

INTERNATIONAL PANEL OF INDEPENDENT LEGAL EXPERTS

ON

SPECIAL PERMIT (“SCIENTIFIC”) WHALING UNDER INTERNATIONAL LAW

INTRODUCTION

1. We are asked to advise the International Fund for Animal Welfare (IFAW) on the following issues:
 - A:** Under what conditions, if any, is a State Party to the International Convention for the Regulation of Whaling (ICRW or the Convention) entitled to carry out scientific whaling, having regard to: (1) the ICRW and in particular to Article VIII of the Convention and to paragraphs 10(e) and 30 of the Schedule to the Convention; (2) such other international acts or instruments as may be relevant?
 - B:** In the light of the answer to A, is “scientific whaling” as currently authorized or carried out by some members of the International Whaling Commission (IWC) consistent with the requirements of the ICRW?
 - C:** If the answer to B is that such “scientific whaling” as currently authorized or carried out by some IWC members is inconsistent with the requirements of the ICRW, what would be the legal consequences (if any) of a Resolution adopted by a majority of the IWC that purports to determine that such “scientific whaling” is lawful?

SUMMARY

2. In summary, our views are as follows:

A: As to the conditions, if any, under which scientific whaling may be carried out having regard to the provisions of the ICRW and other relevant international acts or instruments:

(1) The “scientific whaling” conducted by some members of the IWC does not meet the requirements of paragraph 30 of the Schedule to the ICRW and does not therefore fall within the exemption laid down in Article VIII of the ICRW, as interpreted in the light of the object and purpose of the Convention and its context, according to principles applied under the law of treaties. Consequently such whaling is unlawful. We also consider that there is strong evidence that the “scientific whaling” conducted by some members of the IWC is in violation of the moratorium on commercial whaling laid down in paragraph 10(e) of the Schedule to the ICRW. This reinforces our view that it is necessary for such whaling to be made subject to the review required under paragraph 30 of the Schedule (paragraphs 43-80). Alternatively, we consider that such whaling constitutes an abuse of rights afforded under Article VIII of the ICRW (paragraphs 82-98);

(2) The “scientific whaling” conducted by some members of the IWC raises serious questions of compliance with Articles 64, 65, 87, 116, 117, 119, 120, 240, 241 and 251 of United Nations Convention on the Law of the Sea (UNCLOS) and/or may constitute an abuse of rights contrary to Article 300 UNCLOS (paragraphs 99-111);

(3) The “scientific whaling” conducted by some members of the IWC raises serious questions of compliance with obligations arising under: the Convention on Biological Diversity (the CBD) (paragraphs 114-119), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (paragraphs 120-127) and the Convention on the Conservation of Antarctic Marine Living Resources (the CCAMLR) (paragraphs 128-135);

B: In the light of the answer to Question “A”, and in the light of certain factual matters noted by the Parties to the ICRW, and/or recorded in various Resolutions adopted by the International Whaling Commission (IWC), in particular Resolution 2005-1:

(4) We consider that “scientific whaling” as conducted or authorised by some members of the IWC, and in particular the Government of Japan, is not consistent with the requirements of paragraph 30 of the Schedule to the ICRW, nor with the requirements of Article VIII ICRW. We also consider that there is strong evidence that such whaling is in violation of paragraph 10(e) of the Schedule (paragraphs 137-153);

(5) In particular, we consider the following aspects of such scientific whaling, as conducted or authorised by the Government of Japan, to provide strong evidence that such whaling is unlawful:

(a) The recent adoption of its JARPA II programme by the Government of Japan has not allowed the IWC Scientific Committee adequate time to review and comment on the results of the earlier JARPA programme, contrary to the requirements of paragraph 30 of the Schedule to the ICRW;

(b) As noted by a number of scientists participating in the work of the IWC Scientific Committee and others, the Government of Japan is conducting “scientific whaling” on an increasingly commercial scale and for apparently economic and commercial purposes. Such whaling contravenes the prohibition on commercial whaling agreed by the Parties at paragraph 10(e) of the Schedule to the Convention. Such commercial-type whaling also threatens to undermine conservation measures adopted by the Parties to the ICRW and to promote the illegal international trade in whale meat (in contravention of the CITES Convention);

(c) The Government of Japan has not demonstrated to the satisfaction of the Scientific Committee or the IWC that its special permit whaling has been authorised in exceptional circumstances, nor that its “scientific whaling”, including the JARPA II and JARPN II programmes, meets critically important research needs;

(d) The Government of Japan has not demonstrated to the satisfaction of the Scientific Committee or the IWC that its programme of special permit whaling, in particular the JARPA II programme, fulfils criteria set out in the Guidelines for Review of Special Permits established by the IWC Scientific Committee¹ in relation to objectives, methodology and the effects of catches on stocks.

(e) The Government of Japan’s “scientific whaling” programme is conducted using lethal research techniques when alternative and non-lethal techniques may be available. The Government of Japan has not demonstrated to the satisfaction of the Scientific Committee or the IWC that its programme of special permit whaling takes adequate account of the development of alternative non-lethal research techniques. We note in this regard the forthcoming report of the survey carried out by the Government of Australia using non-lethal techniques in the Southern Ocean;

(f) The Government of Japan has not demonstrated to the satisfaction of the Scientific Committee or the IWC that its programme of special permit whaling does not jeopardise the conservation of whales in sanctuaries, including those classified internationally as endangered and vulnerable;

¹ We refer in this regard to the Comments on the Government of Japan’s JARPA II Proposal presented by 63 scientists, including members of 16 national delegations, participating in the work of the IWC Scientific Committee, published in June 2005 as Appendix 2 to the Report of the Standing Working Group on Scientific Permits (the response of 5 scientists defending JARPA II is published as Appendix 3) in *J Cetacean Res Manag* 1(1): 3-24 [2005] also available at [www.iwcoffice.org/ documents/sci_com/SCRepfiles2005](http://www.iwcoffice.org/documents/sci_com/SCRepfiles2005) .

(g) Against the background of the serious and wide-ranging concerns referred to above, and in the absence of a Scientific Committee review of its proposals, the Government of Japan has failed to cooperate with the IWC by consistently refusing to withdraw or restructure its “scientific whaling” programmes as requested by the Commission on numerous occasions, most recently by Resolution 2005-1;

C: In the light of the answer to Question “B”:

(6) A Resolution adopted by a majority of the IWC that purported to determine that such “scientific whaling” is lawful would not be capable of altering the legal obligations arising under the ICRW in relation to the prohibition on commercial whaling and the conditions under which scientific whaling may be conducted. Nor would such a Resolution be capable of altering the scope of legal obligations arising under other relevant international acts or instruments. Such a Resolution would therefore be without legal effect in altering the rights and obligations of the parties to the ICRW;

(7) We consider that the ICRW falls into the category of treaties creating interdependent or collective obligations. As such, any party who considers that another party has breached its obligations under the ICRW would be entitled to bring a claim of state responsibility under the conditions laid down in Article 48 of the (2001) International Law Commission’s Draft Articles on State Responsibility.

FACTUAL BACKGROUND

3. “Scientific Whaling” and the ICRW: A small number of states, including Japan, Iceland² and Norway³, have in recent decades conducted “scientific” or “special

² We refer, by way of example to Iceland’s, “Programme for a Two Year Feasibility Study on Cetaceans in Icelandic Waters”, Paper SC55/02 presented to the IWC Scientific Committee.

³ See for example IWC Resolution 1994-11 on Special Permit Catches by Norway.

permit” whaling, in purported reliance on Article VIII of the ICRW⁴. The scale and impact of such “scientific” whaling has attracted considerable international attention in view of the moratorium on commercial whaling which was agreed by the Parties to the ICRW in 1982 and which came into effect in the 1985/1986 season (see further below). Owing to recent significant increases in the scale of whaling carried out under special permits issued by the Government of Japan, international attention has tended to focus on whaling undertaken by that country. For the same reason, this Opinion also focuses on the recent activities of the Government of Japan.

4. The international legal framework for regulating whaling under the ICRW is considered below, but in outline, Japan and other states who have conducted “scientific whaling” have relied on Article VIII of the ICRW as providing legal justification for their actions. Article VIII of the ICRW permits any Contracting Government to 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 other restrictions as the Government thinks fit. Each Contracting Government is required to “report at once to the Commission all such authorizations which it has granted” (Article VIII.1, set out in full below).
5. *Review by the Scientific Committee:* Under ICRW procedures (set out below), proposals for special permits for scientific whaling are reviewed by the Scientific Committee of the IWC. Paragraph 30 of the Schedule to the Convention requires Parties to provide the IWC with proposed permits “before they are issued” and “in sufficient time to allow the Scientific Committee to review and comment on them”. The Scientific Committee takes the position that, whilst all proposed permits have to be submitted for review by the Scientific Committee, following Guidelines

⁴ During the period covering 1950-1970 special permits were also issued by other countries including the Soviet Union, the United States Australia, New Zealand and South Africa (Source: Reports of the IWC 1956, 1963 and 1964. Japan adhered to the ICRW on 4 April 1951.

issued by the Commission⁵, “the ultimate responsibility for their issuance lies with the member nation”⁶. The IWC Guidelines require the Scientific Committee to examine a range of matters, including whether the information sought in the research programme under each Special Permit is: required for the purposes of management of the species or stock being researched; and whether the information sought could be obtained by non-lethal means⁷.

6. Since the Parties to the ICRW adopted the moratorium on commercial whaling⁸, which came into effect in the 1985/1986 season, Japan, Norway and Iceland have issued special permits in reliance on Article VIII and in recent years only Japan and Iceland have issued permits⁹.
7. The validity of “scientific” whaling activity has been the subject of longstanding international debate, at the IWC and elsewhere. The IWC has passed over 40 separate Resolutions rejecting Japanese or all scientific whaling¹⁰. The most recent such Resolution is Resolution 2005-1 on the JARPA II programme, which expresses a range of concerns about the latest Japanese proposal and concludes by strongly urging Japan to withdraw its JARPA II proposal or revise it so that any information needed to meet its objectives is obtained by non-lethal means. The JARPA II programme is now operational (see below).
8. Recent attention has focussed on Japan in particular because it is one of only two countries currently issuing special permits and because of the scale of catch authorised under those permits. As stated on the webpage of the Scientific Committee: “Recent discussions have centred on accusations that such permits have been issued merely as a way around the moratorium decision; these have been

⁵ “Guidelines for the review of scientific permit proposals”, summarised at www.iwcoffice.org/conservation/permits .

⁶ See the information on Scientific Permit Whaling, set out at www.iwcoffice.org/conservation/permits.

⁷ This particular requirement is laid down in Resolution 1999-2.

⁸ The Moratorium was adopted in 1982. It is currently set out at paragraph 10(e) of the Schedule to the Convention.

⁹ See the information on Scientific Permit Whaling, set out at www.iwcoffice.org/conservation/permits

¹⁰ Reports of the IWC 1986-2005.

countered by claims that the catches are essential to obtain information necessary for rational management and other important research needs”.

9. Japan uses profits derived from scientific whaling (through commercial sale of whale products) to support the Institute for Cetacean Research (ICR). Critics have pointed to the ICR’s close ties with the commercial whaling industry as well as with the Ministry for Fisheries, notwithstanding the ICR’s official status as a non-governmental research institute.

10. JARPA, JARPN, JARPA II and JARPN II¹¹: The issues on which we have been asked to advise have arisen in the context of an unprecedented proposed expansion of Japanese scientific whaling activity and in particular the announcement by the Government of Japan, in 2005, of the commencement of the “Japanese Whale Research Programme under Special Permit in the Antarctic”, known as JARPA II. The programme commenced in the 2005/2006 season¹². The first two years of JARPA II will be a feasibility study commencing with the sampling each year of a maximum of 850 (+ or – 10% allowance) minke whales and 10 fin whales (No humpback whales are scheduled to be taken during the period of the feasibility study). The full whaling programme involves the taking of up to 935 minke whales, 50 fin whales¹³ and 50 humpback whales¹⁴ annually from the Antarctic. This represents a significant increase in the number of whales taken under earlier scientific whaling programmes operated by Japan, or indeed any other Contracting Government.

11. The programme is said by the Head of ICR to have been designed “with far-reaching objectives to ascertain the dynamics of the Antarctic ecosystem.”¹⁵ The

¹¹ “JARPA” stands for Japanese Whale Research Programme under Special Permit in the Antarctic and JARPN stands for “Japanese Whale Research Programme under Special Permit in the Western North Pacific”

¹² Feasibility studies will be conducted in the first two years and the full-scale programme will start in the 2007/2008.

¹³ Fin whales are classified as “endangered” on the IUCN Red List of Threatened Species.

¹⁴ Humpback whales have been listed as vulnerable on the 2004 IUCN Red List of Threatened Species.

¹⁵ See the letter published in Nature Vol 436 (August 2005) page 912.

objectives of the JARPA II and a description of the methods to be used are set out in the document entitled “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” (SC/57/01) published by ICR and presented to the Scientific Committee of the IWC.¹⁶ The stated objectives of the programme include: monitoring of the Antarctic ecosystem; modeling competition among whale species and developing future management objectives; elucidation of temporal and spatial changes in stock structure and improving the management procedure for the Antarctic minke whale stocks.

12. The programme has however been heavily criticised by members of the Scientific Committee and by the IWC itself.
13. A group of 63 scientists involved in the work of the IWC’s Scientific Committee¹⁷, including members of 16 national delegations, expressed their serious concerns about the proposal in June 2005, arguing that it was scientifically invalid to review the JARPA II proposal before the IWC had had a chance to conduct a full review of the original 18 year JARPA programme. They recorded their concerns in published comments on the proposal and noted that:

“With the new proposal Japan will increase its annual take of whales under special permit to a level where, in each year, it will take almost half the number of all whales ever taken under special permit by all other nations combined. These levels are also approaching the annual commercial quotas for Antarctic minke whales that were in place prior to the moratorium”.¹⁸

¹⁶ The document is available at www.icrwhale.org/JARPAII

¹⁷ The Scientific Committee is composed of scientists nominated by the Commissioner of each Contracting Government which indicates that it wishes to be represented on that Committee (Section A of the Rules of Procedure of the Scientific Committee). According to information published by the IWC, the Scientific Committee comprises up to 200 of the world's leading whale biologists. Many are nominated by member governments. In addition, in recent years it has invited other scientists to supplement its expertise in various areas. The size of the Scientific Committee, as well as the subject matter it addresses, has increased considerably over time, www.iwcoffice.org/commission.

¹⁸ See footnote 1 above.

