



Whaling in the Southern Ocean: A Reply to Nelissen and van der Velde

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Introduction

On 31 May 2010, Australia filed an application instituting proceedings at the International Court of Justice in relation to the “dispute concerning Japan’s JARPA II program of scientific whaling”.¹ Prof. Dr. Frans A. Nelissen and Steffen van der Velde have provided a commentary dated 5 July 2010 entitled “Australia Attempts to Harpoon Japanese Whaling Program” on the Hague Justice Portal.² In providing their commentary, Nelissen and van der Velde carry over the anti-whaling bias and errors from the Australian application to which they add their own.

The purpose of this commentary is to correct the bias and some of these errors in the commentary by Nelissen and van der Velde as well as to provide additional information on a number of the issues raised. Analyses of the case instituted by Australia have been provided by Rothwell³ and Anton⁴.

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¹ International Court of Justice. Application instituting proceedings filed in the Registry of the Court on 31 May 2010. Dispute concerning Japan’s JARPA II program of “scientific whaling” (Australia v. Japan). Available at the “Court Documents” section of the Hague Justice Portal.

<http://www.haguejusticeportal.net/eCache/DEF/11/840.TGFuZz1FTg.html>

² Available at: <http://www.haguejusticeportal.net/eCache/DEF/11/843>.

³ Rothwell, Donald R. Australia v. Japan: JARPA II Whaling Case before the International Court of Justice. The Hague Justice Portal. July 2, 2010. <http://www.haguejusticeportal.net/eCache/DEF/11/840.html>

⁴ Anton, Donald K. Dispute Concerning Japan’s JARPA II Program of “Scientific Whaling” (Australia v. Japan). ASIL Insight Vol. 14 Issue 20. July 8, 2010. <http://www.asil.org/insights100708.cfm>.

Preservation (protection) or Conservation?

Throughout their commentary Nelissen and van der Velde mis-use the words “protection” and “preservation”. This is both error and bias. For example, in their legal assessment related to the matter of *ius standi* of Australia, they claim that “The issue at hand is an obligation established for the protection of a collective interest, namely the **preservation** of whales located in waters beyond national jurisdiction” and that “Should the Court arrive at the merits, it will be in a position to take a stance in environmental **protection** and to safeguard endangered whale species for present and future generations.” (emphasis added) Further, in their section on IWC’s opinion on JARPA’s scientific value, Nelissen and van der Velde suggest that an important question could be “... whether JARPA II is actually contributing to the **preservation** of whales in the Antarctic” and that the IWC “... can develop its Regulations for the **preservation** of whales and the control of whaling” based on advice from its Scientific Committee. (emphasis added)

These examples clearly but inappropriately imply that the 1946 International Convention for the Regulation of Whaling (ICRW) is about “protecting” or “preserving” whales. However, as the authors themselves point out, the main purpose of the ICRW is “...to provide for the proper **conservation** of whale stocks.” (emphasis added) In fact, except for Article V of the Convention and paragraph 10 of the Schedule where the words “protected” and “protection” are used in relation to the classification of whale stocks rather than as objectives of the Convention, the word “protect” appears only once in the Convention, that is, in the second paragraph of the preamble where it is used in terms of protecting species rather than individual whales.⁵ Therefore, the “collective interest” referred to by Nelissen and van der Velde is not “the preservation of whales located in waters beyond national jurisdiction.” Indeed, if there is a “collective interest” it would rather be the conservation of whales in all waters (the ICRW applies to all waters, not just to waters beyond national jurisdiction). Similarly, other places in their text should more accurately refer to conservation, which in the case of the ICRW includes protection of depleted stocks rather than preservation or protection applied to all individual whales – there is a difference.

As part of their explanation of the ICRW, Nelissen and van der Velde mistakenly refer to “an orderly development of the whaling industry is described as ‘desired’ by the Convention.” In fact, the final paragraph of the preamble to the Convention says, “Having decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry.” The ‘desired by the Convention’ refers to the penultimate paragraph of the preamble which says, “Desiring to establish a system of international regulation...” Error or bias? In either case it is a misrepresentation of an important part of the Convention – the statement of its purpose.

