Australia v. Japan: ICJ Halts Antarctic Whaling

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On March 31, 2014, the International Court of Justice declared that Japan must halt its current whaling program in the Southern Ocean.[1] The decision will not affect Japan's whale hunt in the northern Pacific and it does not foreclose Japan from all whaling in the future, as long as it is conducted within the requirements of the International Convention for the Regulation of Whaling (ICRW). [2] Nor does this decision affect the other two nations that currently conduct whaling operations, Norway and Iceland, which, though parties to the ICRW, have objected to and are therefore not bound by the moratorium on nearly all whaling activity that it imposes.

Japan violated three provisions of the ICRW by conducting large-scale whaling under the second phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II). They were:

- the moratorium on all commercial whaling;
- the moratorium on use of factory ships to process whales; and
- the prohibition on whaling in the Southern Ocean Sanctuary.

The Court found that Japan met the procedural requirements for review of permits by the International Whaling Commission, found in the ICRW Schedule, paragraph 30.[3]

The result is that Japan must revoke any extant authorization, permit or license to kill, take or treat whales in relation to JARPA II and refrain from granting any further permits in pursuance of JARPA II. The Court observed that “[i]t is to be expected that Japan will take account of the reasoning and conclusions contained in this Judgment as it evaluates the possibility of granting any future permits under Article VIII, paragraph 1, of the Convention.”[4]

The Court based the judgment on its interpretation of the ICRW, finding a lack of scientific merit in Japan's whaling program, specifically, the lack of justification of the large scale of lethal sampling. In so doing, it demonstrated its willingness and ability to address past criticisms of its treatment of scientific evidence. The Court decided that it did not need to discuss several theories of international law as
applied to the environment and wildlife advanced by Australia and New Zealand (as intervenor);[5] (/print/937#_edn5) and it did not discuss the question raised by Japan of whether the moratoria were based on science.

ICRW, Whaling Moratorium and Article VIII Exceptions

The ICRW establishes the International Whaling Commission (IWC, Commission), which comprises representatives of its eighty-eight state parties and a Scientific Committee. By amending its Schedule[6] (/print/937#_edn6) the Commission sets catch limits for commercial and aboriginal whaling—which may be zero catch—and addresses other aspects of research and hunting. Parties that object to an amendment are not bound by it.

This dispute is focused on the interpretation of the ICRW, Article VIII, whose operative paragraph reads:

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.

Other paragraphs of Article VIII require that research results be communicated and encourage “processing” the whales taken for research, with the state to use the “proceeds.” The ICRW does not require states to obtain approval of other parties or of treaty bodies when they authorize whale hunts under Article VIII, but the Schedule, paragraph 30, requires states to provide the IWC with “proposed scientific permits before they are issued and in sufficient time to allow the Scientific Committee to review and comment on them.”

Australia, Japan and New Zealand are parties to the ICRW. In 1982, the IWC established zero catch limits for all whaling, with two exceptions: aboriginal whaling and special permit scientific whaling under Article VIII of the ICRW. In 1994 the IWC established the Southern Ocean Whale Sanctuary and prohibited all whaling there. It also banned the use of factory ships. Japan has a current objection to the moratorium on killing minke whales and to the establishment of the Southern Ocean Sanctuary. Japan conducted two whaling programs, JARPA II and JARPN II (in the North Pacific Ocean, not at issue in this case),[7] (/print/937#_edn7) which it justified as falling under the article VIII exception for special permit scientific whaling. JARPA II includes lethal sampling of fin, humpback and minke whales within and outside the Southern Ocean Sanctuary; it uses a factory ship to process the meat. Its research objectives are: (1) monitoring the Antarctic ecosystem; (2) modelling competition among whale species and future management objectives; (3) elucidating temporal and spatial changes in stock structure; and (4) improving management of Antarctic minke whale stocks. On average, 450 minke whales were killed annually under JARPA II, about half the target sample size of 850 minke whales, fifty fin whales, and fifty humpback whales per season.[8] (/print/937#_edn8)

Jurisdiction and Claims

The Court found that it had jurisdiction on the basis of Japan’s and Australia’s declarations of acceptance of the Court’s compulsory jurisdiction under the ICJ Statute Article 36, paragraph 2. Japan contested jurisdiction on the grounds that Australia’s declaration included a reservation excluding disputes “arising out of, concerning, or relating to the exploitation of” maritime zones. Australia argues that the reservation is intended only to address maritime boundary delimitations. Accepting this, the Court concluded that the reservation did not apply as in this case there were no overlapping maritime claims between Japan and Australia.