14. The JARPA II programme follows on from the earlier JARPA programme which ran for 16 years until the 2004/2005 Antarctic season. The stated objectives of that programme were “the estimation of biological parameters (especially the natural mortality rate) to improve management; elucidation of stock structure to improve management; examination of the role of whales in the Antarctic ecosystem; examination of the effect of environmental changes on cetaceans”.
15. By Resolution 1997-5, the IWC expressed its “deep concern” at Japan’s continuing lethal research within the Southern Ocean Sanctuary¹⁹ and recommended that research involving the killing of cetaceans should only be permitted where “critically important research needs” are addressed which cannot be answered by analysing existing data or using non-lethal methods. The Resolution records that the Scientific Committee found that the results of JARPA “are not required for management” although the results “have some potential to improve management”. The IWC Resolution goes on to: affirm that JARPA does not address critically important research needs; reaffirm that Contracting Governments should refrain from issuing special permits involving killing in sanctuaries; reiterate its deep concern at Japan’s continuing scientific programme in the Southern Ocean sanctuary; strongly urge the Government of Japan to refrain from issuing any further special permits for the take of any whales, particularly in the Southern Ocean sanctuary and instruct the Scientific Committee not to consider Southern hemisphere minke whales in the context of the implementation of the RMP unless instructed to do so by the Commission. These concerns were reiterated in subsequent Resolutions (see Appendix I).
16. The Japanese Government has also issued special permits under its JARPN II programme, announced in 2000, which operates in the Western North Pacific. The stated goal of the programme is to obtain information to contribute to the

¹⁹ The Sanctuary was established in 1994, see further at paragraph 39 below.

conservation and sustainable use of marine living resources (including whales) in the western North Pacific. In 2002, a full JARPN II programme was proposed involving the take of 150 common minke whales, 50 Bryde's whales, 50 sei whales and 10 sperm whales. The current permit (2004) is for 220 common minke whales, 50 Bryde's whales, 100 sei and 10 sperm whales. This programme replaces an earlier programme known as JARPN which ran from 1994-1999.

17. The Scientific Committee reviewed the results of JARPN at a Workshop in February 2000²⁰. The Scientific Committee agreed that the information obtained was useful for management as it had been and will continue to be used in the refinement of “Implementation Simulation Trials” for North Pacific common minke whales. No consensus view was reached on whether the results could have been obtained using non-lethal research techniques in a suitable timeframe.

18. The Review of JARPA II in the IWC Scientific Committee: The JARPA II proposal was on the agenda of the Scientific Committee at its meeting in June 2005. However some members of the Scientific Committee felt unable to take part in a review of the proposal on the basis that a full review of JARPA had not been conducted and was not expected until 2006. As discussed above at paragraph 11, a group of 63 scientists (including representatives from 16 national delegations and 16 other participants) issued a statement expressing their concerns about the proposal. They stated that it was “scientifically invalid to review the JARPA II proposal before the IWC has had a chance to conduct a full review of the results of the original 18 year old JARPA programme”. They also took the view that: “By bringing this proposal forward at this time the Government of Japan has substantially compromised the capacity of the scientific committee to perform its task as designated by the Commission in its “Guidelines for the Review of

²⁰ The report of the Workshop is published in the Volume 5 supplement to the Journal of Cetacean Research and Management 2001

Scientific Permit Proposals...and puts at stake the capacity of the SC to provide objective and representative scientific advice to the Commission”²¹.

19. The matter was referred to the Commission. The information about the meeting published by the IWC states that: “There was considerable disagreement over the value of this research within the Commission. A Resolution was passed (30 votes to 27 votes with 1 abstention) that strongly urged the Government of Japan to withdraw its JARPA II proposal or to revise it so that any information needed to meet the stated objectives of the proposal is obtained using non-lethal means. Japan withdrew a proposed resolution in favour of the research programmes.
20. Subsequently Japan issued a permit for the first year of the feasibility study to take place in the 2005/2006 Antarctic summer. That part of the study has now concluded but it appears that no information on its findings has yet been published.

INTERNATIONAL LEGAL FRAMEWORK FOR THE REGULATION OF WHALING

21. **The ICRW**: The ICRW was concluded on 2 December 1946 and entered into force on 10 November 1948²². There are currently 66 parties to the Convention, all of whom are also members of the IWC.
22. The object and purpose of the ICRW is set out in the Preamble to the Convention which declares:

“Recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks;

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;

²¹ See footnote 1 above.

²² The first international instrument which sought to regulate whaling was the 1931 Convention for the Regulation of Whaling. This Convention was limited in its practical effect because five key whaling states refused to accede to it and because it lacked any means of updating the regulations governing whaling without the negotiation of a separate protocol, see the discussion in Simon Lyster “International Wildlife Law”, Grotius, 1985 at pages 17-19.

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;

Recognizing that in the course of achieving these objectives, whaling operations should be confined to those species best able to sustain exploitation in order to give an interval for recovery to certain species of whales now depleted in numbers;

Desiring to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks on the basis of the principles embodied in the provisions of the International Agreement for the Regulation of Whaling, signed in London on 8th June, 1937, and the protocols to that Agreement signed in London on 24th June, 1938, and 26th November, 1945; and

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..."

23. The Convention applies to factory ships, land stations, and whale catchers under the jurisdiction of the Contracting Governments and to all waters in which whaling is prosecuted by such factory ships, land stations, and whale catchers²³ (Article I.2).
24. The Schedule to the Convention contains detailed regulations governing whaling seasons, capture, catch limits, classification of stocks, treatment and supervision and control of whaling operations, among other matters. The Schedule forms an integral part of the Convention (Article I.1). The Schedule is updated periodically by the Commission (as to which see below), Article V.²⁴
25. Article IX.1 of the ICRW deals with enforcement at the national level and requires each Contracting Government to take appropriate measures to ensure the application of the provisions of the Convention and the punishment of infractions against its provisions in operations carried out by persons or by vessels under its jurisdiction. Paragraph (3) of Article IX also requires that "Prosecution for infractions against or contraventions of this Convention shall be instituted by the

²³ These terms are defined in Article II.

²⁴ The current version of the Schedule is the version as amended by the Commission at the 57th Annual Meeting, Ulsan, Republic of Korea, 20-24 June 2005.

Government having jurisdiction over the offence”. Information on infractions is to be transmitted to the Commission (Article IX.4, see below)

26. **The IWC**: Article III.1 of the ICRW provides for the establishment of the IWC, to be composed of one member from each Contracting Government. Each member of the IWC has one vote and may be accompanied by one or more experts and advisers (Article III.1).
27. *Rules of Procedure*: Pursuant to Article II.2 of the ICRW, the IWC has adopted its own Rules of Procedure (ROP)²⁵. The IWC ROP provide for a regular Annual Meeting (section B), the attendance of Observers (section C) and the establishment of a Scientific Committee, a Technical Committee and a Finance and Administration Committee as well as ad hoc committees (section M), among other matters.
28. Section E of the ROP deals with decision-making and provides that the “Commission should seek to reach its decisions by consensus. Otherwise, [the voting procedure set out in section E is to apply]” those rules provide that where a vote is taken on any matter before the Commission, a simple majority of those casting an affirmative or negative vote shall be decisive, except that a three-fourths majority of those casting an affirmative or negative vote shall be required for action in pursuance of Article V of the Convention. At meetings of committees appointed by the Commission, a simple majority of those casting an affirmative or negative vote shall also be decisive. The committee shall report to the Commission if the decision has been arrived at as a result of the vote.
29. *The Scientific Committee*: Paragraph 30 of the Schedule requires Contracting Governments to provide the IWC with proposed scientific permits before they are

²⁵ The current Rules of Procedure are the Rules as amended at the 57th Annual Meeting, Ulsan, Republic of Korea, 20-24 June 2005.

issued “and in sufficient time to allow the Scientific Committee to review and comment on them”. The proposed permits are to specify the objectives the research; the number, sex, size and stock of the animals to be taken; opportunities for participation in the research by scientists of other nations and the possible effect on conservation of stock.

30. The Scientific Committee “shall review the current scientific and statistical information with respect to whales and whaling, shall review current scientific research programmes of Governments, other international organisations or of private organisations, shall review the scientific permits and scientific programmes for which Contracting Governments plan to issue scientific permits, shall consider such additional matters as may be referred to it by the Commission or by the Chair of the Commission, and shall submit reports and recommendations to the Commission” (Section M: 4 of the RoP)

31. *The Technical Committee*: The Technical Committee shall, as directed by the Commission or the Chair of the Commission, prepare reports and make recommendations on:

- “(a) Management principles, categories, criteria and definitions, taking into account the recommendations of the Scientific Committee, as a means of helping the Commission to deal with management issues as they arise;
- (b) technical and practical options for implementation of conservation measures based on Scientific Committee advice;
- (c) the implementation of decisions taken by the Commission through resolutions and through Schedule provisions;
- (d) Commission agenda items assigned to it;

(e) any other matters.”²⁶

32. The IWC has adopted ROP for both the Scientific Committee and the Technical Committee. In relation to review of scientific permits, the ROP of the Scientific Committee state that:

- “1. When proposed scientific permits are sent to the Secretariat before they are issued by national governments the Scientific Committee shall review the scientific aspects of the proposed research at its annual meeting, or during a special meeting called for that purpose and comment on them to the Commission.
2. The review process shall take into account guidelines issued by the Commission²⁷.
3. The proposed permits and supporting documents should include specifics as to the objectives of the research, number, sex, size, and stock of the animals to be taken, opportunities for participation in the research by scientists of other nations, and the possible effect on conservation of the stock resulting from granting the permits.
4. Preliminary results of any research resulting from the permits should be made available for the next meeting of the Scientific Committee as part of the national progress report or as a special report, paper or series of papers. “(Section F of the ROP)

33. At the 2003 Annual Meeting, the IWC launched the Berlin initiative on strengthening the conservation agenda of the IWC (Resolution 2003-1) and established a Conservation Committee entrusted with preparing the future Conservation agenda, implementing those items on the agenda referred to it by the Commission and making recommendations in order to maintain and update the Conservation Agenda on a continuing basis.

34. *Functions:* The IWC’s functions are set out in Articles IV, V and VI of the ICRW which deal respectively with the carrying out of analysis and research, the amendment of the Schedule and the making of recommendations.

35. *Research and Information:* Article IV.1 states that the IWC may:

“...either in collaboration with or through independent agencies of the Contracting Governments or other public or private agencies, establishments, or organizations, or independently; (a) encourage, recommend, or if necessary, organize studies and

²⁶ Section M:7 of the IWC ROP.

²⁷ “Guidelines for the review of scientific permit proposals”, summarised at www.iwcoffice.org/conservation/permits

investigations relating to whales and whaling; (b) collect and analyze statistical information concerning the current condition and trend of the whale stocks and the effects of whaling activities thereon; (c) study, appraise, and disseminate information concerning methods of maintaining and increasing the populations of whale stocks.”

The IWC is to arrange for the publication of reports of its activities (Article IV.2)

36. *Amendment of the Schedule:* Article V provides that the IWC may amend “from time to time” the provisions of the Schedule to the ICRW by adopting regulations with “respect to the conservation and utilization of whale resources, fixing (a) protected and unprotected species; (b) open and closed seasons; (c) open and closed waters, including the designation of sanctuary areas; (d) size limits for each species; (e) time, methods and intensity of whaling (including the maximum catch of whales to be taken in any one season); (f) types and specifications of gear and apparatus and appliances which may be used; (g) methods of measurement; and (h) catch returns and other statistical and biological records” (Article V.1).
37. The scope of the amendments is framed by paragraph 2 of Article V which states that they: “(a) shall be such as are necessary to carry out the objectives and purposes [of the ICRW] and to provide for the conservation, development and optimum utilization of the whale resources; (b) shall be based on scientific findings; (c) shall not involve restrictions on the number or nationality of factory ships or land stations, nor allocate specific quotas to any factory ship or land station or to any group of factory ships or land stations; and (d) shall take into consideration the interests of the consumers of whale products and the whaling industry”.
38. The entry into force of such amendments is dealt with in Article V.3. Amendments become effective 90 days after notification by the IWC, subject to the possibility of an objection being raised by any State Party within that period. This triggers a further period of up to 120 days during which other Governments may also present objections. The amendment then becomes effective with respect to all Contracting Governments which have not presented objections but does not become effective

with respect to any Government which has objected, until such date as the objection is withdrawn. This therefore constitutes an application of the “opting out” technique for the amendment of treaties, requiring pro-active steps for Parties to avoid the new obligations.

39. *The Sanctuaries:* The IWC has established two sanctuaries, the Indian Ocean Sanctuary, declared in 1979 (provided for at paragraph 7(a) of the Schedule) and the Southern Ocean Sanctuary²⁸, declared in 1994 (paragraph 7(b) of the Schedule). In both sanctuaries, commercial whaling is prohibited, irrespective of catch limits for baleen or toothed whales set by the IWC. In the case of the Southern Ocean Sanctuary, provision is made for review at 10 yearly intervals²⁹. The JARPA II programme is conducted within the waters of the Southern Ocean Sanctuary.
40. *The Moratorium:* Pursuant to a 1982 decision of the Parties, the Schedule was amended to include the following provision, which applies as from the 1985/1986 season (currently at paragraphs 10(e) of the Schedule):

“(e) 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 the 1985/1986 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a

²⁸ The Southern Ocean Sanctuary comprises the waters of the Southern Hemisphere southwards of the following line: starting from 40 degrees S, 50 degrees W; thence due east to 20 degrees E; thence due south to 55 degrees S; thence due east to 130 degrees E; thence due north to 40 degrees S; thence due east to 130 degrees W; thence due south to 60 degrees S; thence due east to 50 degrees W; thence due north to the point of the beginning

²⁹ The footnote to paragraph 7(b) states that the Government of Japan lodged an objection within the prescribed period to paragraph 7(b) to the extent that it applies to the Antarctic minke whale stocks. The Government of the Russian Federation also lodged an objection to paragraph 7(b) within the prescribed period but withdrew it on 26 October 1994. For all Contracting Governments except Japan paragraph 7(b) came into force on 6 December 1994.

comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits”³⁰

The Factory Ship Moratorium: The Parties had earlier (in 1979) adopted a moratorium on whaling from factory ships (currently paragraph 10(d)):

“(d) Notwithstanding the other provisions of paragraph 10 [Classification of stocks] there shall be a moratorium on the taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships. This moratorium applies to sperm whales, killer whales and baleen whales, except minke whales.”³¹

41. *Recommendations:* Article VI empowers the IWC to make recommendations “to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention”.

