Whaling in the Antarctic
(Australia v. Japan)

Judgement of 31 march 2014 of the International Court of Justice

30. In the present case Australia contends that Japan has breached certain obligations under the ICRW to which both States are parties by issuing special permits to take whales within the framework of JARPA II. Japan maintains that its activities are lawful because the special permits are issued for purposes of scientific research", as provided by Article VIII of the ICRW. The Court will first examine whether it has jurisdiction over the dispute.

48. Australia alleges that JARPA II is not a programme for purposes of scientific research within the meaning of Article VIII of the Convention. In Australia's view, it follows from this that Japan has breached and continues to breach certain of its obligations under the Schedule to the ICRW. Australia's claims concern compliance with the following substantive obligations : (1) the obligation to respect the moratorium setting zero catch limits for the killing of whales from all stocks for commercial purposes (para. 10 (e)) ; (2) the obligation not to undertake commercial whaling of fin whales in the Southern Ocean Sanctuary (para. 7 (b)) ; and (3) the obligation to observe the moratorium on the taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships (para. 10 (d)).

49. Japan contests all the alleged breaches. With regard to the substantive obligations under the Schedule, Japan argues that none of the obligations invoked by Australia applies to JARPA II, because this programme has been undertaken for purposes of scientific research and is therefore covered by the exemption provided for in Article VIII, paragraph 1, of the Convention.

70. The Parties address two closely related aspects of the interpretation of Article VIII — the meaning of the terms "scientific research" and "for purposes of" in the phrase "for purposes of scientific research". Australia analysed the meaning of these terms separately and observed that these two elements are cumulative. Japan did not contest this approach to the analysis of the provision.

The scale of the use of lethal methods in JARPA II

145. The scale of lethal methods used in JARPA II is determined by sample sizes, that is, the number of whales of each species to be killed each year. The Parties introduced extensive evidence on this topic, relying in particular on the JARPA II Research Plan, the actions taken under it in its implementation, and the opinions of the experts that each Party called.

146. Taking into account the Parties' arguments and the evidence presented, the Court will begin by comparing the JARPA II sample sizes to the sample sizes set in JARPA. It will then describe how sample sizes were determined in the JARPA II Research Plan and present the Parties' views on the sample sizes set for each of the three species. Finally, the Court will compare the target sample sizes set in the JARPA II Research Plan with the actual take of each species during the programme. Each of these aspects of the sample sizes selected for JARPA II was the subject of extensive argument by Australia, to which Japan responded in turn.

A comparison of JARPA II sample sizes to JARPA sample sizes

147. The question whether the lethal sampling of whales under JARPA was "for purposes of scientific research" under Article VIII, paragraph 1, of the Convention is not before the Court. The Court draws no legal conclusions about any aspect of JARPA, including the sample sizes used in that programme. However, the Court notes that Japan has drawn comparisons between JARPA and JARPA II in addressing the latter programme and, in particular, the sample sizes that were chosen for JARPA II.

148. As noted above (see paragraph 104), JARPA originally proposed an annual sample size of 825 minke whales per season. This was reduced to 300 at JARPA's launch, and after a number of years was increased to 400 (plus or minus 10 per cent). Thus, the JARPA II sample size for minke whales of 850 (plus or minus 10 per cent) is approxi-

mately double the minke whale sample size for the last years of JARPA. As also noted above (see paragraph 110), JARPA II also sets sample sizes for two additional species — fin and humpback whales — that were not the target of lethal sampling under JARPA.

149. To explain the larger minke whale sample size and the addition of sample sizes for fin and humpback whales in JARPA II generally, Japan stresses that the programme's research objectives are "different and more sophisticated" than those of JARPA. Japan also asserts that the emergence of "a growing concern about climate change, including global warming, necessitated research whaling of a different kind from JARPA".

In particular, Japan argues that "JARPA was focused on a one-time estimation of different biological parameters for minke whales, but JARPA II is a much more ambitious programme which tries to model competition among whale species and to detect changes in various biological parameters and the ecosystem". It is on this basis, Japan asserts, that the "new objectives" of JARPA II — "notably ecosystem research" — dictate the larger sample size for minke whales and the addition of sample size targets for fin and humpback whales.

150. Given Japan's emphasis on the new JARPA II objectives — particularly ecosystem research and constructing a model of multi-species competition — to explain the larger JARPA II sample size for minke whales and the addition of two new species, the comparison between JARPA and JARPA II deserves close attention.

