice-President*; Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Gaja, Sebutinde and Bhandari, *Judges*; Charlesworth, *Judge ad hoc*)

Judgment on Merits. 31 *March* 2014

(Tomka, *President*; Sepúlveda-Amor, *Vice-President*; Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde and Bhandari, *Judges*; Charlesworth, *Judge ad hoc*)

[1] Australia was represented by Mr Bill Campbell, QC, General Counsel (International Law), Attorney-General's Department, as Agent, Counsel and Advocate; HE Mr Neil Mules, AO, Ambassador of Australia to the Kingdom of the Netherlands, as Co-Agent; the Honourable Mark Dreyfus, Mr Justin Gleeson, Mr James Crawford, Mr Henry Burmester, Mr Philippe Sands, Ms Laurence Boisson de Chazournes, as Counsel and Advocates; Ms Kate Cook, Mr Makane Mbengue, as Counsel; Ms Anne Sheehan, Mr Michael Johnson, Ms Danielle Forrester, Ms Stephanie Ierino, Ms Clare Gregory, Ms Nicole Lyas, Ms Erin Maher, Mr Richard Rowe, Mr Greg French, Mr Jamie Cooper, Ms Donna Petrachenko, Mr Peter Komidar, Mr Bill de la Mare, Mr David Blumenthal, Ms Giulia Baggio, Mr Todd Quinn, as Advisers; Ms Mandy Williams, as Assistant.

Japan was represented by HE Mr Koji Tsuruoka, Ambassador, Chief Negotiator for the Trans-Pacific Partnership Agreement Negotiations, as Agent; HE Mr Yasumasa Nagamine, Deputy Minister for Foreign Affairs, and HE Mr Masaru Tsuji, Ambassador Extraordinary and Plenipotentiary of Japan to the Kingdom of the Netherlands, as Co-Agents; Mr Alain Pellet, Mr Vaughan Lowe, Mr Alan Boyle, Mr Yuji Iwasawa, Mr Payam Akhavan, Mr Shotaro Hamamoto, Ms Yukiko Takashiba, as Counsel and Advocates; Mr Takane Sugihara, Ms Atsuko Kanehara, Mr Masafumi Ishii, Ms Alina Miron, as Counsel; Mr Kenji Kagawa, Mr Noriyuki Shikata, Mr Tomohiro Mikanagi, Mr Joji Morishita, Mr Tatsuo Hirayama, Mr Takero Aoyama, Mr Naohisa Shibuya, Ms Yuriko Akiyama, Mr Masahiro Kato, Mr Hideki Moronuki, Mr Takaaki Sakamoto, Mr Shinji Hiruma, Mr Sadaharu Kodama, Mr Nobuyuki Murai, Ms Risa Saijo, Ms Héloïse Bajer-Pellet, as Advisers; Mr Douglas Butterworth and Ms Judith E. Zeh, as Scientific Advisers and Experts; Mr Martin Pratt, as Expert Adviser; Mr James Harrison, Ms Amy Sander, Mr Jay Butler, as Legal Advisers.

New Zealand (intervening) was represented by Ms Penelope Ridings, International Legal Adviser, Ministry of Foreign Affairs and Trade, as Agent, Counsel and Advocate; HE Mr George Troup, Ambassador of New Zealand to the Kingdom of the Netherlands, as Co-Agent; the Honourable Christopher Finlayson, as Counsel and Advocate; Ms Cheryl Gwyn and Ms Elana Geddis, as Counsel; Mr Andrew Williams, Mr James Christmas, Mr James Walker, Mr Paul Vinkenvleugel, as Advisers.

SUMMARY:[2] *The facts*:—The International Convention for the Regulation of Whaling ("the Convention") was adopted in 1946 in response to concerns that commercial whaling was threatening the survival of whale stocks. The Convention did not prohibit whaling but provided for the establishment of the International Whaling Commission ("the IWC") and empowered the IWC to adopt measures for the regulation of whaling which were to be added to the Schedule to the Convention. Australia, Japan and New Zealand were at all relevant times parties to the Convention.

In 1986, the IWC exercised its powers to adopt a moratorium on commercial whaling. However, Article VIII(1) of the Convention[3] provided that, notwithstanding anything contained within the Convention, a contracting government could grant to a national 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 other conditions as thought fit. The killing, taking and treating of whales in accordance with this Article was thus exempt from the operation of the Convention and excluded from the moratorium. Each contracting government had to report to the IWC all authorizations granted. Special permits could be revoked at any time. The Scientific Committee of the IWC reviewed and commented on special permits.