42. **Scientific Whaling:** Article VIII of the Convention provides as follows:

³⁰ The footnote to paragraph 10(e) states: The Governments of Japan, Norway, Peru and the Union of Soviet Socialist Republics lodged objection to paragraph 10(e) within the prescribed period. For all other Contracting Governments this paragraph came into force on 3 February 1983. Peru withdrew its objection on 22 July 1983. The Government of Japan withdrew its objections with effect from 1 May 1987 with respect to commercial pelagic whaling; from 1 October 1987 with respect to commercial coastal whaling for minke and Bryde's whales; and from 1 April 1988 with respect to commercial coastal sperm whaling. The objections of Norway and the Russian Federation not having been withdrawn, the paragraph is not binding upon these Governments. Iceland's instrument of adherence to the International Convention for the Regulation of Whaling and the Protocol to the Convention deposited on 10 October 2002 states that Iceland 'adheres to the aforesaid Convention and Protocol with a reservation with respect to paragraph 10(e) of the Schedule attached to the Convention'. The instrument further states the following: 'Notwithstanding this, the Government of Iceland will not authorise whaling for commercial purposes by Icelandic vessels before 2006 and, thereafter, will not authorise such whaling while progress is being made in negotiations within the IWC on the RMS. This does not apply, however, in case of the so-called moratorium on whaling for commercial purposes, contained in paragraph 10(e) of the Schedule not being lifted within a reasonable time after the completion of the RMS. Under no circumstances will whaling for commercial purposes be authorised without a sound scientific basis and an effective management and enforcement scheme.' The Governments of Argentina, Australia, Brazil, Chile, Finland, France, Germany, Italy, Mexico, Monaco, the Netherlands, New Zealand, Peru, San Marino, Spain, Sweden, UK and the USA have lodged objections to Iceland's reservation to paragraph 10(e).

³¹ It appears that no country has filed an objection to this regulation and that it is intended to be a permanent measure, see footnote 15 to “Sustainable Use of Oceanic Wildlife: What Lessons Can Be Learned from Commercial Whaling?”, Vassili Papastavrou and Justin Cooke, Chapter 7 of “Gaining Ground: in pursuit of ecological sustainability”, ed David Lavigne, (2006).

- “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. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.
2. Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.
3. Each Contracting Government shall transmit to such body as may be designated by the Commission, in so far as practicable, and at intervals of not more than one year, scientific information available to that Government with respect to whales and whaling, including the results of research conducted pursuant to paragraph 1 of this Article and to Article IV.
4. 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.”

ISSUES

A: A: Under what conditions, if any, is a State Party to the International Convention for the Regulation of Whaling (ICRW) entitled to carry out scientific whaling, having regard to: (1) the ICRW and in particular to Article VIII of the Convention and to paragraphs 10(e) and 30 of the Schedule to the Convention; (2) such other international acts or instruments as may be relevant?

(1) The ICRW

43. In considering the context for the operation of the rules of the ICRW (see below), it is important to have regard to the fact that the IWC is the primary international standard-setting organization with regard to whales and scientific whaling. The

ICRW is the major institutional framework which has developed a true “corpus juris” on the issue of whaling, including on scientific whaling. We note that Iceland, Norway, Greenland and the Faroe Islands established in 1992 the North Atlantic Marine Mammal Commission (NAMMCO). However, it is clear that this organization has not in any way displaced the IWC as the internationally recognized body for addressing issues relating to whaling³². We note that in 2000, the Parties to the CITES Convention (discussed below at paragraphs 112-119) recognized the IWC as having primary legal competence for the management and conservation of whales³³.

44. In considering the legality of purported “scientific whaling” under the ICRW, we have approached the issue in the following way: we have first examined the conditions under which such whaling contravenes the substantive prohibition on commercial whaling laid down in the Convention. We have then considered the exception laid down in Article VIII of the Convention, including the procedural requirements laid down in the Schedule to the Convention. Only where the conditions for the operation of the exception in Article VIII are met, can scientific whaling be said to be lawful within the meaning of the Convention.
45. *Commercial Whaling Prohibited under the ICRW*: As noted above, the moratorium on commercial whaling was adopted by the Parties to the ICRW in 1982 and came into effect for the season 1985/1986. The moratorium was adopted by means of an amendment to the Schedule to the ICRW, under the procedural conditions laid down in Article V to the Convention. Initially, Japan (together with a number of other State Parties) lodged an objection to the moratorium pursuant to Article V.3 of the ICRW³⁴, but in the case of Japan, this objection was withdrawn in stages between May 1987 and April 1988. Accordingly, as of 1 April 1988 (the date of the final withdrawal), Japan accepted in full a legally binding prohibition on commercial whaling under the ICRW.

³² So far as we are aware no further states have adhered to the 1992 Agreement.

³³ CITES COP Resolution 11.4 adopted at Gigiri, Kenya, 2000.

³⁴ See footnote 31 to paragraph 40 above.

46. In addition to the general moratorium under paragraph 10(e), the Parties have also established, by means of amendments to the Schedule to the ICRW, two whale sanctuaries, within which all commercial whaling is prohibited. In the case of the Southern Ocean Sanctuary, Japan has lodged a partial objection to the sanctuary, to the extent that the sanctuary applies to the Antarctic minke whale stocks.
47. In our view, the objection lodged and maintained by Japan in relation to the Southern Ocean Sanctuary indicates that Government's continuing interest in commercial whaling, since that is the only type of whaling prohibited in paragraph 7(b) of the Schedule.
48. From a legal point of view, it is clear therefore that, with the exception of the Governments of Iceland, Norway and the Russian Federation³⁵, all parties to the ICRW have agreed not to undertake commercial whaling. In the case of Japan, a reservation is made in the case of minke whales within the Southern Ocean Sanctuary but this is subject to the general moratorium which remains in place and which Japan has accepted.
49. Accordingly, where it can be shown, as a matter of fact, that a state is engaged in commercial whaling, however the activity is described by the state concerned, it follows that the state concerned will bring itself into clear violation of the rules of the Convention. We consider the operation of Article VIII, expressed as an exception to the requirements of the ICRW, below. In our view however, commercial whaling which is simply described as "scientific whaling", or which is conducted pursuant to a special permit purportedly issued under Article VIII, does not become lawful simply because it is so described. In order to be lawful, such activity must genuinely constitute whaling for *scientific* purposes, on the basis of objective criteria. An assessment of whether or not that is the case must, in our

³⁵ Iceland rejoined the ICRW in 2002 with a controversial reservation to the moratorium in paragraph 10(e). Norway and the Russian Federation maintain formal objections to the moratorium.

view, take into account factual determinations made by the parties to the ICRW as discussed below, together with criteria laid down in Guidelines adopted under the auspices of the Convention and applied pursuant to procedural requirements laid down in the Schedule, together with any other relevant material including scientific reports commissioned by individual members of the IWC.

50. *Article VIII ICRW*: We address the interpretation of Article VIII in the light of the principles applied under Article 31 of the 1980 Vienna Convention on the Law of Treaties (the Vienna Convention). Article 31(1) of the Vienna Convention requires that a treaty be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
51. *The Terms of Article VIII*: From the express terms of Article VIII itself, we note in particular the following elements: Article VIII is expressed as an exception to the other provisions of the Convention (paragraph 1); Contracting Governments have a discretion to grant special permits “for purposes of scientific research” (and for no other purpose) (paragraph 1); all such authorizations must be reported at once to the IWC (paragraph 1); scientific information on whales and whaling, including the results of research conducted under Article VIII.1, must be transmitted to the body designated by the IWC (paragraph 3).
52. *Article VIII as an Exemption*: We note that Article VIII is framed as creating an exemption to the operation of the Convention (Article VIII.1). As an exemption to the general rules applied under the Convention, it should be construed narrowly. Furthermore, in order for that exemption to apply (and for scientific whaling to be lawful under the ICRW), the conditions for the grant of special permits must all be met. Specific conditions for the grant of special permits arise from the language of Article VIII itself and from the IWC Guidelines for the Review of Scientific Permit Proposals adopted by the IWC for the purposes of the review provided for in paragraph 30 of the Schedule. Such conditions also arise from the practice of the

Parties to the ICRW, both in relation to international scrutiny of special permits and also in relation to substantive criteria for assessment. General conditions for the grant of special permits arise from a consideration of the object and purpose of the ICRW and the context for that provision (considered at paragraphs 66-80 below).

53. *Specific Conditions:* The first specific condition which arises in relation to the operation of Article VIII is that any whaling conducted pursuant to that Article must be carried out “for the purposes of scientific research”. In our view, the ordinary meaning of the phrase “for the purposes of” entails that the whaling is conducted exclusively for those purposes and not only incidentally for those purposes. Clearly a situation where the whaling was not genuinely conducted for the purposes of scientific research would not fall within the exemption laid down in Article VIII.
54. *Substantive Criteria:* The ICRW does not define the words “scientific research” but we consider that the operation of this condition would exclude whaling conducted for economic or commercial purposes. Whaling which is conducted in order to meet commercial or economic goals, including the preservation of employment and infrastructure in the whaling sector, or to supply the domestic market for whale meat would not in our view constitute scientific whaling for the purposes of Article VIII, based on the language used in Article VIII itself.
55. An elaboration of the express condition that whaling under Article VIII must be for the purposes of scientific research is provided in the IWC Guidelines for the Review of Scientific Permit Proposals. These Guidelines are outlined in a working paper published on the official IWC website and are derived from a series of Resolutions adopted by the IWC, summarised most recently in IWC Resolution 2003-2. We understand that the first such Resolution, Resolution 1986-Appendix 2 was adopted by consensus. That 1986 Resolution recommends inter alia that Contracting Governments “while complying fully with Paragraph 30 of the Schedule, should also take account of guidelines drawn up by the Scientific Committee” and goes on to recommend that both the Contracting Government and

the Scientific Committee, in considering proposals, should take into account a series of considerations including: whether the objectives of the research “are not practically and scientifically feasible through non-lethal research techniques” and whether the proposed research is essential for the rational management of the stock. The Resolution reiterates that no special permit should be granted until the proposals have been reviewed in accordance with paragraph 30 of the Schedule. These criteria from the 1986 Resolution all appear to be reflected in the current Guidelines.

56. The Guidelines require the Scientific Committee to advise the IWC as to whether the information sought in the research undertaken pursuant to any Special Permit is “required for the purposes of management of the species or stock being researched” and whether the information sought could be obtained by non-lethal means³⁶.

57. We note that Working Paper published by the IWC on its website includes all the Guidelines applied for the review of the first JARPN proposal. The Guidelines include, in addition to the two criteria referred to above: in relation to the *objectives* of the proposed research, whether the research addresses a question or questions that should be answered in order to conduct the comprehensive assessment or to meet “other critically important research needs”; as to *methodology*, whether the objectives of the research are not practically and scientifically feasible through non-lethal research techniques and whether the research is likely to yield results leading to reliable answers to the questions addressed; as to the *effect of the catches* on “stocks”, the relevant guidelines require an evaluation of the specification in the permit proposal of possible effect on the conservation of the stock and whether the research can be conducted without adversely affecting the overall status and trends of the stock in question or the success of the comprehensive assessment of such stocks³⁷. These Guidelines reflect the criteria set out in IWC Resolution 2003-2 which state that in the opinion of the IWC special permit whaling should: only be

³⁶ These criteria were set out in IWC Resolution 1999-2.

³⁷ See Rep. Int. Whal. Commn. 38 27-28.

permitted in exceptional circumstances; meet critically important research needs; satisfy criteria established by the Scientific Committee; be consistent with the Commission's conservation policy; be conducted using non-lethal research techniques and ensure the conservation of whales in sanctuaries. Scientific whaling must not assume the characteristics of commercial whaling.³⁸

58. In our view, whaling which (1) does not meet critically important research needs and/or (2) is otherwise not required for the rational management of whale stocks and/or which uses lethal techniques unnecessarily and/or (3) which assumes the characteristics of commercial whaling does not fall within the scope of scientific whaling covered by Article VIII. Such whaling would not, from an objective point of view, be conducted for the purposes of genuine scientific research as required by Article VIII itself.

59. *Procedural Requirements:* The specific conditions for the lawful operation of scientific whaling also include the procedural requirements for review by the Scientific Committee which are derived from Article VIII.3 of the ICRW and paragraph 30 of the Schedule. Article VIII.3 expressly requires parties to transmit to a body designated by the Commission scientific information with respect to whales and whaling, including the results of research conducted under Article VIII.1. Paragraph 30 of the Schedule requires Governments to provide proposed scientific permits before they are issued "and in sufficient time to allow the Scientific Committee to review and comment on them". The proposed permits are required to specify, inter alia "the possible effect on conservation of stock".

60. We consider that two key issues arise in relation to the procedural requirements for review of permits under the ICRW. First, in our view the requirement to submit proposed permits for review in order for the Scientific Committee to comment on them entails a requirement that any such comments should be taken into account by

³⁸ See the discussion at paragraph 48 above. Resolution 1985-2 expresses the Commission's serious concerns at the possibility of whaling for scientific purposes assuming the characteristics of commercial whaling.

the State concerned. We recognise that the Convention does not provide for any veto of the proposal on the part of the Scientific Committee or the IWC itself. Nevertheless, in our view it follows from the general requirement that the Convention be applied in good faith by the parties³⁹ that a state should take the views expressed by those bodies into account when issuing permits which have been subject to review. A consistent refusal to take views into account would in our view run counter to the requirement to operate the mandatory procedures in good faith.

61. Second, States must allow the Scientific Committee and the IWC sufficient time to evaluate proposals and must provide them with the necessary information which will allow those bodies to undertake a review of the proposals. We note in this regard, the view taken by 63 scientists participating in the Scientific Committee review of JARPA II that it was “scientifically invalid to review the JARPA II proposal before the IWC has had a chance to conduct a full review of the results of the original 18 year old JARPA programme” and that: “By bringing this proposal forward at this time the Government of Japan has substantially compromised the capacity of the Scientific Committee to perform its task as designated by the Commission in its “Guidelines for the Review of Scientific Permit Proposals”...and puts at stake the capacity of the Scientific Committee to provide objective and representative scientific advice to the Commission”⁴⁰.
62. We consider that the decision of the Government of Japan to issue a special permit before the Scientific Committee has been able to conduct the full scrutiny required under the Guidelines agreed by the Parties to the ICRW violates the terms of Article VIII of the ICRW as elaborated in those Guidelines and the requirement for prior review contained in paragraph 30 of the Schedule to the Convention.

³⁹ As expressed in Article 26 of the Vienna Convention on the Law of Treaties, discussed below at paragraph 84.

⁴⁰ See footnote 1 above.