151. At the outset, the Court observes that a comparison of the two Research Plans reveals considerable overlap between the subjects, objectives, and methods of the two programmes, rather than dissimilarity. For example, the research proposals for both programmes describe research broadly aimed at elucidating the role of minke whales in the Antarctic ecosystem. One of the experts called by Australia, Mr. Mangel, stated that JARPA II "almost exclusively focuses data collection on minke whales", which, the Court notes, was also true of JARPA. Specifically, both programmes are focused on the collection of data through lethal sampling to monitor various biological parameters in minke whales, including, in particular, data relevant to population trends as well as data relating to feeding and nutrition (involving the examination of stomach contents and blubber thickness). JARPA included both the study of stock structure to improve stock management and research on the effect of

environmental change on whales (objectives that were not included in the original research proposal for JARPA, but were added later), and JARPA II also includes the study of these issues.

152. The Court notes that Japan states that "the research items and methods" of JARPA II are "basically the same as those employed for JARPA", which is why "the explanation for the necessity of lethal sampling provided regarding JARPA also applies to JARPA II". Australia makes the point that "in practice Japan collects the same data" under JARPA II "that it collected under JARPA". Japan also asserts broadly that both programmes "are designed to further proper and effective management of whale stocks and their conservation and sustainable use".

211. The Court also notes Japan's contention that it can rely on non-lethal methods to study humpback and fin whales to construct an ecosystem model. If this JARPA II research objective can be achieved through non-lethal methods, it suggests that there is no strict scientific necessity to use lethal methods in respect of this objective.

224. The Court finds that the use of lethal sampling per se is not unreasonable in relation to the research objectives of JARPA II. However, as compared to JARPA, the scale of lethal sampling in JARPA II is far more extensive with regard to Antarctic minke whales, and the programme includes the lethal sampling of two additional whale species. Japan states that this expansion is required by the new research objectives of JARPA II, in particular, the objectives relating to ecosystem research and the construction of a model of multi-species competition. In the view of the Court, however, the target sample sizes in JARPA II are not reasonable in relation to achieving the programme's objectives.

225. First, the broad objectives of JARPA and JARPA II overlap considerably. To the extent that the objectives are different, the evidence does not reveal how those differences lead to the considerable increase in the scale of lethal sampling in the JARPA II Research Plan. Secondly, the sample sizes for fin and humpback whales are too small to provide the information that is necessary to pursue the JARPA II research objectives based on Japan's own calculations, and the programme's design appears to prevent random sampling of fin whales. Thirdly, the process used to determine the sample size for minke whales lacks transparency, as the experts called by each of the Parties agreed. In particular, the Court notes the absence of complete explanations in the JARPA II Research Plan for the underlying decisions that led to setting the sample size at 850 minke whales (plus or minus 10 per cent) each year. Fourthly, some evidence suggests that the programme could have been adjusted to achieve a far smaller sample size, and Japan does not explain why this was not done. The evidence before the Court further suggests that little attention was given to the possibility of using non-lethal research methods more extensively to achieve the JARPA II objectives and that funding considerations, rather than strictly scientific criteria, played a role in the programme's design.

227. Taken as a whole, the Court considers that JARPA II involves activities that can broadly be characterized as scientific research (see paragraph 127 above), but that the evidence does not establish that the programme's design and implementation are reasonable in relation to achieving its stated objectives. The Court concludes that the special permits granted by Japan for the killing, taking and treating of whales in

connection with JARPA II are not "for purposes of scientific research" pursuant to Article VIII, paragraph 1, of the Convention

228. The Court turns next to the implications of the above conclusion, in light of Australia's contention that Japan has breached three provisions of the Schedule that set forth restrictions on the killing, taking and treating of whales: the obligation to respect zero catch limits for the killing for commercial purposes of whales from all stocks (para. 10 (e)); the factory ship moratorium (para. 10 (d)); and the prohibition on commercial whaling in the Southern Ocean Sanctuary (para. 7 (b)).

1. The facts and regulation

In the 30s the international community started to worry about the whale population. The reason for protecting the whales was awareness of the fact that whale population decreased considerably due to the extensive whaling in the last years. After world war II, the problem of whaling was regulated for the first time.