Following the adoption of the moratorium, Japan commenced the Japanese Whale Research Program ("JARPA") under which Japan authorized the taking of specified numbers of minke whales in the Antarctic. The first phase of this programme, JARPA I, commenced in 1987. Special permits were issued under Article VIII(1) of the Convention. According to Japan, JARPA was a research programme to estimate the stock size of the southern hemisphere minke whale and provide a scientific basis for resolving divergent views concerning commercial whaling. In 2005, Japan submitted a research plan for a second phase, JARPA II, to the Scientific Committee. JARPA II contemplated the lethal sampling of Antarctic minke, fin and humpback whales in addition to non-lethal methods. Its research objectives were described as monitoring the Antarctic ecosystem, modelling competition among whale species, clarifying temporal and spatial changes in stock structure, and improving management procedures for minke whales. It was a long-term programme without a specified termination date and operated within the Southern Ocean Whale Sanctuary. JARPA II commenced before the final review by the Scientific Committee of the earlier JARPA programme.

Under JARPA II, the intended take of minke whales was 850 (plus or minus 10 per cent) each year and of fin and humpback whales 50 of each species. Japan maintained that such takes would be too small to have any negative effect on stocks. In practice, the take of each species was considerably smaller. During the first year of JARPA II, 853 minke whales and 10 fin

[2] Prepared by Dr S. Tully.
[3] For the text of Article VIII of the Convention, see para. 13 of the Order.

whales were taken.[4] Thereafter the take declined. An average of 450 minke whales were taken each year, with much smaller numbers in 2010-11 and 2012-13. Eighteen fin whales were killed over the first seven seasons (including the ten taken in the first season) and in subsequent years the take was never more than three in any one year. No humpback whales were killed, although permits were issued which authorized their taking.[5]

On 31 May 2010, Australia instituted proceedings against Japan claiming that JARPA II breached the Convention. Australia contended that JARPA II was not a programme for purposes of scientific research within the meaning of Article VIII(1) of the Convention. Moreover, according to Australia, Japan had breached three provisions of the Schedule to the Convention which restricted the killing, taking and treating of whales: the obligation to respect zero catch limits for the killing for commercial purposes of whales from all stocks (para. 10(e));[6] the factory ship moratorium (para. 10(d));[7] and the prohibition on commercial whaling in the Southern Ocean Sanctuary (para. 7(b)).[8] Australia also alleged that Japan had violated the obligation to make proposed permits available to the IWC before they were issued, in sufficient time to permit review and comment by the Scientific Committee, and with respect to the items to be included in proposed permits (para. 30 of the Schedule). Australia sought an order that Japan refrain from authorizing or implementing any special permit which was not for purposes of scientific research, immediately cease implementation of JARPA II and revoke any authorization, permit or licence that allowed its implementation. Australia maintained that the jurisdiction of the Court was established on the basis of the declarations made by both States under Article 36(2) of the Statute of the Court.[9]

Japan denied that the Court had jurisdiction. It maintained that the case concerned the exploitation of disputed maritime areas and thus fell within the reservation to Australia's declaration which, in accordance with the principle of reciprocity, was applicable to Japan in proceedings brought against it by Australia. In addition, Japan denied all claims, responding that JARPA II fell within the exemption provided in Article VIII(1) of the Convention and that its procedural obligations had been met.

Order of 6 February 2013

On 20 November 2012, New Zealand filed a Declaration of Intervention in the case as a non-party to proceedings, pursuant to Article 63(2) of the Statute.[10] New Zealand's intervention related to the points of interpretation

[4] See Judgment, para. 155.
[5] See Judgment, para. 203.
[6] For the text of this provision, see Judgment, para. 231
[7] For the text of this provision, see Judgment, para. 232.
[8] For the text of this provision, see Judgment, para. 233.
[9] For the relevant parts of the texts of these declarations, see Judgment, para. 31.
[10] Article 63 of the Statute provided: "1. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such

at issue in the proceedings, in particular in relation to Article VIII of the Convention.[11] By availing itself of the right to intervene, New Zealand recognized that the construction given by the judgment would be equally binding upon it. While neither Australia nor Japan objected to the admissibility of the Declaration, Japan was concerned that "serious anomalies" would arise in relation to the principle of equality between the Parties should New Zealand be admitted as an intervener.

Held (unanimously):—The Declaration was admissible.