63. We note that the Scientific Committee has been conducting a “Comprehensive Assessment” of whale stocks, defined as an in-depth evaluation of the status of the stocks in the light of management objectives. This is not yet fully completed. The Scientific Committee is also continuing to work to assess the effects on cetaceans of environmental change such as global warming and pollution, and whale-watching activities. The Parties have agreed to the application of the precautionary principle in a wide range of contexts including the need for further research on the environment and whale stocks⁴¹, the exploitation of white whales⁴² and small cetaceans⁴³, the evaluation of whale-watching⁴⁴ and the scientific evaluation of the sanctuaries⁴⁵.
64. Having regard to the ongoing efforts of Parties to the ICRW to conserve whales, to the fact that the Parties themselves have invoked the precautionary principle, and that the principle is reflected in relevant international acts and instruments including in Principle 15 of the Rio Declaration and in the CBD and that the International Tribunal on the Law of the Sea has confirmed the duty of parties to UNCLOS to act with “prudence and caution”, we take the view that it is strongly arguable that Article VIII should be interpreted consistently with precautionary principle.
65. In its Order in the Southern Blue Fin Tuna case, the International Tribunal for the Law of the Sea expressed the view that the parties should act with “prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of bluefin tuna”⁴⁶. By proceeding with the JARPA II programme

⁴¹ See Resolutions 1992-2 and 1993-Appendix 12.

⁴² See for example Resolution 1998-9.

⁴³ See Resolution 1999-9

⁴⁴ See Resolution 1996-2.

⁴⁵ See Resolution 2002-1 (Guidance to the scientific committee on the sanctuary review process) which states: “When considering scientific arguments for sanctuary evaluation, if consensus is not possible, then a precautionary approach should prevail.”

⁴⁶ For a discussion of the precautionary principle and its emergence, see “Principles of International Environmental Law” by Philippe Sands (Cambridge) (Second Edition), pages 266-279.

before the Scientific Committee has conducted a review of JARPA, and before the completion of the comprehensive assessment for all the species affected, we consider that there is a strong argument that the Government of Japan has failed to act in accordance with the precautionary principle as it applies in the context of Article VIII⁴⁷. The Parties to the ICRW have expressly referred to the Southern Ocean Sanctuary as a “precautionary measure” against uncertainties in whale management in the Antarctic in IWC Resolution 2001-7. The IWC has also instructed the Scientific Committee that, in reviewing Sanctuaries, it include the application of the precautionary approach in addition to those in the Instructions from the Commission to the Scientific Committee for Review of Sanctuaries approved by the 53rd Annual Meeting (Resolution 2002-1). Whatever the precise legal status of the precautionary principle in international law generally, we consider that its relevance to activities which may adversely affect the conservation of vulnerable and endangered whale species, or species whose status remains uncertain, is clear. We note, for example, the concerns expressed by a number of scientists involved in the Scientific Committee as to the potentially disastrous impact of Japanese scientific whaling on small highly depleted populations of humpback whales in the Southern Ocean⁴⁸.

66. *General Conditions*: The general conditions for the grant of special permits arise from a consideration of the objects and purposes of the Treaty and the context for the ICRW and for Article VIII itself as discussed above.
67. *The Object and Purpose of the ICRW*: The object and purpose of the ICRW are set out in the Preamble to the Convention. A treaty’s preamble defines, in general terms, the purposes and considerations that led the parties to conclude the treaty. In addition to setting forth the parties motives, the preamble also sets forth the object and purpose of the treaty. The legal effect of a preamble has been considered by

⁴⁷ See also the discussion at paragraph 94 below.

⁴⁸ See “Japan’s Whaling Plan under Scrutiny” *Nature* Vol 435 16 June 2005 at page 884.

various international tribunals. In the Beagle Channel Arbitration, the tribunal stated:

“Although Preambles to treaties do not usually-nor are they intended to-contain provisions or dispositions of substance-(in short they are not operative clauses)-it is nevertheless generally accepted that they may be relevant and important as guides to the manner in which the Treaty should be interpreted, and in order, as it were, to “situate” it in respect of its object and purpose”.⁴⁹

68. The Preamble to the ICRW refers, among other matters, to: “the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks”; the history of over-fishing of whales “to such a degree that it is essential to protect all species of whales from further over-fishing”; the recognition that whale stocks are susceptible of natural increases if whaling is properly regulated; the recognition 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”; the recognition that in the course of achieving these objectives, whaling operations should be confined to those species best able to sustain exploitation in order to give an interval for recovery to certain species of whales now depleted in numbers; the desire to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks⁵⁰; and the proper conservation of whale stocks and thus the orderly development of the whaling industry...”.
69. We recognize that the object and purpose set out in the Preamble to the ICRW refer both to the conservation and recovery of all whale stocks and to the “orderly development of the whaling industry” conditional on effective conservation (“and thus”). These appear as two strands in the foundation for the Convention. It is relevant in analysing the object and purpose of the ICRW to take into account

⁴⁹ Case concerning a dispute between Argentina and Chile concerning the Beagle Channel (1977), United Nations, *Reports of International Arbitral Awards*, Vol. XXI, p. 187, para. 169

⁵⁰ “on the basis of the principles embodied in the provisions of the International Agreement for the Regulation of Whaling, signed in London on 8th June, 1937, and the protocols to that Agreement signed in London on 24th June, 1938, and 26th November, 1945”.

developments in international law which have occurred since the adoption of the ICRW. This approach to treaty interpretation is confirmed in the judgment in the Gabcikovo-Nagymaros case, where the ICJ held that:

“...the Treaty is not static, and is open to emerging norms of international law...new environmental norms can be incorporated...”⁵¹

Applying this approach, it follows in our view that in considering the issue of “scientific whaling” under the ICRW, it is also appropriate to have regard to other relevant treaties as well as to principles of international law. As a separate matter, which is ancillary to this Opinion, there may arise the question of the compatibility of these whaling activities with other international agreements, including UNCLOS, the CITES Convention and the CBD (considered at paragraphs 99-127).

70. Taking into account the language used in the Preamble to the ICRW itself, subsequent developments in the approach taken by the Parties to the conservation and management of whales, and the development of international environmental law since the adoption of the ICRW, we consider that a number of key principles can be distilled from the Preamble to ICRW: (1) the overriding need to allow whale stocks to recover to what would now be termed a sustainable level; (2) the common interest of all nations and of future generations in conserving whales; (3) the need for a system of international regulation, based where necessary on the precautionary principle, to ensure proper and effective conservation and, only through this means, the creation of conditions for the “orderly development” of the whaling industry. The ICRW does not define what is meant by “the whaling industry” and in our view, under current conditions and in the light of a series of Resolutions adopted by the IWC, this clearly includes the whale watching industry and tourism⁵².

71. *The Context-the Primacy of Conservation:* We consider that an examination of the steps taken by the Parties to the ICRW since 1946 indicates that the international

⁵¹ Hungary/Slovakia (1997) ICJ Reports 7, See paragraph 112 of the judgment

⁵² See for example IWC Resolutions 1993-Appendix 9; 1994-14; 1996-2.

community is still at the stage of seeking to ensure effective conservation and recovery of whale stocks and that there has been an increased emphasis on conservation by the Parties in the past few decades. We take this view based in particular on the adoption of the moratorium on commercial whaling in 1982; the establishment of the two existing whale sanctuaries in the Indian Ocean in 1979 and the Southern Ocean in 1994; and the adoption of the Berlin initiative in 2003. Prior to those initiatives however, we note that the international community had already placed increasing emphasis on the conservation of whale stocks. For example in 1972, the United Nations Conference on the Human Environment in Stockholm recommended that the IWC consider a 10-year moratorium on commercial whaling⁵³.

72. As noted in the Preamble to IWC Resolution 2003-1 (adopting the Berlin initiative on strengthening the conservation agenda of the IWC),: “the first objective of the [ICRW] is a recognition of “the interests of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks”. We consider it significant that the objective of conserving whale stocks is expressed before any reference to regulating the whaling industry is made in the Preamble to the ICRW. The preamble to Resolution 2003-1 continues: “...during the last 25 years, the [IWC] has devoted an overwhelming part of its work to the pursuit of that conservation objective”; and that “...through the adoption of more than a hundred conservation-oriented resolutions, as well as through various Schedule amendments, the Commission has evolved into an organization internationally recognized, among other things, for its meaningful contributions to the conservation of great whales...the Commission has gradually developed an extensive conservation-oriented agenda...”. Notwithstanding that Japan voted against Resolution 2003-1⁵⁴, apparently the Government of Japan has not sought to exclude itself from the consensus view that whales stocks must be conserved (indeed it emphasised at the time of the vote on Resolution 2003-1 that a vote against the Resolution should not

⁵³ UN/Doc.A/CONF.48/14, Stockholm, 16 June 1972, Report of the United Nations Conference on the Human Environment, Chapter II, Action Plan for the Human Environment, Recommendation 33.

⁵⁴ See the Chair’s Report of the 55th Meeting, at paragraph 4.2, page 10 (2003 Annual Report of the IWC).

be interpreted as meaning that a country was against conservation⁵⁵) and it is to be noted that Japan participates in the work of the Conservation Committee. We note that under the express terms of paragraph 30, parties have agreed that Contracting Governments must provide, and the Scientific Committee must review and comment on, information about the possible effect on conservation of stock of proposed scientific whaling.

73. We consider that the establishment of the Conservation Committee by the IWC (in 2003) is an important development in this regard. Under the Berlin initiative, the Conservation Committee has been given the task of preparing and recommending to the IWC a conservation agenda. The Conservation Committee has been directed to explore means of coordinating the IWC's conservation agenda, through greater collaboration with other organizations and conventions (including the establishment of funds to finance such activities). The inaugural meeting of the Committee was held in July 2004. At this meeting, there was a consensus that "all members of the IWC are committed to conservation and that conservation of whale stocks was in the common interest of the IWC's members"⁵⁶. We note that some pro-whaling countries "indicated that they still had reservations about the establishment of the Conservation Committee, especially because in their view it took the objective of the 'conservation of whale stocks' out of the context of the objective of making possible "the orderly development of the whaling industry"⁵⁷." Nevertheless, the commitment to conservation was accepted by all members.

74. We note that, in a similar situation, in its decision in the Shrimp Turtle case⁵⁸, the Appellate Body of the WTO, stated that the establishment of the Committee on Trade and Environment (CTE) was the most significant development to elucidate

⁵⁵ See the Chair's Report of the 55th Meeting at paragraph 4.2, page 10 (2003 Annual Report of the IWC).

⁵⁶ See IWC, Report of the Conservation Committee (IWC/56/Rep 5, 9 August 2004), at 1

⁵⁷ See page 1 of the Report of the Conservation Committee. The report also adds: "They [pro-whaling nations] were committed to the sustainable use of natural resources, and viewed completion of a Revised Management Scheme to prevent over-exploitation as a higher priority conservation measure than items that might be addressed under a Conservation Committee".

⁵⁸ US-Import of Certain Shrimp and Shrimp Products, 12 October 1998, 38 ILM 118 (1999)

the objectives of WTO members with regard to the relationship between trade and the environment (see paragraph 154 of the Decision).

75. Although we acknowledge that the terms of the Convention itself refer to the requirements of the whaling industry, in our view it is clear both from the wording of the Preamble and also from subsequent implementation of the ICRW by the Parties as mentioned above, that conservation is the paramount consideration at least until stocks have fully recovered from the decimation of pre-Convention commercial whaling. It is in the light of this objective, given current conditions, that Article VIII falls to be considered.
76. It follows, in our view, that the conduct of “scientific whaling” in such a way as to undermine the conservation measures agreed by the Parties constitutes a breach of that Article and of the requirements of the Convention as a whole. This is clearly of particular relevance to “scientific whaling” which uses lethal methods when other methods may be available. In our view, it is clear that Article VIII is not intended to cover “scientific whaling” which has, or runs the risk of having, such an undermining effect on internationally agreed conservation measures, for example by permitting whaling on such a scale as to prejudice the conservation and recovery of particular species, or in particular areas such as the sanctuaries. Nor is Article VIII intended to allow Parties to circumvent an internationally agreed moratorium. If a Party does not wish to be bound by measures agreed under Article V it must object in the prescribed manner and not purport to resort to Article VIII. This analysis is also relevant to our view that the Government of Japan is abusing its rights under Article VIII of the ICRW, see paragraphs 82-98 below.
77. We are confirmed in our view by an examination of the context provided for Article VIII by the other terms of the ICRW. As indicated above, as an exception to the application of the international regulations to be agreed by the parties, Article VIII should be interpreted so as not to undermine the effectiveness of the general regulatory regime agreed by the Parties (which currently includes the

moratorium⁵⁹). Nor is there any suggestion in the language of Article VIII that special permits may be granted for any purpose other than scientific research, for example to sidestep a ban on commercial whaling or whaling in a particular area. To the contrary, any whaling undertaken in pursuance of Article VIII must be for the sole purpose of scientific research and not for the purpose of continuing commercial whaling by another means. With that in mind, it is our view that whaling on a commercial scale is not contemplated by Article VIII since such an interpretation would clearly undermine the entire operation of the ICRW.

78. As relevant background to a consideration of whether Japan is in fact conducting commercial whaling under the guise of carrying out a programme of scientific research we note that the Government of Japan has consistently sought to maintain the possibility of conducting commercial whaling, in particular by maintaining an objection to the Southern Ocean Sanctuary as regards commercial whaling of minke whales and by seeking, most recently in 2005, to lift the moratorium.
79. An interpretation of Article VIII which allowed for whaling on a commercial scale would violate the principle of effectiveness under international law. This principle is reflected in Articles 26 and 31 of the Vienna Convention referred to above and has also been applied by the International Court of Justice in its decisions⁶⁰.
80. By way of an example of how these general conditions for the application of Article VIII give rise to the specific requirements set out above, we consider that it follows that special permits may only be granted, inter alia, where it has been demonstrated that non-lethal methods are not available to achieve the same scientific objectives. Given the developments in modern scientific research techniques, including the use

⁵⁹ We note that Japan put forward a proposed Schedule amendment for an RMS that would have lifted the moratorium. The proposal did not attract the required three-quarter majority for it to be adopted (23 votes in favour, 29 against and 5 abstentions), IWC, 20-24 June 2005, 57th Annual Meeting. The Information is available at: <http://www.iwcoffice.org/conservation/rms.htm#2005>.

⁶⁰ See for example the *Reparation for Injuries Case* ICJ Rep (1949) 174 in which the ICJ held, in interpreting the Charter of the United Nations, that the United Nations possessed not only the powers expressly conferred but also such implied powers as were necessary to enable to achieve the purposes for which it was set up.

of non-lethal DNA sampling and photographic identification, and in the light of the overriding need for conservation and recovery of whale stocks as reflected in the first and second Recitals to the ICRW, we consider that Article VIII must be interpreted as permitting the use of lethal methods of scientific whaling only where this is absolutely necessary and unavoidable. Use of lethal techniques beyond what is critical and unavoidable constitutes a violation of Article VIII⁶¹.