⁵ The full text of the 1946 International Convention for the Regulation of Whaling including the preamble and Article V may be viewed at: <http://www.iwcoffice.org/commission/convention.htm> The Schedule to the Convention including paragraph 10 may be viewed at <http://www.iwcoffice.org/commission/schedule.htm>.

The assessment by Nelissen and van der Velde that “Should the Court arrive at the merits, it will be in a position to take a stance in environmental protection and to safeguard endangered whale species for present and future generations” is similarly biased since that is what the IWC and its member countries already do by implementing the ICRW. Further, scientists and the IWC’s Scientific Committee as a whole have agreed that catches under Japan’s research program in the Antarctic are unlikely to affect the long-term status of the stocks.⁶

Finally, on the matter of preservation or conservation, the question posed by Nelissen and van der Velde, that is, “...whether JARPA II is actually contributing to the preservation of whales in the Antarctic” is irrelevant since the ICRW is not about preservation of all whales and there is no prerequisite that this or any other research contribute in such a way. In fact, as the following quote from Article VIII of the ICRW shows, research takes conducted under Article VIII are exempt from the operation of the Convention and unencumbered by any conditionality except as may be imposed by the Government issuing the “special permit”.⁷

Article VIII

1. Notwithstanding anything contained in this Convention 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 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 this Article shall be exempt from the operation of this Convention.

The Southern Ocean Sanctuary and the moratorium on commercial whaling

In the section of their commentary that describes the ICRW, Nelissen and van der Velde state that “In a Resolution adopted, adopted in 1994 by 23 votes to one, the majority of the Southern Ocean was declared a sanctuary in which all commercial whaling is prohibited” and that “According to the website of the IWC, ‘Adopted Resolutions are non-binding’....” In fact, the Southern Ocean Sanctuary was so designated by the adoption of an amendment to the Schedule (paragraph 7(b)) that is legally binding on all members except for Japan in respect of Antarctic minke whales. Nelissen and van der Velde get it right in a later section of their commentary but thereby leave two conflicting descriptions, with the former comment on Page 2 of their commentary factually incorrect.

Of importance in terms of how the court may deal with the issue of the Southern Ocean Sanctuary is the fact that it applies to “commercial whaling” only. It does not apply to any

⁶ See document M10/SWG6 Report of the Scientific Assessment Group 2010 available at <http://www.iwcoffice.org/commission/futuredocs.htm> and, document IWC/62/Rep1 Report of the Scientific Committee 2010 p.79 available at http://www.iwcoffice.org/sci_com/screport.htm.

⁷ Article VIII of the ICRW : <http://www.iwcoffice.org/commission/convention.htm>:
<http://www.iwcoffice.org/commission/convention.htm>.

other activity including fishing, marine transportation or research conducted under Article VIII of the ICRW. This fact alone renders false the conclusion of Nelissen and van der Velde that because Japan continues to take fin whales as part of JARPA II⁸ and because Japan's objection to paragraph 7(b) of the Schedule did not include fin whales, it "can be considered not compatible with the Convention".

Japan's objection to paragraph 7(b) of the Schedule has nothing to do with its research program. It simply means that for "commercial whaling", Japan is not legally bound by paragraph 7(b) as it applies to Antarctic minke whales but is legally bound by the paragraph as it would apply to fin whales. Of course this point is somewhat academic in any event given the zero quotas for commercial whaling set under paragraph 10(e) of the Schedule (commonly referred to as the "moratorium") and the fact that Japan has withdrawn its earlier objections to that paragraph.

Japan has on numerous occasions made the point that the adoption of paragraph 7(b) was inconsistent with the requirement of Article V 2 (b) that regulations adopted by the Commission "shall be based on scientific advice" because there was no recommendation from the Commission's Scientific Committee that the Southern Ocean Sanctuary was required for conservation reasons. In this regard, it is also interesting to note that as part of its 2004 review of the effectiveness of the Southern Ocean Sanctuary, the Scientific Committee invited participation of outside experts in Marine Protected Areas. These external reviewers concluded that: the Southern Ocean Sanctuary and IWC sanctuaries in general are not ecologically justified, that it represents a "shotgun" approach to conservation, whereby a large area is protected with little apparent rationale for boundary selection and management prescriptions within the sanctuary and that it is more prohibitive than precautionary.⁹