In 1946, the international Whale Conference in Washington adopted the International Convention for the Regulation of Whaling (ICRW). The Convention entered into force for Australia on 10 November 1948 and for Japan on 21 April 1951. Currently, it is signed by 89 countries. The ICRW had a double purpose: the protection of whales and the orderly regulation of the whale industry. In 1982, a moratorium on commercial whaling ("zero quotas") was established. Japan initially opted out of the moratorium but later they withdrew the opting out clause. The moratorium can be found in the Schedule. A part of the Convention is The Schedule, which contains substantive provisions regulating the conservation of the whale stock or the management of the whaling industry. The Schedule 'forms an integral part' of the Convention. The Schedule also contains a 'whales reserves' in the Antarctic (Southern Ocean Sanctuary). In these reserves, the parties can't do commercial whaling for at least ten years. This is stronger than the moratorium, which can be changed whenever the parties want.

Today, due to a generalized anti-whaling sentiment, there are only a few countries that continue to hunt whales. Japan, Norway, Iceland, the Faroe Islands and some smaller nations combine to kill approximately 2000 whales each year. It is Japan's whaling program that has received the most attention in recent years.

Shortly after the ban on commercial whaling went into effect in Japan, this country began a program of what it labelled 'scientific whaling in the Southern Ocean surrounding Antarctica' (called JARPA I). Scientific whaling is one of the three types of whaling. The others are: commercial and aboriginal (subsistence) whaling. Before performing scientific whaling, a special permit is needed (art. VIII of the Convention). This special permit has to be evaluated by the Scientific Committee, which assists the Commission (art. III of the Convention). The Scientific Committee can't make any binding assessment; it can only communicate its views on programmes for scientific research. In 2005 began JARPA II, the second Japanese Scientific research program, and this is what this case is concerning. JARPA II is a research programme aimed at "monitoring the Antarctic ecosystem(1), modelling competition between whale species(2), recording changes in stock structure(3), and improving future management of Antarctic whales(4) (par. 113 of the judgement).

The ICRW doesn't say anything about how to solve a conflict between parties of the Convention. They can use two mechanisms. At first, there is the "name and shame"-technique or the rules of the international law can be used. That's what Australia did by going to the International Court of Justice (ICJ).

2. Claims of Australia

Australia claims that JARPA II was not a programme for purpose of scientific research within the meaning of Article VIII of the Convention. They alleged that Japan used this status to sell the whales, and the "scientific whaling" was in fact a cover for commercial whaling. They kill the wales and after they performed scientific research, they sell the whales. The Australian government claimed that Japan breached certain provisions of the International Convention for the Regulation of Whaling. Australia alleged bad faith on the part of Japan.

Overall, Australia alleged that Japan had breached and continues to breach three substantive obligations under the Schedule: the obligation to respect the moratorium setting zero catch limits for the killing of whales from all stocks for commercial purpose, the obligation not to undertake commercial whaling of fin whales in the Southern Ocean Sanctuary and the obligation to observe the moratorium on the taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships. They also alleged that Japan has violated procedural requirements for propose of scientific permits set out in paragraph 30 of the Schedule.

2.1. Interpretation of article VIII of the Convention.

For this case the interpretation of art. VIII of the Convention is important. Australia tried to convince the Court that they have to maintain an evolutionary interpretation whereby art. VIII ICRW (about the scientific whaling) must be interpreted restrictively, because art. VIII ICRW is a limited exception from the Treaty. Thereafter, Australia uses relevant interpretation principles of the Vienna Convention of the Law of Treaties (1969) to know the real implication of art. VIII.

They used art. 31(1) of the Vienna Convention: "A treaty shall 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".

Australia examined the ordinary meaning of "*for purpose of scientific research*". There is no definition of this in the Treaty but it's clear that this cannot include commercial whaling.

They also discussed the fact that the Treaty must be implemented 'in good faith' (art. 26 Vienna Convention). In the conclusion Australia also refered to 'abus de droit' and 'reasonableness'.

Lastly, they involve art. 31 (3) which refers to the relevant rules of the international law, for example 'the precautionary principle'. Australia argues that a State must act carefully and alert in case there is any doubt about the effect on the environment, so the lethal whaling should be reduced to the minimum.

2.2. Necessity and the scale of use of lethal methods

The use of lethal methods is only allowed where the objectives of the research cannot be achieved by any other means. Australia says that for the JARPA II, it wasn't necessary, especially not on such a big scale.

Australia requests the Court to order that Japan ends the implementation of JARPA II, recall all the authorizations, special permits or licences allowing the activities which are the subject of this application to be undertaken and propose assurances and guarantees that all the actions of JARPA II will stop and that there never will be a similar program.

3. Answer of Japan

Japan sought to dismiss claims by contesting both the jurisdiction of the Court and the content of the allegation. Japan intended to demonstrate that it was all about scientific whaling.

3.1. Interpretation

Opposed to Australia, Japan argues that a wide interpretation must be applied and art. VIII must be read completely separately from the Treaty.