81. By way of an alternative analysis of the legal implications of current practice of special permit whaling, we now set our view that the current practice of the Government of Japan on scientific whaling constitutes an abuse of rights under Article VIII of the ICRW, as well as under Article 300 UNCLOS.

Abuse of Rights

82. An alternative analysis⁶² to that set out above (paragraphs 44-81), which we also consider forceful, is that Japan has abused its right to conduct special permit whaling under Article VIII of the ICRW. The abuse of rights arises because (1) Japan has exercised its right to conduct special permit whaling for purposes outside the scope of Article VIII of the ICRW, the relevant international framework for such activity; (2) Japan's programme of lethal research, including the JARPA II programme, threatens the internationally agreed conservation efforts of the Parties to the ICRW (including both those accepted by Japan, such as the moratorium on commercial whaling, and also those which it in part objects to, the establishment of the Southern Ocean Sanctuary in relation to minke whales) and thus threatens to cause injury to their collective and individual interests in conserving whales. Our basis for this view is set out in more detail below.

⁶¹ See in particular IWC Resolution 1990-Appendix 5;

⁶² In fact the Appellate Body of the WTO in the Shrimp Turtle Decision discussed below analysed an abuse of rights as giving rise to a violation of the treaty rights of others and a breach of the treaty obligations of the offending state, see paragraph 72 below.

83. In referring to an abuse of rights, we refer to a general principle of law recognised by civilised nations within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice (ICJ)⁶³. This principle is reflected in Article 300 of UNCLOS (as to which see below). In international law, abuse of rights refers to a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another state⁶⁴. We consider the scientific whaling undertaken by Japan constitutes an abuse of right in both these senses, for the reasons set out below.
84. Abuse of rights is clearly connected to the duty to perform obligations in good faith as expressed in Article 26 of the Vienna Convention on the Law of Treaties. In the context of the principle of good faith as reflected in Article 26, the ICJ concluded in the Gabcikovo-Nagymaros Case that:
- “...it is the purpose of the Treaty and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the parties to apply it in a reasonable way and in such a manner that its purpose can be realised.”⁶⁵
85. Under Article 300 of UNCLOS a clear distinction is drawn between performance of obligations in good faith and the exercise of rights so as not to constitute an abuse of rights. We accept that distinction for the purposes of this Opinion, but, in our view, the general analysis of the principle of good faith provided by the ICJ in Gabcikovo-Nagymaros is relevant to a consideration of whether or not the Government of Japan has abused its rights in relation to scientific whaling, in particular by failing to exercise its rights under Article VIII in a reasonable way. As discussed below, we consider that its rights under the ICRW must be considered in the light of the (conservation) purpose of the Convention and the steps which the

⁶³ For a detailed discussion of the concept of abuse of rights, see “Abuse of Rights: An Old Principle, A New Age” Michael Byers (2002) 47 McGill L.J 389.

⁶⁴ See the formulation presented by Professor Kiss in relation to “Abuse of Rights” in “The Encyclopaedia of Public International Law” (1992) North-Holland, at page 4.

⁶⁵ Hungary v Slovakia (1998) 37 ILM 162, see paragraph 142 of the judgment.

Parties to the IWC have collectively taken to realize that purpose. We recognise of course that Article VIII expressly affords to Parties the right to conduct scientific whaling. However, in order to fall within the scope of Article VIII, such scientific whaling must be exercised under strict conditions. We base our view on a consideration of the object and purpose of the ICRW, the primacy afforded to conservation under current conditions, the fact that Article VIII is expressed as an exception to the general regime, and on the findings of the Parties to the ICRW as set out in the IWC Resolutions on scientific whaling, in particular Resolution 2003-2 and those earlier Resolutions to which it refers (see paragraphs xx48-50 above). We consider that Japan's scientific whaling programme, including the JARPA II programme, goes well beyond those conditions (see further Section B below).

86. We also consider that the evidence that Japan has abused its rights and failed to act in good faith and in a reasonable way in relation to its conduct of scientific whaling is overwhelming as set out in Section B below. In summary, however we base our view on Japan's persistence in maintaining its scientific whaling in the face of repeated requests from the members of the IWC to refrain from issuing special permits and withdraw its programmes in circumstances where the Scientific Committee has not had the opportunity to review and comment on the proposals (in the case of JARPA II) and where the Commission has found, on repeated occasions, and following consideration by the Scientific Committee, that the research in question did not meet the criteria adopted by the IWC for the review of scientific whaling under Article VIII/paragraph 30 of the Schedule.
87. We also take into account the formulation of an abuse of right adopted by the Appellate Body of the World Trade Organisation (WTO) in the Shrimp Turtle Case⁶⁶. In considering, in that case, the scope of the Article XX exception relied upon by the United States to justify certain trade restrictive measures, the Appellate Body stated that:

⁶⁶ US-Import of Certain Shrimp and Shrimp Products, 12 October 1998, 38 ILM 118 (1999)

“This principle [of good faith], at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably."... An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting...”

In this case we consider that Japan has failed to demonstrate that it has exercised its right to conduct scientific whaling in a reasonable manner, in a number of important respects which are considered in more detail below and also in Section B. These include the following: Japan has exercised its rights under Article VIII for purposes other than scientific research, specifically commercial purposes; Japan has taken whales for research in circumstances where the parties to the ICRW have repeatedly found that the research did not meet critical needs and was not necessary for the management of the species; Japan has used lethal research methods unnecessarily; the scale and location of the take may jeopardise the conservation of the whales concerned.

88. *JARPA II and other Programmes-Not Conducted for Scientific Purposes*: We reiterate that, in the light of the terms of Article VIII itself, together with the object and purpose of the ICRW as a whole and the context of the ICRW, scientific whaling under Article VIII should not assume the characteristics of commercial whaling. This would be the case, in our view, even in the absence of a moratorium on commercial whaling since it follows from the language of Article VIII and a consideration of the Convention as a whole. Nevertheless, the existence of the moratorium on commercial whaling set out in paragraph 10(e) of the Schedule reinforces the limited scope of the exemption in Article VIII of the Convention, since it is unlikely that the Parties to the Convention would have adopted a moratorium in those terms if they had taken the view that Article VIII provided an automatic loophole which would allow the continuation of commercial whaling by another name.

89. Special permit whaling should not assume the characteristics of commercial whaling either in terms of the scale of the catch involved, or as regards the commercial exploitation of the whale products resulting from the catch⁶⁷. We also consider that genuine “scientific whaling” should be conducted only on the basis of critical need and the unavoidable use of lethal methods as indicated in the IWC Guidelines. We do not consider that the “scientific whaling: which fails to meet these criteria can fulfil internationally agreed requirements.
90. Whaling conducted for commercial, economic or cultural purposes does not fall within the scope of Article VIII and any purported exercise of the right to issue special permits for commercial, economic or cultural reasons would in our view constitute an abuse of rights under Article VIII ICRW and under the relevant provisions of UNCLOS which require Parties to cooperate with the IWC and respect their treaty obligations in exercising fishing and research rights.
91. *The Impact of Japanese Scientific Whaling on International Conservation Efforts:* In relation to the likely impact of Japan’s scientific whaling programme, we note that the IWC Scientific Committee has not yet completed its ongoing work on abundance estimates for all whale stocks (the Comprehensive Assessment) and that the members of the IWC have expressed their concern about the apparent decline in stocks of Antarctic minke whales which are the subject of the JARPA II programme⁶⁸. Parties also expressed concern about discrepancies between abundance estimates derived from the IWC’s SOWER cruises and those derived from the JARPA programme⁶⁹. Resolution 2005-1 refers to the following: the Third Circumpolar Survey indicates that the abundance of Antarctic minke whales is “substantially lower” than the earlier estimate; there are no agreed data to indicate

⁶⁷ We recognise that Article VIII.2 directs that whales taken under special permits be processed and the proceeds dealt with under Government direction, but in our view this provision does not derogate from the scientific as opposed to commercial purpose for granting special permits and does not contemplate special permits being granted in order to maintain commercial trade, see further paragraphs 106-11xx below in relation to obligations arising under the CITES Convention.

⁶⁸ See section 4.1 of the Chairman’s Report of the 2005 IWC Meeting.

⁶⁹ See for example section 4.3 of the Chairman’s Report of the 2005 IWC Meeting.

that endangered fin whale populations have increased since the cessation of whaling; some humpback whales which will be targeted by JARPA II belong to small, vulnerable breeding populations and even small takes could have a detrimental effect on their recovery and survival⁷⁰.

92. We are referred to a copy of an Aide Memoire, dated January 2006, which presents a Joint Demarche by a number of members of the IWC including Argentina, Australia, Mexico, New Zealand and the United Kingdom in which those Governments express their “serious concerns” about the implementation of JARPA II and state that they have “grave concerns” that JARPA II will undermine the long-term viability of these species. The Governments concerned also state that they consider that Japanese scientific whaling “undermines international efforts to conserve and protect whales”. The Aide Memoire refers to the Buenos Aires Declaration, signed on the same day that the JARPA II fleet sailed, in which 13 Latin American and Southern Hemisphere Member States plus Spain made a commitment to promote the South Atlantic and South Pacific whale sanctuaries and reaffirmed that special permit whaling should be terminated and scientific research limited to non-lethal methods.
93. We also note that the members of the IWC have confirmed on numerous occasions the application of the precautionary principle in the context of whale regulation (see paragraph 65).
94. The escalation of lethal scientific research on minke whales and other vulnerable species, in circumstances where the relevant international organisation has not yet completed its work on abundance estimates and where there is concern as to an apparent decline in abundance of the most affected species constitutes an abuse of the rights granted by Article VIII of the ICRW. Such escalation also raises

⁷⁰ We are referred to a copy of an Aide Memoire dated January 2006 which presents a Joint Demarche by a number of members of the IWC including Argentina, Australia, Mexico, New Zealand and the United Kingdom in which those Governments express their “serious concerns” about the implementation of JARPA II and state that they have “grave concerns” that JARPA II will undermine the long-term viability of these species.

questions of compliance with the requirements of Article 240 of UNCLOS in particular, as well as with the other UNCLOS obligations referred to below, and with those arising under the ICRW itself. Such escalation does not, in our view, appear to be consistent with the precautionary principle, or with an approach based on prudence and caution. In this regard, we note that the Government of Japan has repeatedly failed to convince the members of the IWC that it is conducting genuine “scientific whaling”. Accordingly, on the basis of the materials that have been made available to us we consider that Japan is currently abusing its right to conduct scientific whaling under the ICRW and UNCLOS. Such an abuse of rights constitutes a violation of a general principle of international law and a specific breach of Article 300 of UNCLOS.

95. In our view, the conduct of the JARPA II programme in the Southern Ocean represents a particular abuse of the right to undertake “scientific whaling” given the special status afforded to those waters by the parties to the ICRW⁷¹. We note that Japan has entered a (partial) reservation to the decision to adopt the Southern Ocean Sanctuary⁷² but as the Sanctuary only purports to regulate commercial whaling, this reservation does not detract from the obligation on Japan to respect the special status afforded to those waters by other parties in conducting any scientific whaling.
96. In this context, we note the decision of the International Tribunal of the Law of the Sea (ITLOS) in the Southern Bluefin Tuna cases⁷³ which concerned complaints brought by Australia and New Zealand against Japan in respect of its experimental fishing programme for blue fin tuna. Australia and New Zealand invoked the jurisdiction of the Tribunal under Part XV and Annex VII to UNCLOS⁷⁴ on the basis of Articles 64, 116-119 of UNCLOS and sought provisional measures against Japan. In that case, the Tribunal ordered provisional measures⁷⁵ in respect of fishing for southern bluefin tuna, and made the following findings: the dispute between the

⁷¹ See further paragraphs 94-100 below.

⁷² See footnote 23 above.

⁷³ *New Zealand v Japan; Australia v Japan* 4 August 2002, 39 ILM 1359 (2000).

⁷⁴ Providing for the establishment of an arbitral tribunal

⁷⁵ See the Order of 27 August 1999

parties concerned points of law as well as scientific disputes (rejecting the argument of the Government of Japan that the dispute was purely scientific)⁷⁶; the parties should in the circumstances act with “prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna”⁷⁷; the parties should “intensify their efforts to cooperate with other participants in the fishery for southern bluefin tuna with a view to ensuring conservation and promoting the objective of optimum utilization of the stock”⁷⁸; that there was scientific uncertainty regarding measures to be taken to conserve the stock of bluefin tuna and that there was no agreement among the parties as to whether conservation measures had led to improvement in the stock, and that, although the Tribunal could not conclusively assess the scientific evidence, measures should be taken as a matter of urgency to preserve the rights of the parties and avert further deterioration of the stock⁷⁹. Ultimately, in that case, the Annex VII arbitral tribunal declined jurisdiction on the basis that this was excluded by Article 16 of the 1993 Convention for the Conservation of Southern Bluefin Tuna to which all three states were also party.

97. We recognise that there are some differences between the circumstances which gave rise to the Southern Bluefin Tuna case and those relating to scientific whaling, in particular the fact that Japan’s experimental fishing programme for bluefin tuna was not expressly permitted under the 1993 Convention (see below). Nevertheless, we draw from this case the following: the likelihood that an international tribunal would find that there is a legal, as well as a scientific, dispute between the Government of Japan and other parties to the IWC as to the impact of Japan’s special permit whaling; the confirmation that parties to the IWC and UNCLOS should act on the basis of the precautionary principle or approach (or prudence and caution) in considering whether or not to issue special permits (and generally); the relevance of Articles 64 and 116-119 to the issue of scientific whaling (as well as,

⁷⁶ See paragraphs 42-43 of the Order

⁷⁷ See paragraph 77 of the Order

⁷⁸ See paragraph 78 of the Order.

⁷⁹ See paragraphs 79-80 of the Order.

in our view, the other provisions of UNCLOS referred to above). We note that, in contrast to the 1993 Convention for the Conservation of Southern Bluefin Tuna, the ICRW makes no provision for dispute settlement which, may cause an Annex VII UNCLOS arbitral tribunal to adopt an alternative approach to that which declined jurisdiction in the Southern Bluefin Tuna case (an award that has been heavily criticised in the academic literature and which may not, in any event, be followed).

98. In this section, we have principally addressed abuse of rights under Article VIII ICRW, but we also consider that similar issues of abuse of rights arise in relation to various rights arising under the law of the sea, namely under Articles 87, 116, 119 and 240 of UNCLOS. These provisions are considered below.