The Government of Australia, in its application instituting proceedings, focuses on the Southern Ocean Sanctuary (paragraph 7(b) of the Schedule) and the so-called moratorium of commercial whaling (paragraph 10(e) of the Schedule) claiming that catching of whales under JARPA II is in breach of Japan's obligations under these two paragraphs. Since paragraphs 7(b) and 10 (e) do not apply to catches for research purposes under Article VIII,

⁸ Nelissen and van der Velde state that Japan intends to catch 10 fin whales per year under JARPA II. In fact, the JARPA II research plan submitted to the IWC's Scientific Committee notes that for the first two years of the program (2005/2006 and 2006/2007 referred to as a feasibility study) the intended catch of fin whales was 10. The research plan specifies an intended catch of 50 fin whales per year for the remainder of the program. See document SC/57/O1 Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) - Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources. Government of Japan. Available at: <http://www.icrwhale.org/eng/SC57O1.pdf>.

⁹ IWC document SC/56/SOS 5. The Southern Ocean Sanctuary. Zacharias, Mark A., Leah R. Gerber and K. David Hyrenbach. 2004. Available from the IWC Secretariat. The views of these authors related to the IWC's Southern Ocean Sanctuary were further elaborated in an article titled "Do the largest Protected Areas Conserve Whales or Whalers?" published in www.sciencemag.org Science VOL 307 28 JANUARY 2005 pp. 525-526.

such could only be the case if the catch of whales under JARPA II was commercial whaling. In this regard, Australia claims, and Nelissen and van der Velde concur, that the scale of the JARPA II cannot be justified under Article VIII of the ICRW.¹⁰

This argument has been made many times less diplomatically as an accusation that the research is “commercial whaling in disguise.” The point here is that scale is not the determinant. Research on one whale and research on 1,000 whales is research. The determinant is the purpose. If it was whaling for commercial purposes, the operations would be focused in the areas of highest whale density and on the largest animals. This is not the case with whaling under Japan’s whale research program, where the research protocol requires that sampling is done along a scientifically derived track line according to standard survey methodology and where the target animals are selected randomly. In addition, the sample size, that is, the number of whales killed, is not an arbitrary number, nor the maximum that would be taken if it were commercial whaling. Rather, it is a scientifically calculated minimum number needed to obtain statistically significant results over a specified period of time. A large sample size is needed when the population being sampled is large. Taking a small number of samples from a large population can only provide qualitative information related to the animals sampled rather than quantitative data on the population.¹¹

Further support for the position that the purpose is for research is reflected in the conclusions of the IWC Scientific Committee’s 2006 review of the JARPA results.¹² The Scientific Committee made a number of recommendations for additional data analysis and concluded that: “...the dataset provides a valuable resource to allow investigation of some aspects of the role of whales within the marine ecosystem and that this has the potential to make an important contribution to the Scientific Committee’s work in this regard as well as the work of other relevant bodies such as the Convention for the Conservation of Antarctic Marine Living Resources. The Scientific Committee also agreed with its earlier (1997)¹³ conclusion that the results from the research program “have the potential to improve management of minke whales in the Southern Hemisphere.”¹⁴ In this regard it should also be recalled that paragraph 4 of Article VIII of the Convention emphasizes the importance of the collection and analysis of biological data and obliges Contracting Governments to “...take all

¹⁰ Paragraph 37. Application instituting proceedings filed in the Registry of the Court on 31 May 2010. Dispute concerning Japan’s JARPA II program of “scientific whaling” (Australia v. Japan). Available at the “Court Documents” section of the Hague Justice Portal. <http://www.haguejusticeportal.net/eCache/DEF/11/840.TGFuZz1FTg.html>.

¹¹ For detailed explanation of sample sizes see Appendices 6, 7 and 8 of SC/57/O1 Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) - Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources. Government of Japan. Available at: <http://www.icrwhale.org/eng/SC57O1.pdf>

¹² SC/59/Rep 1. Intersessional Workshop to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic held in December 2006 in Tokyo, Japan. 10 (Suppl.) J. CETACEAN RES. MGMT. 411–439 (2008).

¹³ 48 REP. INT’L WHALING COMM. 95–105 (1998).