Australia claimed that Japan had failed to act in good faith by ignoring the zero-catch limit for commercial whaling, paragraph 10(e) of the Schedule, and the prohibition on commercial hunting for humpback and fin whales in the Southern Ocean Sanctuary, paragraph 7(b) of the Schedule. Australia’s application also argued that Japan breached its obligations to preserve marine mammals and the marine environment.
under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, or the Endangered Species Convention), and the Convention on Biological Diversity.\[9\] (/print/937#_edn9)

Note that Australia accepted that under some circumstances, killing whales for scientific research can be necessary and lawful.

Japan, on the other hand, argued that article VIII whaling was wholly outside the Convention[10] (/print/937#_edn10) and that the Court did not have the power to judge the character of the special permits that it granted under JARPA II. It further argued that the species it hunted were not endangered and that the moratorium on hunting whales was not based on science.

New Zealand contended that article VIII was a limited exception, that JARPA II was not scientific research, and therefore it did not qualify for an exemption from the moratorium under article VIII.

Science and the ICJ

The claims in this case hinged on the facts alleged by each party regarding the scientific nature of JARPA II. In a previous case the Court was sharply criticized, by some of its own judges as well as public opinion, for poor handling of significant scientific and technical issues.[11] (/print/937#_edn11) This case presented a fresh approach.

The procedure for presenting scientific evidence followed a strict and rapid schedule. The parties were to inform the Court by December 28, 2012 of the expert evidence they intended to present, including a list of experts to be called at the hearing. They then had one month to comment on each other’s information and to amend their own. The experts’ statements were to be provided to the Court within two and a half months after that; they were also provided to New Zealand. The Court then gave the parties about one month to respond in writing. The oral hearings were held about one month later (June 26 to July 16, 2014), when all of the written submissions were made public. Two experts were called by Australia, one by Japan; the experts were examined and cross-examined and they responded to questions posed by the judges. The Court did not appoint its own expert, which it is authorized to do under article 50 of the ICJ Statute.

Decision – Interpretation of Article VIII – Standard of Review

The ICJ viewed the dispute over article VIII as an objective question of science and not as a matter entirely left to state discretion or a question of whaling policy.[12] (/print/937#_edn12) If article VIII conditions are satisfied by a permit, the whaling it authorizes is exempt from the moratoria and the prohibition on whaling in the Southern Ocean Sanctuary. Japan argued that it was entitled to a “margin of appreciation” in issuing the permits, as the state issuing the permit is best able to evaluate the research proposed. In contrast, Australia and New Zealand maintained that permit requirements must conform to an objective standard. The Court concluded that “whether the killing, taking and treating of whales pursuant to a requested special permit is for purposes of scientific research cannot depend simply on that State’s perception.”[13] (/print/937#_edn13)

The Court stated that the standard of review was an objective assessment of the reasonableness of Japan’s authorization of JARPA II. The Court found that it did not need to consider whether JARPA II constitutes commercial whaling, which might have involved looking at factors like the amount of whale meat sales, employment, and capital return. It examined, first, whether JARPA II involved scientific research and second, the purposes of the program. For the latter analysis, the Court considered whether JARPA II’s design and implementation were reasonable in relation to its stated objectives.

The Court was at pains, as it was throughout the decision, to distinguish the tools that it found appropriate for legal interpretation of the treaty from the methods used within scientific disciplines. As “scientific research” is not defined in the ICRW, the Court considered views of the party experts and the relevant law, but declined to adopt a specific set of criteria. It found that JARPA II could be characterized as scientific research, based on its objectives, which are within the scope of the Scientific Committee’s research categories, and its activities, which are the systematic collection and analysis of data by scientists.
The second part of the analysis is key: the Court found that important aspects of JARPA II’s design and implementation (i.e., lethal take) were not reasonable in relation to its research objectives. The Court found that lethal methods would be necessary to obtain evidence from internal organs and were not per se unreasonable.[14] It refused to engage with the parties’ dispute over the scientific value of the data sought, which it characterized as a matter of scientific opinion. But the Court found Japan’s failure to assess the use of non-lethal alternatives unreasonable in light of its obligations to cooperate with the IWC, its own scientific policy, and the advent of new technologies improving non-lethal whale research. Also, several aspects of the study were not reasonably related to the objectives of the research program, including: different durations for three studies that were supposed to produce related data; sample sizes for some species that were insufficient for statistical analysis; weaknesses in the fin whale studies identified by Japan’s own expert; failure to demonstrate a reasonable basis for questionable study parameters; and failure to adjust the study protocol when actual take was less than half of the study’s required sample size. The Court also said, “a State party may not, in order to fund the research for which a special permit has been granted, use lethal sampling on a greater scale than is otherwise reasonable in relation to achieving the programme’s stated objectives.”