(2): Other International Acts and Instruments Relevant to Whaling

UNCLOS

99. *Provisions Relevant to the Regulation of Whaling:* A number of provisions of UNCLOS are directly relevant to the international regulation of whaling and thus to the issue of special permit whaling in our view. Japan⁸⁰, Iceland⁸¹ and Norway⁸² are all parties to UNCLOS. The overall effect of these various provisions of UNCLOS is to buttress the interpretation of the ICRW set out above in particular because of the emphasis on conservation of marine living resources, on cooperation with the relevant international organization and on the exercise of rights with due regard to the rights of other state parties.
100. Part V of UNCLOS is primarily concerned with activities in the Exclusive Economic Zone. Article 64 of UNCLOS (dealing with highly migratory species) provides in part that: "...coastal States and other States whose nationals fish in the

⁸⁰ Japan ratified UNCLOS on 20 June 1996.

⁸¹ Iceland ratified UNCLOS on 21 June 1985 [need to check declaration].

⁸² Norway ratified UNCLOS on 24 June 1996 [need to check declaration].

region for the highly migratory species listed in Annex I⁸³ shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone...”

101. Article 65 of UNCLOS (Marine mammals) provides:

“Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.”

102. Article 120 states that Article 65 also applies to the conservation and management of marine mammals in the high seas.

103. Part VII of UNCLOS is concerned with the High Seas. Article 87 provides in part:

“1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

...(e) freedom of fishing, subject to the conditions laid down in section 2⁸⁴;

(f) freedom of scientific research, subject to Parts VI and XIII [see below].

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.”

104. Article 116 (right to fish on the high seas) provides:

“All States have the right for their nationals to engage in fishing on the high seas subject to:

⁸³ Annex I includes cetaceans in the Family *Physeteridae*; Family *Balaenopteridae*; Family *Balaenidae*; Family *Eschrichtiidae*; Family *Monodontidae*; Family *Ziphiidae*; Family *Delphinidae*.

⁸⁴ Section 2 of Part VII of UNCLOS, dealing with conservation and management of the living resources of the high seas

- (a) their treaty obligations;
- (b) the rights and duties as well as the interests of coastal States provided for, *inter alia*, in article 63, paragraph 2, and articles 64 to 67; and
- (c) the provisions of this section”

105. Article 117 provides: “All States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.”
106. Article 118 requires in part that Parties cooperate in the conservation and management of living resources in the areas of the high seas.
107. Article 119(1) requires Parties, in determining the allowable catch and establishing other conservation measures for the living resources in the high seas, to take measures which are designed, on the best scientific evidence available to the State concerned, “to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.”
108. Part XIII of UNCLOS deals with marine scientific research: Article 240 sets out the general principles to be applied in the conduct of marine scientific research which include that: “marine scientific research shall be conducted in compliance with all relevant regulations adopted in conformity with this Convention including those for the protection and preservation of the marine environment.” Article 241 provides that marine scientific research activities shall not constitute the legal basis for any claim to any part of the marine environment or its resources. Article 251 requires States to “seek to promote through competent international organizations the

establishment of general criteria and guidelines to assist States in ascertaining the nature and implications of marine scientific research”.

109. Article 300 of UNCLOS provides:

“State Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdictions and freedoms recognized in this Convention in a manner which would not constitute an abuse of right”

110. *UNCLOS Rights and Duties in Relation to Scientific Whaling*: Taken together, we consider that these provisions of UNCLOS give rise to the following set of rights and obligations in the context of special permit whaling conducted by the Government of Japan:

- (1) Japan has a duty to cooperate with the IWC “with a view to ensuring conservation and promoting the objective of optimum utilization” of whales, taking into account the emphasis placed on conservation by the members of the IWC under current conditions of depletion of whale stocks. This includes cooperation in relation to IWC standards which are stricter than those set by UNCLOS (Articles 64, 65, 118 and 120)
- (2) In exercising its general freedom to fish on the high seas, Japan has a duty to comply with treaty obligations under the ICRW, and to recognise that that freedom is subject to the rights, duties and interests of coastal states (Articles 87, 116);
- (3) Japan has a duty to cooperate with other States in the conservation and management of living resources in the areas of the high seas (Articles 117-118);
- (4) In determining the operation of its scientific research programme, Japan must take measures which are designed, on the best scientific evidence available to it, “to maintain or restore populations of whales at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and

economic factors and taking into account IWC minimum standards for such scientific whaling (Article 119);

- (5) Japan must conduct its marine scientific research in conformity with the principle that it will comply with the relevant regulations of the IWC as set in the Schedule, the Guidelines for Review by the Scientific Committee and in the Resolutions relating to scientific whaling under the Convention (Articles 240, 251). Japan may not rely on its purported marine research activities to lay claim to marine resources (Article 241).

111. As discussed above, the Government of Japan has in our view consistently failed to adhere to the conditions under which scientific whaling must be conducted under the terms of Article VIII of the ICRW, as interpreted in the light of the object and purpose of the Convention and its context. The context includes the Guidelines for the Review of Special Permits, adopted by the IWC for the purposes of the Scientific Committee review under Article VIII.3 and paragraph 30 of the Schedule. The findings of fact set out in a series of IWC Resolutions concerning Japanese scientific whaling provide the evidence for such non-adherence and are considered further in Section B below. We do not in this Opinion enter into any detailed consideration as to whether those findings indicate that Japan has also breached its obligations under UNCLOS, but we do consider that, at the very least, they raise serious questions as to Japan's compliance with the rights and duties listed above.

The Rio Declaration

112. *The Rio Declaration*: We consider relevant the following principles laid down in the 1992 Rio Declaration: (1) Principle 2 of the Rio Declaration [confirming] the sovereign right of nations to exploit resources and their responsibility to ensure that activities do not cause damage to the environment of other states (as reflected in Article 3 of the CBD discussed below); (2) Principle 7 of the Rio Declaration which calls on states to cooperate in the spirit of a global partnership (as reflected in

Article 5 of the CBD, Articles 64, 65, 120, 116-118 of UNCLOS and elsewhere); (3) Principle 9 of the Rio Declaration which concerns exchanges of scientific and technical knowledge (also reflected in the CBD and UNCLOS among other agreements); and Principle 27 which calls on states to cooperate in good faith and in a spirit of partnership (also reflected in the CBD and UNCLOS).

113. We consider that all these Principles taken together reinforce the legal framework for the conservation efforts of the Parties to the ICRW both collectively and individually.

The CBD

114. There are currently 188 Parties to the CBD, including the Governments of Japan⁸⁵, Norway⁸⁶ and Iceland⁸⁷. The objects of the CBD include the conservation of biological diversity and the sustainable use⁸⁸ of its components (Article 1). Article 3 of the CBD provides:

“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

115. Article 5 of the CBD imposes a duty of cooperation on the Parties to the Convention and provides:

⁸⁵ Japan became a party on 28 May 1993.

⁸⁶ Norway became a party on 9 July 1993.

⁸⁷ Iceland became a member on 12 September 1994.

⁸⁸ “Sustainable use” is defined in Article 2 of the CBD as: “Sustainable use” means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.

“Each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.”

116. Articles 6-9 then set out a series of obligations relating to conservation and sustainable use of biological diversity including: the development of national strategies for conservation (Article 6); identification and monitoring of biological diversity (Article 7); and in-situ conservation (Article 8).

117. Article 14(1) relates to impact assessment and provides:

“1. Each Contracting Party, as far as possible and as appropriate, shall:

(a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures;

(b) Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account;

(c) Promote, on the basis of reciprocity, notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate...”

118. In the light of these general obligations arising under the CBD, we consider that, in the context of special permit whaling, Parties to the ICRW which are also parties to the CBD⁸⁹ have the following obligations: (1) to conserve whales, both within the limits of territorial jurisdiction and beyond it: (2) the responsibility to ensure that special permit whaling which occurs under their jurisdiction or control does not cause damage to the environment of other States or to areas beyond the limits of national jurisdiction; (3) a duty to cooperate with other parties to the CBD, through the ICRW, in respect of areas beyond national jurisdiction and on other matters of

⁸⁹ These obligations may also arise under customary international law, for example the duty not to cause harm to areas beyond national jurisdiction.

mutual interest, for the conservation and sustainable use of whales⁹⁰; (4) the duty to conduct appropriate impact assessment, in line with the requirements of Article 14(1), of any proposal to conduct scientific whaling⁹¹. In this context, we note the reference to whales in SBSSTTA Decision VII/10 “Further development of guidelines for incorporating biodiversity-related issues into environmental impact assessment legislation and/or processes and in strategic environmental assessment” (see paragraph 1 of Appendix I). These Guidelines were endorsed by the Parties in COP Decisions VI/7. This is an indication that effects on whales are to be assessed where the activity in question is likely to have an impact on them.

119. Accordingly, any special permit whaling which undermines the conservation of whale species, and in particular the conservation measures agreed under the ICRW, raises in our view a question as to compliance by the state concerned with the requirements of the CBD, in particular Articles 5, 6 and 8, as set out above. Those requirements of the CBD, in our view, inform the nature and scope of the rights afforded to parties under Article VIII of the ICRW. A failure to conduct an appropriate impact assessment of any proposal to conduct scientific whaling also raises questions of compliance with Article 14.1 of the CBD. Furthermore, both the CBD and the CITES Convention (considered below), in setting an international framework for protection and conservation for biodiversity as a whole, and vulnerable species in particular, confirm the exhaustible character of living resources such as whales.⁹²

CITES

⁹⁰ See the reference to cooperation between the CBD and ICRW in COP Decision VII/28.

⁹¹ Article 22(2) CBD provides that : Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea. The relationship between UNCLOS and scientific whaling is considered in section A (2) above.

⁹² This is relevant to the application of Article XX(g) of the WTO Agreement as interpreted in particular by the Appellate Body in the Shrimp Turtle Case (paragraphs 130-132 of the Decision).

120. There is a history of close cooperation between the parties to CITES⁹³ and the members of the IWC. The CITES secretariat and the IWC each have observer status at the meetings of the other body (the CITES Secretariat has adviser status on trade matters and is represented at the IWC Scientific Committee). The main focus of CITES activity on whales has been to address illegal international trade in whale meat and to support the conservation decisions of the IWC through listing whale species on Appendix I to CITES (international trade in such species “for primarily commercial purposes” is prohibited under CITES).
121. Article XV(2)(b) of CITES provides that, in relation to amendments to Appendices I and II between meetings of the Conference of the Parties:
- “For marine species, the Secretariat shall, upon receiving the text of the proposed amendment, immediately communicate it to the Parties. It shall also consult inter-governmental bodies having a function in relation to those species especially with a view to obtaining scientific data these bodies may be able to provide and to ensuring co-ordination with any conservation measures enforced by such bodies. The Secretariat shall communicate the views expressed and data provided by these bodies and its own findings and recommendations to the Parties as soon as possible.”
122. In practice, the Parties to CITES consult with IWC on any proposal relating to the listing of whales.
123. The IWC has adopted several Resolutions on the relationship between the CITES Regime. The most recent such Resolution is Resolution 1999-6 which acknowledges “with satisfaction” that all species of whale in the Schedule to the IWC have been listed in Appendix I of CITES (with the exception of the West Greenland stock of minke whale which is listed on Appendix II⁹⁴) pursuant to the establishment of zero catch limits for commercial whaling agreed by the IWC and other decisions relating to the conservation of great whale species. The Resolution goes on to recognize the important role of CITES in supporting the conservation of whale stocks and the IWC’s management decisions and recognizes the important

⁹³ There are currently 169 parties to CITES. Japan (accepted 6 August 1980), Iceland (acceded 3 January 2000) and Norway (ratified 27 July 1976) are all parties to CITES.

⁹⁴ Species listed on Appendix II may be commercially traded subject to monitoring for the impact of such trade on their conservation status.

role of CITES in detecting illegal trade in whale meat through the inclusion of whale species in Appendix I. The Resolution directs the IWC Secretariat, when the IWC is asked to provide comments on any proposal submitted by a CITES party to transfer any whale species or stock from Appendix I to II, “to advise the CITES Conference of the Parties that the IWC has not yet completed a revised management regime which ensure that future commercial whaling catch limits are not exceeded and whale stocks can be adequately protected” and that “zero catch limits are still in force for species of whales which are managed by the [IWC]....”

124. In 2000, the Parties to CITES consolidated previous CITES decisions relating to the IWC and whales in Conference Resolution 11.4 (Rev COP12) which, inter alia, recalls that “great whales have not generally recovered from the depletion brought about by commercial exploitation”; notes that the IWC has taken “increasingly vigorous action to provide for the effective conservation and management of whales which are of interest to all nations of the world”; recognizes the need for CITES and the IWC to cooperate and exchange information on international trade in whale products and affirms that any illegal international trade in Appendix I whale specimens undermines the effectiveness of both IWC and CITES. The Resolution goes on to recommend that those Parties who have not yet adhered to the ICRW be encouraged to do so and sets out a series of recommendations on the illegal trade in whale meat, including that Parties not issue any import or export permit or certificate of introduction from the sea for primarily commercial purposes, in respect of specimens of whale species protected from commercial whaling under the ICRW.

125. The members of the IWC have expressed their concern that any commercial international trade in whale products obtained from research whaling undermines the effectiveness of the IWC’s conservation programme, see Resolution 2003-2 (fifth recital). In Resolution 2003-2 the members of the IWC stated that Article VIII of the Convention “is not intended to be exploited in order to provide whale meat for commercial purposes and shall not be so used.”

126. In our view, the conduct of “scientific whaling” in a manner which leads to an increase in the scale of the illegal international trade in whale meat will raise questions of compliance under CITES. We consider that scientific whaling which is conducted on commercial scales is likely to result in an increase in such illegal trade because of the amount of whale meat and other products which will become available for such trade. By definition, international commercial trade in whale meat is likely to contravene CITES because whales are listed on Appendix I and commercial trade in Appendix I specimens is generally prohibited. We note that a number of countries, including Japan, Iceland and Norway have entered certain reservations as regards the listing on Appendix I of certain whales species⁹⁵ In cases of trade in meat from those Appendix I whale species for which a reservation has been entered, the state concerned will be treated as a non-party state with respect to trade in products from the species concerned (Articles XV and XXIII of the Convention). Trade with non-parties is dealt with in Article X of the Convention which states that comparable documentation (to that required under the Convention) issued by the competent authorities in that State which substantially conforms with the requirements of the present Convention for permits and certificates may be accepted in lieu thereof by any Party.

127. Countries are also called on, under CITES Conference Resolution 11.4, to collect and inventory skin and meat samples for DNA identification from frozen whale stocks and baleen whales obtained from “directed harvest”. This is to allow states to monitor any illegal trade. Any country which fails to do this in respect of whales obtained as a result of scientific whaling would in our view be in breach of its obligations under CITES as well as the ICRW.