¹⁴ Further elaboration of these issues is given in: Goodman, Dan. 2010. Japan’s Research Whaling Is Not Unlawful and Does Not Violate CITES Trade Rules. *Journal of International Wildlife Law & Policy*, 13:176–182, 2010.

practicable measures to obtain such data.”¹⁵ The above noted conclusions of the Scientific Committee clearly support a positive response to what Nelissen and van der Velde view as “One of the most important questions *in casu*” that is, “...whether Japan is acting in good faith in its adherence to the ICRW by executing JARPA II and by continuing the application of lethal research methods for scientific purposes.”¹⁶

In their commentary, Nelissen and van der Velde provide what appears to be a quote of Paragraph 10(e) of the Schedule (the moratorium on commercial whaling):

Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and 1985/86 pelagic seasons and thereafter shall be zero.

However, this quote omits the second sentence of Paragraph 10(e) which reads:

This provision 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.

This second sentence of Paragraph 10(e) demonstrates clearly that the moratorium was intended as a temporary measure. Its omission incorrectly implies a sense of permanence notwithstanding the fact that the paragraph in whole or in part (and any other part of the Schedule) could be amended by a ¾ majority vote. The point here is that the omission of the second sentence of the paragraph from the quote is a part of the bias noted above. Examination of the verbatim records of the Commission’s 24th to 26th (1972-1974) and 31st to 34th (1979-1982) Annual Meetings¹⁷ clearly show that the zero quotas for commercial whaling were intended as a temporary measure to allow for the accumulation of scientific information, to allow stocks to recover and, to allow time for development of better killing methods. It was not intended as a permanent remedy or an expression that whaling itself was bad. For example, at the 33rd Annual Meeting (the year before the adoption of Paragraph

¹⁵ Paragraph 4 of Article VIII of the ICRW: “Recognizing 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, the Contracting Governments will take all practicable measures to obtain such data.”

¹⁶ There has been no consensus within the IWC Scientific Committee on the need for or value of lethal sampling however in its mid-term review of JARPA in 1997 the Scientific Committee noted that “...there were non-lethal methods available...but that logistics and the abundance of minke whales in the relevant Area probably precluded their successful application.” (See IWC document 49/4 Report of the Scientific Committee 1997.) More recently, an expert panel “...recognizes that at present, certain data, primarily stomach content data, are only available via lethal sampling.” (See page 26 of the Report of the Expert Workshop to Review the Ongoing JARPN II Programme held in January 2009 available at: <http://www.icrwhale.org/eng/workshop2.pdf>)

¹⁷ Verbatim records of the IWC’s Annual Meetings are available from the IWC Secretariat: secretariat@iwcoffice.org.

10(e)), the Commissioner from the United Kingdom said, “what we had in mind is a moratorium and not a permanent ban.”¹⁸

Remedies sought by Australia

In referring to the remedies sought by Australia, Nelissen and van der Velde incorrectly include “the withdrawal of any Scientific Permits”. In fact, Japan has two research programs under Article VIII of the Convention: one in the Antarctic (JARPA II) that is the subject of the court case and another in the Western North Pacific (JARPNI). Remedies sought by Australia¹⁹ (subject to their reserving the right to supplement, amplify or amend its Application) include the revocation of “any authorizations, permits or licences allowing the activities which are the subject of this application to be undertaken...” This does not mean “the withdrawal of any Scientific Permits” as stated by Nelissen and van der Velde. Rather, it specifically means the “Special Permits” issued by the Government of Japan under Article VIII of the Convention for the conduct of JARPA II.

The IWC’s opinion on JARPA’s scientific value

Nelissen and van der Velde note that the IWC has “expressed deep concern with regard to the continuing lethal research within the Southern Ocean Sanctuary under JARPA II” and correctly state that “Nevertheless, the fact remains that the statements and resolutions of the IWC are not capable of binding State Parties.” But it is also important to recall that the statements and resolutions of the IWC cannot affect the rights of State Parties, including the right to issue “Special Permits”, under Article VIII of the Convention. Further, the resolutions of the IWC against Japan’s research programs (and those of Norway and Iceland as well) must not be seen as a consensus view of the Commission. For the most part, these resolutions were adopted by a relatively small majority vote reflecting the polarization within the Commission. Interestingly, and consistent with an anti-whaling bias, Nelissen and van der Velde chose not to cite the IWC’s resolution 2006-1 (the St. Kitts and Nevis Declaration)²⁰ which emphasized “that the use of cetaceans in many parts of the world including the Caribbean, contributes to sustainable coastal communities, sustainable livelihoods, food security and poverty reduction...”, noted “that the moratorium which was clearly intended as a temporary measure is no longer necessary” and supported the need for continuing research on whales by declaring “our commitment to normalising the functions of the IWC based on the terms of the ICRW ... and the need for science-based policy and rulemaking that are accepted as the world standard for the management of marine resources”.