3.2. Necessity and the scale of use of lethal methods

Japan says that the use of lethal methods is not prohibited as a means of scientific research. Sometimes it's necessary to use lethal methods to obtain certain evidence. Japan means that they don't use it more than necessary, when it was possible to use a non-lethal method, they did it.

3.3. New counterargument: About the jurisdiction

Japan contested the jurisdiction of the Court because Australia's acceptance under article 36, paragraph 2, of the ICJ Statute, which excludes jurisdiction for "any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea; the exclusive economic zone and the continental shelf; or arising out of, concerning, or relating to the exploitation of any disputed area of, or adjacent to, any such maritime zone pending its delimitation".

4. The Court's judgement

4.1. About the jurisdiction

The Court considered that they had jurisdiction, because the exclusion was intended only for the maritime zones, which was not the case here.

4.2. Interpretation

For the judging of this case the interpretation of Article VIII of the ICRW was of fundamental importance. The Court noted that taking into account the Preamble and other provisions of the ICRW neither a restrictive nor an expansive interpretation of Article VIII was justified. The Court observed that the programmes for purposes of scientific research should foster scientific knowledge. These programmes may pursue an aim other than either conservation or sustainable exploitation of whale stocks. The Court, however, did not provide the definition of scientific research but analysed and interpreted the expression "for purposes of".

4.3. Necessity and the scale of use of lethal methods

The Court examined whether Japan has considered the alternative use of non-lethal methods, because the resolutions and the guidelines from the ICW prescribed the minimal use of lethal methods. The Court found no basis to conclude that the use of lethal methods is unreasonable in the context of JARPA II, and there is no explanation, on the part of Japan, for this lack of evidence. The Court noted also that Japan "should have included some analysis of the feasibility of non-lethal methods as means of reducing the planned scale of lethal samplings".

The scale of use of lethal methods has to be in proportion to the aim. Therefore, a comparison of the sample size (that is the number of whales of each species to be killed each year) of JARPA I was made.

The sample sizes set by JARPA II stood at 850 minke whales, 50 fin whales and 50 humpback whales. The fin whales and humpback whales had not been targeted under the original JARPA, while the sample size for minke whales was approximately double in JARPA II, which is a gap between both programs. But the Court found that there was an overlap between the subjects, objectives, methods and aims of the two programmes. So the large sample size of JARPA II was probably not reasonable in relation to achieving the programme's objectives.

It also noted a lack of transparency in how its sample sizes were determined and found that Japan has not sufficiently substantiated the scale of lethal sampling. The Court stated that JARPA II involved activities that in broad terms could be characterized as scientific research, but that "the evidence does not establish that the design and implementation of the Program are reasonable in relation to achieving its stated objectives."

4.3. The final decision

The Court decided that JARPA II had activities that could be characterized as scientific research, but the methods and the programme's design were not in proportion to the objectives and aims. The Court concluded that the special permits are not 'for purpose of scientific research', as expressed in article VIII of the Convention. In the light of Australia's arguments, the Court concluded that the three obligations of the Schedule were breached. Finally the Court required "*to refrain from authorizing or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII, cease with immediate effect the implementation of JARPA II and revoke any authorization, permit or licence that allows the implementation of JARPA II*." (Par. 244 of the judgement)

5. The present and the future?

After the decision of the Court, Japan complied and conducted only nonlethal sampling. But now, Japan is determined and they restarted a new whaling plan, called NEWREP-A. This plan, again in the Antarctic, sets a target of capturing 333 minke whales annually as part of a 12-years-long research effort, with almost the same objects as the previous programs, with scientific research purposes.

Joji Morishita, Japan's representative to International Whaling Commission (ICW), announced that Japan is making the plan in accordance with the judgement of the ICJ, which did not rule out lethal sampling but only asked for a stronger scientific justification.

The ICW scientific committee analysed the NEWREP-A in its annual meeting. Some members concluded that it is not justified to start with lethal sampling others didn't see a reason to postpone an immediate initiation. But there is a big majority that rejected the plan for resuming the killing of minke whales in the Antarctic and decided that Japan can't demonstrate the need for lethal sampling. The panel hopes that Japan is coming back to the scientific committee with more analysis, reasoning, and justification for the planned lethal methods.

The problem is that everything the scientific committee decides, isn't binding for Japan. So there is very little doubt that Japan will continue whaling in the next Antarctic season despite what the experts say.

The question now is: will the Australian government take the case back to the Court? Or maybe another country this time?

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