The CCAMLR

⁹⁵ A full list of the relevant reservations is set out at www.cites.org/eng/app/reserve_index . Iceland has also entered certain reservations as regards Appendix II listings of humpbacks and rorquals.

128. The CCAMLR, which entered into force in 1982, is part of the Antarctic Treaty System. The objective of the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) is the conservation⁹⁶ of Antarctic marine living resources which are defined as: “the populations of fin fish, molluscs, crustaceans and all other species of living organisms, including birds, found south of the Antarctic Convergence” (Article I.2). The geographical area with which CCAMLR is concerned corresponds to a large degree to the coverage of the Southern Ocean Sanctuary established by the parties to the ICRW⁹⁷ and extends to those waters where Japan has undertaken its JARPA and JARPA II programmes. Japan and Norway are members of the CCAMLR Commission. There are 24 members of the Commission and 8 additional states have acceded to the Convention.
129. Article II.3 sets out a number of principles of conservation, which include the following: “prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment” (sub-para (a)); “maintenance of the ecological relationships between harvested, dependent and related populations of Antarctic marine living resources and the restoration of depleted populations to the levels defined in sub-paragraph (a) above” (sub-para (b)); and prevention of changes or minimization of the risk of changes in the marine ecosystem which are not potentially reversible over two or three decades, taking into account the state of available knowledge of the direct and indirect impact of harvesting,...”.
130. Article VII establishes the Commission for the Conservation of Antarctic Marine Living Resources, the function of which is to give effect to the object and principles set out in Article II. This includes identifying conservation needs and analyzing the effectiveness of conservation measures (Article IX.(1)(e)) and formulating, adopting and revising conservation measures on the basis of the best scientific

⁹⁶ For the purposes of the Convention, the term conservation includes “rational use”, Article II.2

⁹⁷ The Convention applies to the Antarctic marine living resources of the area south of 60° South latitude and to the Antarctic marine living resources of the area between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem (Article I.1).

evidence available, subject to recommendations or measures established by the Consultative Meetings under Article IX of the Antarctic Treaty or the relevant fisheries commissions (Article IX(1)(f)). A Scientific Committee is established under Article XIV of the CCAMLR. Article XXIV establishes a system of observation and inspection in order to promote the objective and ensure the observance of the Convention.

131. Article VI of CCAMLR provides that:

“Nothing in this Convention shall derogate from the rights and obligations of Contracting Parties under the International Convention for the Regulation of Whaling and the Convention for the Conservation of Antarctic Seals.”

132. In our view, whilst it is clear from Article VI that the CCAMLR does not derogate from the right to conduct scientific whaling under the ICRW, it does not follow that the conservation objectives of the CCAMLR are not relevant to the operation of Article VIII of the ICRW. In our view, given the conservation objectives which the ICRW shares with the CCAMLR in respect of whales in the Southern Ocean (and the ecosystems of which they form part), the conservation principles of the CCAMLR and decisions adopted in implementation of those principles can provide guidance on the conservation objectives of the ICRW.

133. There are no decisions of the IWC which depart from the conservation measures adopted by the CCAMLR or which suggest that there is any divergence in general approach between the two instruments. To the contrary, the IWC has adopted Resolutions noting the first research collaboration of the IWC and CCAMLR under the SOWER 2000 and POLLUTION+ 2000 research programmes (described in the Resolution as “highly successful”), Resolution 2000-7, and calling for greater collaboration with the CCAMLR, see for example Resolution 2003-1.

134. We note that Japan is a party to both agreements. We consider that the two agreements should be interpreted, so far as possible, as imposing mutually consistent and complimentary obligations. It follows, in our view, that if scientific

whaling undermines, or risks undermining, conservation work carried out under the CCAMLR, that in itself provides evidence that the purported scientific whaling is in breach of the conservation obligations of the ICRW itself, since the two instruments share common objectives.

135. Accordingly, Article VI is no bar, in our view, to the CCAMLR Commission conducting an investigation of any scientific whaling, such as the JARPA II programme, in order to assess its likely impact on the conservation work of the CCAMLR. The Commission may undertake such work upon the request of any Contracting Party, whether through the Scientific Committee or the Commission itself. The case for such an investigation is only strengthened in our view in the light of the concerns expressed by the IWC in the Resolutions on the JARPA II programme referred to above. A decision to proceed with an investigation could be taken under Article XII of the Convention (by consensus if considered to be a matter of substance or, as is our view, by simple majority on the basis that it falls under Article XII.2 (other decisions)).

136. *Other International Instruments Specifically Concerned with the Conservation of Whales:* There are a number of international and regional treaties addressing the conservation of whales: these include the Bonn Convention on Migratory Species (CMS); the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS⁹⁸) and the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (ASCOBANS). The latter two agreements are agreements under Article IV of the CMS which provides for the parties to conclude international agreements for the conservation of species listed in Appendix II to the Convention⁹⁹. The existence of these various agreements underscores the attention paid by the international community to the protection of whales globally. In relation to the conduct of

⁹⁸ This Agreement protects, among other species, the fin whale.

⁹⁹ Appendix II shall list migratory species which have an unfavourable conservation status and which require international agreements for their conservation and management, as well as those which have a conservation status which would significantly benefit from the international cooperation that could be achieved by an international agreement.

scientific research, ASCOBANS provides that “Investigations, to be coordinated and shared in an efficient manner between the Parties and competent international organizations, shall be conducted in order to (a) *assess* the status and seasonal movements of the populations and stocks concerned, (b) locate areas of special importance to their survival, and (c) identify present and potential threats to the different species...”. The Annex goes on to provide that “The studies should exclude the killing of animals and include the release in good health of animals captured for research” (See Annex to the Agreement).

B: In the light of the answer to A, is “scientific whaling” as currently authorized or carried out by some IWC members consistent with the requirements of the ICRW?

137. In the light of the answer to “A” above, and the materials to which we have been referred, we consider that there is strong evidence that “scientific whaling”, as conducted by some members of the IWC, and in particular by the Government of Japan, is not consistent with the requirements of the ICRW, in particular with paragraphs 10(e) and 30 of the Schedule and with Article VIII of the Convention. We set out the particular aspects which, in our view, indicate that such whaling is unlawful below. We have taken into account the factual matters referred to in IWC Resolutions which have addressed the scientific whaling conducted by Japan and other parties to the ICRW. In particular, we have had regard to the factual basis for the criticisms of JARPA II made in IWC Resolution 2005-1. We have also taken into account the comments made by the group of 63 Scientists participating in the work of the Scientific Committee referred to above. We have considered these materials against the background of the terms of Article VIII itself, the object and purpose of the Convention and the context which includes the moratorium on commercial whaling, the establishment of the sanctuaries and the adoption of the Guidelines for Review adopted by the parties pursuant to the provision for review made in Article VIII.3 and paragraph 30 of the Schedule.

138. *Purposes of the Research:* We note the view taken by the group of 63 Scientists that, so far as the objectives of the research are concerned, most of the data is not required and that the objectives are based on “several unsubstantiated or incorrect assumptions” including the assumption that whales are competing with each other; that the reduction of one species (minke whales) will lead to the increase of another species (blue whales); that minke whales are top predators and that blue whale low abundance and recovery is due to minke and humpback whale populations¹⁰⁰. The scientists also criticise the fact that the proposal is open-ended and has no time limit for assessment and state that CCAMLR expertise is needed to evaluate ecosystem interactions such as competition assumptions. Finally it is stated that even if the IWC decided to move to a multi-species management procedure, the proposal does not have well-defined hypotheses and performance criteria.
139. We also note that in Resolution 2005-1, the IWC noted that the results of the JARPA program had not been reviewed by the Scientific Committee in 2005 and went on to urge the Government of Japan to withdraw or revise its proposal so that any information needed to meet the stated objectives is obtained by non-lethal means.
140. In circumstances where a significant number of the members of the Scientific Committee have questioned the validity of the objectives of proposed research, and where the Scientific Committee has not had sufficient time to review and comment on an earlier related proposal and where the IWC itself has urged Japan to withdraw or revise its programme, it is incumbent on the Government of Japan to allow sufficient time for the appropriate review of its proposal and to suspend further operation of JARPA II at least until this has occurred. The procedural requirement for such review is set out in binding provisions of the ICRW (paragraph 30 of the Schedule) and the parties have agreed in Guidelines adopted for the purposes of such review that special permit whaling should only be authorised in “exceptional circumstances” and in order to meet “critically important research needs”. The

¹⁰⁰ See page 2 of the Comments published at J.Cet Res Manage I(I): 3-24.

parties have therefore agreed that such research must meet a high threshold of necessity, which reinforces the binding obligation to await the outcome of review by the Scientific Committee.

141. The timing of the adoption of its JARPA II programme has not allowed the IWC Scientific Committee “sufficient time” to review and comment on the results of the earlier JARPA programme, as expressly required under paragraph 30 of the Schedule, so as to allow that Scientific Committee to determine whether JARPA II meets critically important research needs. We note in particular that, in relation to abundance estimates, the non-lethal SOWER¹⁰¹ 2000 programme is currently being conducted for the same purpose by the Parties and includes work on minke whales, fin whales and humpback whales which are all subject to the lethal JARPA II programme.
142. We also note the concern expressed by the group of 63 scientists as to the scale of the whaling programme. They note that the levels of take are approaching the annual commercial quotas for Antarctic minke whales which were in place before the moratorium.
143. As indicated above, it would not in our view be lawful to continue “scientific whaling” in the Antarctic because of the need to keep ships and personnel employed and to maintain markets for whale meat. Economic and commercial objectives cannot lawfully justify a programme of commercial whaling, which must exclusively be aimed at scientific research.
144. In the light of Japan’s continued efforts to lift the moratorium on commercial whaling as described above, her reservation to the establishment of the Southern Ocean Sanctuary (as regards the commercial whaling of minke whales) and the scale and commercial exploitation of the catch obtained by Japan’s special permit

¹⁰¹ The Southern Ocean Whale and Ecosystem Research programme. According to the IWC website, the cruises operating under the programme have provided a wealth of information on the distribution and abundance of cetaceans in the waters south of 60°S.

whaling, we consider that there is strong evidence that Japan is in breach of paragraph 10(e) of the Schedule to the ICRW and is continuing to carry out a level of what appears to be, on the basis of objective criteria, commercial whaling. As an alternative analysis of the legal position, we consider that Japan is abusing its rights under Article VIII of the ICRW in order to maintain a level of commercial whaling in the face of an internationally agreed ban on such whaling which it has accepted.

145. *Use of Lethal Research Methods:* We take note of the recognition by the Parties to the IWC, as expressed in Resolution 2003-2, that “Article VIII of the ICRW was drafted and accepted by State Parties in 1946, at a time when few alternatives to lethal investigations existed, a situation drastically different from today”¹⁰². We consider that the Government of Japan, in continuing to authorise lethal research in circumstances where a range of non-lethal techniques are now available, has violated the conditions for the exercise of its rights under Article VIII ICRW. Those conditions, as recognised by the Parties to the ICRW, evolve with advances in non-lethal research techniques which are more suited to the Convention’s conservation purposes. It is not acceptable, in our view, to use lethal methods, which may have been the only methods available in 1946, where non-lethal methods are now available. Furthermore, we note that many international agreements commit states to use “best environmental practices” (BEP) and best available techniques (BAT)¹⁰³. This reflects the recognition by the international community that states should take into account developments in technology when conducting activities which may be harmful to the environment, in order to minimise the risks of such harm occurring. Clearly the use of non-lethal methods minimises the potential

¹⁰² IWC Resolution 2003-2, Second Recital.

¹⁰³ See for example Article 194(1) of UNCLOS which provides that: “States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection”. See also Article 6 of the 1979 UN/ECE Long-Range Transboundary Air Pollution Convention which requires parties to use the best available technology which is economically feasible in relation to air quality management and see also the 2000 Regulations on Prospecting and Exploration of Polymetallic Nodules in the Area adopted by the International Seabed Authority, regulation 31 of which requires contractors to use the best available technology to prevent, reduce and control marine pollution.

impact of scientific research on the conservation of whales. We also note the published comments of the 63 scientists involved in the work of the IWC Scientific Committee that: “The strongest scientific argument in favour of lethal sampling-the collection of genetic samples for determining population structure-could be conducted far more efficiently using non-lethal biopsy techniques.”¹⁰⁴

146. We also note the reported findings of a recent survey (as yet unpublished) conducted by the Australian Government, the “Baseline Research Oceanography Krill and the Environment (Broke-West) Antarctic marine science survey, January – March 2006¹⁰⁵. In a Government press release, the survey is described as “a comprehensive biological and oceanographic assessment of the Eastern Antarctic ecosystem, led by the Australian Antarctic Division and the Antarctic Climate and Ecosystems Cooperative Research Centre. The survey took place over one million square kilometres of the Southern Ocean off Australia’s Antarctic Territory. Studies included an acoustic survey of marine mammals and a visual line-transect survey of marine mammals. The former is stated to assist scientists in assessing the seasonality and relative abundance of vocalising baleen whales in the region over long temporal scales whilst the latter, along with the acoustic data, will be used to assess the relative distribution and abundance of marine mammals over the study region. In response to the survey’s findings, the Australian Minister for the Environment and Heritage, Senator Ian Campbell, states in the press release that the research shows that there is no justification for Japan’s so-called “scientific whaling” and goes on to state that the information, obtained solely through non-lethal means “now represents the most powerful approach seen yet to understanding the role of whales in their Southern ocean ecosystem”. It concludes that “It is clear that countries like Japan cannot credibly argue the information gained from killing whales is even remotely relevant to the stated objectives of their scientific whaling programme”.

¹⁰⁴ See “Japan’s Whaling Plan under Scrutiny” N J Gales, T Kasuya, P J Clapham and R L Brownell Jr, *Nature* Vol 435 16 June 2005 page 883.

¹⁰⁵ See the Press Release “New Australian research shows Japan’s scientific whaling is a sham”, dated 28 March 2006 at www.deh.gov.au/minister/env/2006/mr28mar206.html.

147. We understand that the Government of Australia will next month be making a submission to the IWC Scientific Committee based upon the research program.

148. In its response to the announcement of the Australian survey, ICR states that it looks forward to assessing the results of the research but goes on to state that:

“Even where they have been collecting data similar to some aspects of the non-lethal components of our research program they have not had the extensive coverage or repetitive observations needed to detect trends.”¹⁰⁶

149. Based on the summary accompanying the Australian Government’s press release, this survey appears to provide further strong evidence that Japan is conducting unnecessary lethal research, contrary to the Guidelines issued by the IWC. The view that Japan is unnecessarily conducting lethal research is also expressed in the Aide Memoire of January 2006 referred to at paragraph 92 above. A commitment to use only non-lethal research methods is made by 13 Governments in the Southern Hemisphere region in the Buenos Aires Declaration to which the Aide Memoire refers.