¹⁸ Verbatim Record – 33rd Annual Meeting of the IWC. Available from the IWC Secretariat: secretariat@iwcoffice.org

¹⁹ Paragraph 41 (b): Application instituting proceedings filed in the Registry of the Court on 31 May 2010. Dispute concerning Japan’s JARPA II program of “scientific whaling” (Australia v. Japan). Available at the “Court Documents” section of the Hague Justice Portal.

<http://www.haguejusticeportal.net/eCache/DEF/11/840.TGFuZz1FTg.html>

²⁰ Resolution 2006-1 was adopted by a vote with 33 votes in support, 32 against and 1 abstention. Available at: <http://www.iwcoffice.org/meetings/resolutions/resolution2006.htm>.

Nelissen and van der Velde also note that the IWC's resolution 2007-1²¹ states that "fin whales in the Southern Hemisphere are currently classified as endangered." This statement is correct but it does not mean that the population could not sustain a continuing harvest at some level. The classification as "endangered" simply means that the species meets at least one of the listing criteria for the IUCN Red List – in this case an "observed, estimated, inferred or suspected population size reduction of 50% over the last 10 years or three generations, whichever is the longer."²²

Comparison with a "reservation" made by Iceland

Nelissen and van der Velde suggest that a comparison of Japan's "objections" to paragraphs 7(b) and 10(e) of the Schedule with a "reservation" made by Iceland in relation to paragraph 10(e) that was an integral part of its notices of adherence in 2001 and 2002 "might be in order". However, they incorrectly suggest that "Iceland was only accepted after it amended its reservation to paragraph 10(e) Schedule in such a way as to satisfy the requirement of the IWC". In fact, Iceland's membership was accepted at the 5th Special Meeting of the International Whaling Commission held on 14 October 2002 in Cambridge, UK, after a complicated set of decisions by the Chair and challenges to those decisions which led to four separate votes.²³ All of this was unrelated to Iceland's redrafting or amending its reservation.²⁴

Comparison of Japan's "objections" to paragraphs 7(b) and 10(e) of the Schedule with a "reservation" made by Iceland in relation to paragraph 10(e) might be valid if there was some equivalency in the basis for comparison. In fact there is no such equivalency since the Articles of the ICRW are silent on the matter of "reservations" but specify in detail²⁵ the

²¹ Available at: <http://www.iwcoffice.org/meetings/resolutions/resolution2007.htm#res1>.

²² See page 22. IUCN. (2001). *IUCN Red List Categories and Criteria: Version 3.1*. IUCN Species Survival Commission. IUCN, Gland, Switzerland and Cambridge, UK. ii + 30 pp. Available at: http://www.iucnredlist.org/documents/redlist_cats_crit_en.pdf.

²³ Chair's Report of the 5th Special Meeting 14 October 2002. International Whaling Commission, May 2003.

²⁴ A detailed analysis of the acrimonious and confrontational process by which the Commission dealt with Iceland's attempted accession with a reservation in 2001 and 2002 together with an analysis of the legal issues raised is presented in: Gillespie, A. *Iceland's Reservation at the International Whaling Commission*, EJIL 2003, Vol.14, No.5, 977-998. Available at: <http://www.ejil.org/pdfs/14/5/454.pdf> See also <http://www.iwcoffice.org/documents/iceland.htm>.