(1) Intervention based on Article 63 of the Statute was an incidental proceeding that constituted the exercise of a right. Unlike an application by a State for permission to intervene under Article 62 of the Statute, its only object was to allow a third State not party to the proceedings to present its observations on the construction of the convention in question. The status of intervener was not conferred automatically; the declaration had to fall within the provisions of Article 63 of the Statute and Article 82 of the Rules[12] (paras. 6-8).

(2) Japan's concerns related to procedural issues regarding the equality of the Parties to the dispute rather than to conditions for admissibility. Since intervention under Article 63 of the Statute was limited to submitting observations on the construction of the Convention, and the State did not become a party to the proceedings, it could not affect the equality of the Parties (paras. 9-18).

(3) Since New Zealand had met the requirements of Article 82 of the Rules and its Declaration, to which the Parties had not objected, fell within the provisions of Article 63 of the Statute, the Declaration was admissible. New Zealand would therefore be bound by the Court's construction of the Convention under Article 63(2) of the Statute (paras. 19-20).

(4) Since party status was not conferred upon New Zealand as intervener, Australia and New Zealand were not "parties in the same interest" within the meaning of Article 31(5) of the Statute. The presence of a New Zealand judge on the Bench therefore had no effect on the right of the judge ad hoc appointed by Australia to remain on the Bench (para. 21).

Declaration of Judge Owada: The Court was in a position, should it be necessary, to determine whether an intervention ensured the fair administration of justice, including equality of Parties, whether it was filed pursuant to Article 62 or 63 of the Statute. This authority was inherent in its judicial function. The Order did not sufficiently examine Japan's concerns regarding

States forthwith. 2. Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it."

[11] For further details, see para. 14 of the Order.

[12] For the text of Article 82(2) of the Rules, see para. 11 of the Order.

the equality of the Parties, which was a cornerstone for the fair administration of justice; the Court's approach was too formalistic (paras. 1-6).

Separate Opinion of Judge Cançado Trindade: Although the Court limited itself to addressing the points raised by the three States concerned, the Convention was of common interest, to be implemented collectively by States Parties and thus contributing to the public order of the oceans. It was necessary to clarify the meaning and scope of intervention under Article 63 of the Statute; the Court had not dwelt upon these substantive aspects concerning the essence of intervention. Insufficient clarification had led to infrequent use of intervention as of right. Decisions to permit intervention had contributed to the development of international law (paras. 1-76).

Declaration of Judge Gaja: The Court should have seized the opportunity to clarify aspects of procedure relating to intervention under Article 63 of the Statute. While not wishing to address questions that were not immediately relevant, the Court should have considered conditions that went beyond a general reference to Article 63 of the Statute and an analysis of the formal requirements in Article 82 of the Rules. It should have considered the relevance of the suggested construction of the Convention for the decision of the case and excluded remarks which did not concern admissibility of the intervention (paras. 1-5).

Judgment of 31 March 2014

Held:—(1) (unanimously) The Court had jurisdiction to entertain Australia's application. The dispute concerned whether Japan's activities were compatible with its obligations under the Convention, and did not involve the exploitation of disputed maritime areas (namely, the asserted Australian Antarctic Territory) such as to enable Japan to rely on Australia's reservation (paras. 30-41 and 247).

(2) (by twelve votes to four, Judges Owada, Abraham, Bennouna and Yusuf dissenting) The special permits granted by Japan in connection with JARPA II were not "for purposes of scientific research" pursuant to Article VIII(1) of the Convention.

(a) Taking into account the preamble and other Convention provisions, neither a restrictive nor an expansive interpretation of Article VIII was justified. Programmes for purposes of scientific research should foster scientific knowledge and could pursue aims other than conservation or the sustainable exploitation of whale stocks. This was reflected in IWC Guidelines applicable to JARPA II in 2005 as well as those currently issued for the review of permit proposals by the Scientific Committee (paras. 56-8).

(b) Article VIII gave discretion to a State Party regarding the issue of a special permit and the conditions under which a permit was granted.

The question whether the killing, taking and treating of whales pursuant to a special permit was for purposes of scientific research could not, however, depend simply on that State's perception. The standard of review was whether the programme involved scientific research and, when using lethal methods, its design and implementation was reasonable in relation to achieving the stated objectives. This was an objective test which did not turn on the intentions of government officials. The Court was not called upon to resolve matters of scientific or whaling policy. The only task was to ascertain whether the special permits granted in relation to JARPA II fell within the scope of Article VIII(1) of the Convention (paras. 59-69).