150. *Whaling in the Southern Ocean Sanctuaries:* We consider that any authorisation of scientific whaling in the sanctuaries, which have been established under the binding provisions of the Schedule to the Convention for the protection of the species concerned, would have to meet the highest standards of scientific justification and be conducted on the most minimal scale achievable, taking into account modern non-lethal research techniques (as to the latter we refer again to the Buenos Aires Declaration and the Australian survey discussed above). Accordingly, we consider that the Government of Japan’s conduct of lethal scientific whaling in the Southern Ocean Sanctuary is a clear violation of its obligations under the ICRW, notwithstanding its partial objection (in respect of minke whales only) to the Southern Ocean Sanctuary, and associated obligations to cooperate with the IWC

¹⁰⁶ See Press Release dated 15 April 2006 available at www.icrwhale.org/eng/release060415

under the UNCLOS and CITES. Given that its objection to the Sanctuary only relates to one species of whale (the minke whale) it appears that Japan does not object to the overall conservation aims of the Sanctuary.

151. By ignoring repeated requests by the IWC that it withdraw or restructure its scientific whaling programmes, including JARPA II, most recently in IWC Resolution 2005-1, the Government of Japan has failed to cooperate with the IWC as required inter alia under Articles 64, 65, 118 and 120 of UNCLOS by consistently refusing to withdraw or restructure its scientific whaling programme. We note that paragraph 30 of the Schedule binds Parties to the IWC to provide information on the possible effect on conservation of stocks in submitting proposals for review by the Scientific Committee. The Committee must then comment on the information. Where the IWC has as a result of this process expressed its concern as to the conservation implications of a proposal (as in relation to fin and humpback whales in Resolution 2005-1¹⁰⁷), we find it difficult to envisage circumstances in which it would be reasonable to disregard those views.
152. As discussed above at paragraph 69, we consider that it is necessary to adopt a dynamic and evolutionary approach to the interpretation and application of the ICRW and we refer in this regard to the Gabcikovo Nagymaros case where the Court stated:

“Owing to new scientific insights and to a growing awareness of the risks for mankind-for present and future generations-of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.” (para 140 of the judgment)

¹⁰⁷ The Resolution also notes that the Third Circumpolar Survey indicates that the abundance of minke whales is substantially lower than earlier estimates and that the Scientific Committee is working to identify factors contributing to the difference between the two surveys.

153. In our view, it follows that Japan must have regard to new technological developments in non-lethal research techniques as well as to the risks posed by climate change and environmental pollution which exacerbate the vulnerable status of whale species¹⁰⁸. Furthermore, the conduct of scientific whaling on a commercial scale constitutes an abuse of rights contrary to the ICRW and to Article 300 of the UNCLOS since such whaling is clearly, conducted primarily for commercial purposes rather than for purposes of genuine scientific research, and threatens to undermine conservation measures which include an international moratorium on commercial whaling. The Government of Japan is conducting purportedly scientific whaling on an increasingly commercial scale which threatens to undermine conservation measures adopted by the Parties to the ICRW and to promote the illegal international trade in whale meat.

C: If the answer to B is that such “scientific whaling” as currently authorized or carried out by some IWC members is inconsistent with the requirements of the ICRW, what would be the legal consequences (if any) of a Resolution adopted by a majority of the IWC that purports to determine that such “scientific whaling” is lawful?

154. In the light of the answer to “B” above, we consider that a Resolution purporting to determine that such scientific whaling is lawful would not make any adjustment to the legal duties and obligations considered in this Opinion. Such a Resolution could not serve to amend the binding obligations arising under paragraphs 10(e) and 30 of the Schedule, nor those arising under Article VIII of the Convention.

155. *Collective Obligations and State Responsibility*: In our view, the ICRW belongs to a special category of multilateral treaties, the category of conventions creating “interdependent obligations”¹⁰⁹. Such conventions contain obligations, “the

¹⁰⁸ We refer to the Parties’ concern with these matters as expressed, for example, in IWC Resolutions 2002-1 (fourth and fifth recitals); 2001-10 (Resolution on the Stockholm Convention on Persistent Organic Pollutants); Resolution 2000-7 (Resolution on Environmental Change and Cetaceans)

¹⁰⁹ This term was used by Sir Gerald Fitzmaurice in his reports to the International Law Commission (ILC) on the codification of the law of treaties.

implementation and efficiency of which is conditioned by the corresponding performance of their obligations by all other parties”¹¹⁰. These obligations can also be characterised as “collective obligations”. We take this view of the ICRW because whales are a migratory marine resource of global importance (in which the “nations of the world” have a common interest¹¹¹) and which are affected by a range of transboundary activities, including of course whaling. The ICRW is founded on an acceptance that unilateral efforts to conserve whales will not be effective and that international regulation is required “to ensure proper and effective conservation”¹¹². Clearly the resumption of commercial or commercial-scale whaling by some members of the ICRW is likely to undermine the collective conservation efforts of the other parties to the Convention.

156. We do not discuss in any detail the consequences, in terms of state responsibility, of such action (the validation of commercial-scale whaling) in this Opinion, but we note that Article 48(1)(a) of the (2001) ILC Draft Articles on State Responsibility provides:

“1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
(a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group;...”

Paragraphs 2 and 3 of Article 48 then provide:

“2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
(b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

¹¹⁰ See ILC Reports 1958, II, commentary of Article 19, page 46 paragraph 19.

¹¹¹ See the first and fourth recitals to the Preamble to the ICRW

¹¹² See the sixth recital to the Preamble to the ICRW.

157. The Commentary to Article 48(1)(a) of the ILC Articles on State Responsibility (2001) defines collective or erga omnes obligations as those that “apply between a group of states and have been established in some collective interest”¹¹³ or “situations where performance of the obligation is owed generally to the parties to the treaty at the same time and is not differentiated or individualised”¹¹⁴. The Commentary provides for some examples of collective obligations which might concern the protection of the environment or the security of a particular region.
158. Since a multilateral convention stating “interdependent” or “collective” obligations is placed under a legal regime of global reciprocity (in the words of Sir Gerald Fitzmaurice), any substantial violation of its obligations by a party or by a group of parties affects the enjoyment by the other parties of their respective rights and obligations. Accordingly in our view the adoption of an act validating commercial-scale whaling and the resumption or continuation of such activity by a party to the ICRW would be susceptible to a claim of the type set out in Article 48(2) of the ILC Draft Articles, brought by another Party or group of Parties to the ICRW which objected to such action.

¹¹³ Commentary Report on the work of its 53rd Session, General Assembly, Official Records, 55th Session, Supplement N.10 (A/56/10), Chapter IV page 320.

¹¹⁴ Ibid page 297.

**ANNEX 1: IWC RESOLUTIONS RELATING TO SCIENTIFIC RESEARCH AND
WHALING UNDER SPECIAL PERMIT**

SUMMARIES OF KEY RESOLUTIONS

Resolution 2005-1 expresses, inter alia, concern that more than 6,800 minke whales have been killed in Antarctic waters under the 18 year JARPA programme, compared with a total of 840 whales killed globally by Japan for scientific research in the 31 year period prior to the moratorium, notes that it is the Government of Japan's intention to more than double the annual catch of Antarctic minke whales and also to take 50 fin whales and 50 humpback whales under the JARPA II programme, notes that the Third Circumpolar Survey indicates that the abundance of Antarctic minke whales is substantially lower than the earlier estimate of 760,000 and the Scientific Committee is working to identify factors contributing to the difference between the two surveys. The Resolution also expresses concerns as to the potential impact of JARPA II on fin and humpback whales. The Resolution concludes by requesting the Scientific Committee to review the outcomes of JARPA as soon as possible and by strongly urging Japan to withdraw its JARPA-II proposal or revise it so that any information need to meet its objectives is obtained by non-lethal methods.

Resolution 2003-2 which recalls that since the adoption of the moratorium on commercial whaling in 1985/1986, the IWC has adopted over 30 resolutions on special permit whaling in which it has expressed the opinion that special permit whaling should: only be permitted in exceptional circumstances; meet critically important research needs; satisfy criteria established by the Scientific Committee; be consistent with the Commission's conservation policy; be conducted using non-lethal research techniques and ensure the conservation of whales in sanctuaries. Resolution 2003-2 goes on to recall that the Commission has expressed its serious concern at the possibility of whaling for scientific purposes assuming the characteristics of commercial whaling and, having addressed further specific concerns, concludes inter alia by expressing deep concern that the provision permitting special permit whaling enables countries to conduct whaling for commercial purposes despite the moratorium on commercial whaling; states that the current and proposed Special Permit whaling operations represent an act contrary to the spirit of the moratorium on commercial whaling and to the will of the Commission and urges any country conducting or considering the conduct of Special Permit whaling to terminate or not commence such activities and to limit scientific research to non-lethal methods only.

Resolution 2003-3: This Resolution addresses Southern Hemisphere Whales and Special Permit Whaling and notes that the Government of Japan continues to issue special permits under Article VIII of the Convention for lethal scientific research on minke whales in the Southern Ocean Sanctuary and recalls that the Scientific Committee agreed in 2000 that there was no valid estimate for Southern Hemisphere minke whales and there is still no agreed estimate for such whales. The Resolution goes on to recall further concerns regarding appreciably lower preliminary abundance estimates for Southern Hemisphere minke whales expresses concern that the 2001 Scientific Committee report did not rule out

that the population may have suffered a precipitous decline over the past decade and refers to the Scientific Committee's work on this issue. The Resolution concludes by requesting the Scientific Committee to provide all plausible hypotheses to explain any decline in abundance estimates that may emerge and to consider fully the possible negative impact of the take of minke whales under Japan's research programme in the Antarctic and the impact of environmental change factors and calls on the Government of Japan to halt the JARPA programme or revise it so that it is limited to non-lethal methods and recommends that no additional JARPA programmes be considered until the Scientific Committee has completed work including an in-depth review of the results of JARPA and its review of the abundance of Southern Hemisphere whales and that any programmes be limited to non-lethal research.

Resolutions 2001-7 and 2001-8: Resolution 2001-7 recognizes that the Southern Ocean Whale Sanctuary may provide a valuable precautionary measure against the uncertainties in whale management in the Antarctic, recalls concerns regarding appreciably lower abundance estimates for Southern Hemisphere minke whales and notes that a precipitous decline cannot be ruled out. The Resolution commends the Scientific Committee's proposal to proceed with a review of abundance and endorses its proposal to present revised estimates in 2003 and strongly urges the Government of Japan to halt the lethal takes of minke whales conducted under JARPA at least until the Scientific Committee has reported on the impact of JARPA on stocks. Resolution 2001-8 addresses the JARPNII programme, noting inter alia the lack of quantifiable objectives, and strongly urges to refrain from issuing any special permit under that programme or at least delay until July 2002 to give the Government of Japan time to take into account the views of the Scientific Committee and the Commission.

Resolutions 2000-4 and 2000-5: These two Resolutions address the JARPA and JARPN programmes respectively and requests that Japan refrain from issuing special permits for the 2000/1 season for the take of mink whales in the Southern Ocean Sanctuary and strongly urges Japan to refrain from issuing special permits for whaling under JARPN II.

Earlier Resolutions: We also note the following earlier Resolutions on Scientific Research and Special Permits: Resolution 1986 (IWC/38/28) which sets out criteria for scientific research¹¹⁵; Resolution 1987-Appendix 1 requesting annual review of research programmes by the Scientific Committee in the light of the criteria set out in the 1986 Resolution on Special Permits for Scientific Research; Resolution 1987-Appendix-4 which adopts the view that the proposed take of Southern Hemisphere Minke Whales and Sperm Whales does not satisfy the criteria set out in the 1986 Resolution¹¹⁶; Resolution 1990-Appendix-2 which incites Japan to reconsider proposed research involving the catch of mink whales in the Southern Hemisphere; Resolution 1990-Appendix 5 on Redirecting Research towards Non-Lethal methods; Resolution 1991-Appendix 2 on Special Permit

¹¹⁵ The research addresses a question/questions that should be answered in order to conduct a comprehensive assessment or meet other critically important research needs; the research be conducted without adversely affecting the overall status and trends of stock; the research address questions that cannot be answered by analysis of existing data or non-lethal research techniques; the research is likely to yield results leading to reliable answers to the question or questions being raised.

¹¹⁶ The Commission also adopted similar Resolutions in relation to other proposals made by Japan and by Korea, Iceland and Norway in 1987-1989

Catches by Japan in the Southern Hemisphere (inviting Japan to reconsider proposed research in light of the 1986 criteria); Resolution 1993-Appendix 3 inviting Japan to reconsider proposed research in the light of the 1986 criteria; Resolution 1994-9 inviting Japan to reconsider proposed research take of minke whales in the North Pacific in the light of the 1986 criteria; Resolution 1994-10 inviting Japan to reconsider proposed research take of minke whales in the Southern Hemisphere in the light of the 1986 criteria; Resolution 1995-8 on Whaling under Special Permit in Sanctuaries which considers that Contracting Governments should conduct research in the Southern Ocean Sanctuary using non-lethal methods and refrain from issuing special permits for research involving killing of cetaceans in the sanctuaries; Resolution 1995-9 on Whaling under Special Permit which inter alia recommends that research involving the killing of cetaceans should only be permitted in exceptional circumstances; Resolution 1996-7 on Special Permit Catches by Japan which inter alia requests that Japan refrain from issuing a special permit for the take of minke whales in the Southern hemisphere or North Pacific; Resolution 1997-6 on Special Permit Catches by Japan which reiterates earlier requests that Japan refrain from issuing a special permit for the take of minke whales in North Pacific and reconsider its research programmes so as to use non-lethal methods; Resolution 1998-4 on Whaling under Special Permit which regrets that despite multiple IWC resolutions affirming that lethal research programmes conducted by Japan did not address critically important research needs, the Government of Japan continues the programme of lethal research, particularly in the Southern Ocean Sanctuary and reaffirms its previous request to Japan to refrain from issuing any further permits for the take of minke whales in the Southern ocean Sanctuary and North Pacific Ocean; Resolution 1999-3 on whaling under Special Permit, which notes that the Japan has issued new special permits for research in the Southern Ocean Sanctuary and North Pacific, notes the information that only 30% of whales are killed instantaneously in the JARPA and JARPN programmes, recalls grave concerns expressed by eminent members of the international scientific community and many others over the continuation of lethal whale research programmes and request Japan to refrain from issuing any permits in the 1999/2000 seasons for the take of minke whales in the Southern Ocean Sanctuary and North Pacific ocean.

MEMBERS OF THE PANEL: PROFESSIONAL BACKGROUND

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