Concluding that the special permits granted by Japan were not “for purposes of scientific research,” the Court’s final findings were straightforward. Deprived of the article VIII exception for scientific research, Japan breached its obligations by issuing permits for JARPA II; by allowing the use of a factory ship to take, kill and treat fin whales; and by JARPA II’s operations within the Southern Ocean Sanctuary regarding fin whales. The ICJ ordered Japan to terminate all aspects of JARPA II. It then said, “[i]t is to be expected that Japan will take account of the reasoning and conclusions contained in this Judgment as it evaluates the possibility of granting any future permits under Article VIII, paragraph 1, of the Convention.”

**Conclusion**

This judgment is an important advance in the ICJ’s approach to environmental disputes for its thoughtful method of addressing the scientific issue on which the dispute hinged. The Court established an efficient procedure to elicit expert opinion from the parties, allowing judges and counsel to interrogate and clarify their understanding. It also developed an analytical approach that distinguishes the judge’s role from the scientist’s, respecting both.

Although it imposes a hiatus on Japan’s whaling activities, the decision does not resolve the fundamental cultural conflict between those who believe whales should not be hunted and those who are willing to restrict hunting as part of a wildlife management program.[15] The Court affirmed that the objectives and structure of the ICRW are oriented toward both conservation of whale stocks and management of the whaling industry and to the extent that there is no other international law that prohibits killing whales it is up to the parties to the ICRW, acting together, to determine when and how whales can be killed. The Court, however, examined only the ICRW, which provided a sufficient answer to the question posed by this dispute. It left for another day how CITES, the Convention on Biological Diversity, customary international law, or evolving environmental norms would reply.

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Thank you for the comments of two guest editors, Timo Koivurova and Anastasia Telesetsky.

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(http://www.asil.org/insights/volume/14/issue/20/dispute-concerning-japan%E2%80%99s-jarpa-ii-program-%E2%80%9Cscientific-whaling%E2%80%9D) [2].


[3] (http://www.asil.org/print/937#_ednref3) Judge Sebutinde, Judge Bhandari and Judge ad hoc Charlesworth disagreed with this, arguing that parties have a duty of cooperation with regard to research under the convention; Judge Greenwood also expressed concern that Japan had not respected its obligation of cooperation.


[5] (http://www.asil.org/print/937#_ednref5) On February 6, 2013, the Court confirmed New Zealand's right to intervene based on its status as a party to the ICRW. Japan did not object to New Zealand’s intervention, but it did raise a number of concerns that it urged the Court to consider, mainly related to the appearance that Australia was getting a second bite at the apple through New Zealand’s identical interest in the dispute, notably by having a judge of New Zealand nationality on the court and a judge appointed ad hoc by Australia. For Australia, New Zealand’s intervention was admissible. The International Whaling Commission was informed of Australia’s Application by the Court and replied that it would not submit observations, which would be allowed under Article 69, paragraph 3, of the Rules of Court.


[12] (http://www.asil.org/print/937#_ednref12) Judge Xue’s Separate Opinion offers an alternative analysis that gives greater weight to the discretion afforded states by article VIII, limited by the regulatory regime of the convention and a duty of good faith. In her view, JARPA II is a program for scientific research; Japan is in breach of its obligation because the scale of permits it granted under JARPA II may have an adverse impact on the moratorium on commercial whaling.


[14] (http://www.asil.org/print/937#_ednref14) Judge ad hoc Charlesworth explained, in her Separate Opinion, her view that the Court should have interpreted this issue according to the precautionary approach, endorsed by both parties, to find that non-lethal methods of research should be used whenever possible.

http://www.asil.org/print/937 21-7-2014
[15] Judge Owada’s Dissenting Opinion addresses this important underlying conflict in views between the parties. Japan based its theory of the case on, as characterized by the Court, “the freedom to engage in whaling enjoyed by States under customary international law.” In contrast, Australia and New Zealand focused on the collective nature of the ICRW as an instrument to enable the international community to manage the global populations of whales for present and future generations. The crux of New Zealand’s interpretation of Article VIII is that it forms “an integral part of the system of collective regulation established by the Convention, not an exemption from it.” Judge Cançado Trindade, in his Separate Opinion to the Order allowing New Zealand’s intervention, observed that New Zealand’s intervention was appropriate to the ICRW’s embodiment of a collective interest and that the Court should allow intervention particularly in the case of a “multilateral treaty like the ICRW, aiming above all at the conservation of all whales species, to the benefit of future generations in all nations.”


Links:
[5] https://archive.iwc.int/pages/view.php?ref=2128&amp;search=%21collection73&amp;order_by=relevance&amp;sort=DESC&amp;offset=0&amp;archive=0&amp;k