(c) The two elements of the phrase "for purposes of scientific research" were cumulative. The term "scientific research" was not defined. It was unnecessary to identify criteria or offer a general definition. Reasonableness required consideration of decisions regarding the use and scale of lethal methods; the methodology for selecting sample sizes; comparing target sample sizes with actual take; the programme's time frame and scientific output; and the degree to which a programme coordinated its activities with related research projects. The Court did not need to pass judgment on the scientific merit or importance of research objectives or decide whether a programme's design and implementation was the best possible means. The fact that a programme sold whale meat and used proceeds to fund research was not sufficient, taken alone, to cause a permit to fall outside Article VIII (paras. 70-97).

(d) JARPA II's design and implementation were not reasonable in relation to achieving its stated research objectives. Using lethal methods was not per se unreasonable. However, there was no evidence concerning the feasibility or practicability of non-lethal methods, either in setting sample sizes or in later years when the programme maintained the same goals yet the numbers of whales taken declined. Nor was there an assessment of the feasibility of combining a smaller lethal take and increasing non-lethal sampling. The similarities between JARPA and JARPA II cast doubt on Japan's argument that JARPA II objectives relating to ecosystem monitoring and multi-species competition were distinguishing features that warranted increasing the minke whale sample size and the lethal sampling of two additional species. Japan's decision to proceed with JARPA II before JARPA's final review supported the view that JARPA II's sample sizes and launch date were not driven by strictly scientific considerations. Although JARPA II could be broadly characterized as "scientific research", the evidence relating to determining sample sizes provided scant analysis and justification for the underlying decisions (paras. 98-198).

(e) There was a significant gap between the JARPA II target sample sizes and the actual number of whales killed in the programme's implementation. However, no changes were made to the programme's design. Japan's reliance on the first two JARPA II objectives, coupled with a statement that JARPA II could obtain meaningful scientific results based on a limited actual take, cast

doubt on JARPA II's characterization as a programme for purposes of scientific research. The evidence suggested that the target sample sizes were larger than reasonable in relation to achieving JARPA II's stated objectives. The actual take of fin and humpback whales was largely a function of political and logistical considerations. A time frame with intermediary targets would have been more appropriate. The scientific output to date was limited and cooperation with other research institutions was expected. The sample sizes for fin and humpback whales were too small to provide the necessary information and JARPA II's design appeared to prevent random sampling of fin whales. The process used to determine the sample size for minke whales lacked transparency. Funding considerations, rather than strictly scientific criteria, played a role in JARPA II's design (paras. 199-227).

(3) (by twelve votes to four, Judges Owada, Abraham, Bennouna and Yusuf dissenting) Japan had not acted in conformity with its obligations under paragraph 10(e) of the Schedule. Catch limits were set above zero for three species in the years in which Japan granted permits for JARPA II (2005 to the present) (paras. 231 and 247).

(4) (by twelve votes to four, Judges Owada, Abraham, Bennouna and Yusuf dissenting) Japan had not acted in conformity with its obligations under paragraph 10(d) of the Schedule. Japan used the factory ship *Nisshin Maru* and other vessels which served as whale catchers for the purpose of hunting, taking, towing, holding on to or scouting for whales in each of the seasons during which fin whales were taken, killed and treated in JARPA II (paras. 232 and 247).

(5) (by twelve votes to four, Judges Owada, Abraham, Bennouna and Yusuf dissenting) Japan had not acted in conformity with its obligations under paragraph 7(b) of the Schedule.

(a) Although this provision did not apply to minke whales given Japan's objection, JARPA II operated within the Southern Ocean Sanctuary in each season in which fin whales were taken (paras. 233 and 247).

(b) Notwithstanding textual differences, these three Schedule provisions intended to cover all killing, taking and treating of whales that was neither "for purposes of scientific research" under Article VIII(1) of the Convention nor aboriginal subsistence whaling under paragraph 13 of the Schedule. Whaling categories did not exist which came within these two provisions but fell outside the prohibitions in paragraphs 7(b) and 10(e) of the Schedule (paras. 229-30).

(6) (by thirteen votes to three, Judges Sebutinde, Bhandari and Judge ad hoc Charlesworth dissenting) Japan had complied with its obligations under paragraph 30 of the Schedule. It had submitted the JARPA II Research Plan for review by the Scientific Committee before granting the first permit and provided the required information as recognized by the Committee during its 2005 review. Lack of detail was consistent with JARPA II being a multi-year programme and Japan's approach accorded with Committee practice (paras. 234-42 and 247).