²⁵ Article V 3. of the ICRW: Each of such amendments shall become effective with respect to the Contracting Governments ninety days following notification of the amendment by the Commission to each of the Contracting Governments, except that (a) if any Government presents to the Commission objection to any amendment prior to the expiration of this ninety-day period, the amendment shall not become effective with respect to any of the Governments for an additional ninety days; (b) thereupon, any other Contracting Government may present objection to the amendment at any time prior to the expiration of the additional ninety-day period, or before the expiration of thirty days from the date of receipt of the last objection received during such additional ninety-day period, whichever date shall be the later; and (c) thereafter, the amendment shall become effective with respect to all Contracting Governments which have not presented objection but shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn. The Commission shall notify each Contracting Government immediately upon receipt of each

required timing for submission of “objections” and their impact with respect to Contracting Governments. Further, while specifying such detail, Article V 3. in no way restricts the nature of amendments to the Schedule that may be objected to so that while Nelissen and van der Velde’s comment that reservations are acceptable only if they are compatible with the object and purpose of the Convention the same restriction cannot be applied to objections in the context of the ICRW.

Nelissen and van der Velde also argue that “Iceland, by making a reservation to paragraph 10(e) Schedule, was objecting to a paragraph, which is considered at the core of the functioning and the object and purpose of the ICRW.” I disagree strongly and would counter-argue that it is the maintenance of paragraph 10(e) in the Schedule notwithstanding the IWC’s adoption of its Scientific Committee’s risk-averse method for setting quotas²⁶ and agreement by the Scientific Committee that some stocks could sustain a harvest that is contrary to the object and purpose of the ICRW. The “...orderly development of the whaling industry” cannot be made possible by maintaining zero quotas for abundant stocks.

Conclusions

Nelissen and van der Velde come to two basic conclusions. The first is that

...one might come to the conclusion that Japan is circumventing the ban on commercial whaling, and therefore defeating the object and purpose of the ICRW, and thus its performance in good faith of the Convention.

The second conclusion is that since Japan intends to catch fin whales under its research program in the Antarctic even though its objection to paragraph 7(b) of the schedule does not include fin whales, the ICJ “...might come to the conclusion that Japan’s behavior is incompatible with a proper execution of the ICRW”.

The first conclusion could only be logically derived if JARPA II was in fact commercial whaling or if it were deemed frivolous or of inconsequential scientific value. Clearly, the IWC’s Scientific Committee’s review of the results of JARPA referenced above demonstrates

objection and withdrawal and each Contracting Government shall acknowledge receipt of all notifications of amendments, objections, and withdrawals.

²⁶ The Revised Management Procedure (RMP). The IWC’s Revised Management Procedure is a risk-averse method of calculating catch quotas. Quotas are only provided for abundant stocks. No quotas are provided for stocks that are below 54% of their initial population size. The objective is that in 100 years after exploitation based on RMP the population will still be around 72% of the initial population size. RMP includes built in safety factors including possible impacts of environmental changes, possible error in abundance estimates of up to 50% and unequal sex ratios in catches. RMP calculations are based on thousands of simulation trials over a period of 100 years. RMP is a feedback system requiring new abundance surveys every 5 years. Most commercial fisheries would be closed if such a conservative regime were used - in fact, RMP wastes whale resources because it is too conservative. The Revised Management Procedure constitutes the most advanced and robust management mechanism ever developed for any wild species.

the opposite. No doubt, however, numerous individual scientists from countries with an anti-whaling position, including Australia, will claim otherwise.²⁷

The second conclusion requires an assumption that there is a linkage between Japan's catches in its research program (JARPA II) conducted under Article VIII of the Convention and its objection to the establishment of the Southern Ocean Sanctuary (Paragraph 7(b) of the Schedule) in accordance with its rights under Article V 3 of the Convention. In fact, there is no such linkage. The words "Notwithstanding anything contained in this Convention..." and "...shall be exempt from the operation of this Convention" of Article VIII are unequivocal and without exception. It is therefore difficult to see how the ICJ "might come to the conclusion that Japan's behavior (catching fin whales as part of its research program) is incompatible with a proper execution of the ICRW."

²⁷ The deep philosophical and political divisions between the IWC member countries that support managed whaling activities and those opposed to any harvesting of whales is evident even in the Scientific Committee particularly on issues related to whaling under "special permit" (Article VIII). For a more complete discussion of this issue see: Morishita, Joji and Dan Goodman 2005. Role and Problems of the Scientific Committee of the International Whaling Commission in terms of Conservation and Sustainable Utilization of Whale Stocks. Global Environmental Research Vol.9 No.2 pp. 157-166. A copy of this document can be found here: <http://www.icrwhale.org/eng/RoleandProb.pdf>.