(7) (by twelve votes to four, Judges Owada, Abraham, Bennouna and Yusuf dissenting) Japan should revoke any extant authorization, permit or licence granted under JARPA II and refrain from granting any further permits under it. Measures going beyond declaratory relief were warranted because JARPA II was ongoing. It was unnecessary to require Japan to refrain from authorizing or implementing any special permit which was not for purposes of scientific research because that obligation already applied (paras. 244-6 and 247).

Dissenting Opinion of Judge Owada: The Convention sought to achieve the maximum sustainable stock yield and the whaling industry's viability. The Court's function was to assess whether a determination by the contracting government under Article VIII(1) of the Convention was objectively reasonable, in the sense that a research programme was based upon coherent reasoning and supported by respectable scientific opinions. The Court erred by taking a standard of objective reasonableness out of context and applying it in a *de novo* assessment of Japan's activities. JARPA II involved reasonable activities for purposes of scientific research because, albeit imperfect, useful scientific information was derived (paras. 1-49).

Dissenting Opinion of Judge Abraham: The phrase "for purposes of" in Article VIII necessarily involved examining the aims pursued by the State. The Court had assumed the status of a scientific committee rather than ascertaining the nature of the activities in question. The Court should have accepted that JARPA II was a programme conducted for purposes of scientific research. There was no manifest mismatch between its stated aims and the means used, and sample sizes were not set at manifestly excessive levels. To find that JARPA II fell outside Article VIII(1) of the Convention questioned the good faith of Japan (paras. 1-48).

Declaration of Judge Keith: The broader context included changes to the whaling industry and attitudes and policies towards whaling. A system to regulate an industry could have been used to prohibit it. The power to grant a special permit under Article VIII(1) of the Convention was interrelated with the Court's power of review. The question was whether a contracting government's decision to award a special permit was objectively justifiable as being supported by coherent scientific reasoning. Decisions regarding the use of lethal methods as opposed to non-lethal ones, determining sample sizes and implementing JARPA II were not supported by evidence of relevant studies, coherent scientific reasoning or explanations to the IWC or Scientific Committee (paras. 1-14).

Dissenting Opinion of Judge Bennouna: The Court, by evaluating JARPA II, had substituted itself for the IWC and Scientific Committee. Whether a series of concerns and queries was sufficient to justify a finding that JARPA II was

not designed and implemented "for purposes of scientific research" was doubted. JARPA sought to make good the lack of scientific data. JARPA II could not be described as commercial whaling because it was not conducted for profit. It was preferable to rely on the Convention's institutional framework to strengthen multilateral cooperation between States Parties (paras. 1-33).

Separate Opinion of Judge Cançado Trindade: The Convention aimed to replace unilateral unregulated whaling with collective regulation and decision-making. The evolving *opinio juris communis* favoured conservation, the use of non-lethal methods and no scientific whaling. When deciding whether a programme was "for purposes of scientific research", a State had to comply with the principles of prevention and precaution. The Convention as a living instrument, directed at conserving and managing living marine resources with a view to inter-generational equity, moreover supported a narrow construction of Article VIII(1) of the Convention. Although scientific research was uncertain, JARPA II's use of lethal methods was not justifiable as "scientific research" and its indefinite duration militated against its professed purpose (paras. 1-90).

Dissenting Opinion of Judge Yusuf: Article VIII(1) of the Convention was not unrestricted: the discretionary power was to be lawfully used only to achieve the Convention's purposes. The Court should have assessed, given developments under the Convention and international environmental law, whether JARPA II frustrated the Convention's object and purpose in light of recent amendments which might have restricted the right to issue permits. The Court had identified an obscure and debatable standard of review extraneous to the Convention and neither grounded in law nor practice and then directly applied it to JARPA II. Reviewing the design and implementation of a scientific research programme was more properly the task of the Scientific Committee. The Committee did not recommend that permits not be issued because JARPA II generated useful data (paras. 1-61).

Separate Opinion of Judge Greenwood: JARPA II did not satisfy Article VIII(1) of the Convention. To fall within the exemption, the numbers of whales to be killed had to be sufficiently related to achieving programme objectives. The higher number of whales to be taken under JARPA II, compared with JARPA, was not justified on this basis. Japan did not attempt to adapt the JARPA II sample size following changed circumstances. Although it might not have fully complied with the Convention's duty of cooperation, Japan had not breached paragraph 30 because it had provided the required information to the Scientific Committee (paras. 1-38).

Separate Opinion of Judge Xue: Under Article VIII(1), an authorizing party had to use its best knowledge to determine, as it perceived proper, whether to