THE HAGUE JUSTICE PORTAL

Australia Attempts to Harpoon Japanese Whaling Program

Proceedings instituted by Australia against Japan: Application Instituting Proceedings, 31 May 2010

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Introduction

On the 31 of May, 2010 Australia initiated proceedings against Japan before the International Court of Justice (ICJ) in The Hague, claiming that "Japan's continued pursuit of a large scale program of whaling under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) [1] [is] in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling (ICRW), as well as its other international obligations for the preservation of marine mammals and marine environment." Australia refers especially to the obligations under paragraphs 7(b) and 10(e) of the ICRW Schedule:[2]

> *Paragraph 7(b):*
> *'In accordance with Article V(1)(c) of the Convention, commercial whaling, whether by pelagic operations or from land stations, is prohibited in a region designated as the Southern Ocean Sanctuary.'*
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> *Paragraph 10(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 1985/86 pelagic seasons and thereafter shall be zero.'*

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[1] For the full text of Article VIII ICRW see the section concerning JARPA II below.
[2] International Court of Justice, Press release No. 2010/16, '*Australia initiates proceedings against Japan for alleged breach of international obligations concerning whaling*.' 16 June 2010. See for schedule section concerning ICRW below.

Australia argues that Japan is in breach of its obligations under Article 26 of the Vienna Convention on the Law of Treaties, which states that 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' The Australian government, which has stated its intention to designate an *ad hoc* judge to the Court,[3] seeks a declaration from the ICJ which stipulates that Japan is in breach of its international obligations under the ICRW. Furthermore, Australia requests the Court to order cessation of the implementation of JARPA II; the withdrawal of any Scientific Permits; and guarantees from the Government of Japan that they will not take any further actions contrary to its obligations under international law.[4]

The International Convention for the Regulation of Whaling (ICRW)

From the preamble of the ICRW it can be established that its main purpose is to provide for the proper conservation of whale stocks. Subsidiary to the accomplishment of that goal, an orderly development of the whaling industry is described as 'desired' by the Convention. The Convention provides for complete protection of certain species; designation of specified areas as whale sanctuaries; limits on the number and size of whales which may be taken; seasons for whaling, and the prohibition of the capture of suckling calves and females whales accompanied by calves. It established the International Whaling Commission (IWC), which is charged to keep under review and revise as necessary the measures laid down in the so called 'Schedule' to the Convention, which governs the conduct of whaling throughout the world and is an integral part of the Convention. The document has been named the 'Schedule' because it provides a detailed scheme to be followed to assure the survival of the whale stock. For example, the Schedule contains specific information on methods of research; sanctuaries; classification of areas and divisions; geographical boundaries for management stocks and the classifications of stocks.[5]

Australia and Japan are both parties to the ICRW.[6] In a Resolution adopted, adopted in 1994 by 23 votes to one, the majority of the Southern Ocean was declared a sanctuary in which all commercial whaling is prohibited. Japan was the only State to vote against the designation. According to the website of the IWC, 'Adopted Resolutions are non-binding but are intended to reflect the general view of the Commission on an issue.'[7]

[3] In accordance with the provisions of Article 31 of the Statute of the Court and Article 35(1) of the Rules.
[4] Proceedings instituted by Australia against Japan, Application Instituting Proceedings, 31 May 2010. Available at: http://www.haguejusticeportal.net/Docs/Court Documents/ICJ/Australia against Japan_Applications instituting proceedings.pdf .
[5] Schedule to the International Convention for the Regulation of Whaling, 1946, as amended by the Commission at the 61st Annual meeting, Madeira, Portugal, June 2009, available at www.iwcoffice.org, hereafter: Schedule.
[6] List of member states available at www.iwcoffice.org.
[7] See: http://www.iwcoffice.org/meetings/resolutions/resolutionmain.htm.

JARPA II

In June 2005, the government of Japan issued renewed special permits and announced the start of its second JARPA program (Japanese Whale Research Program under Special Permit in the Antarctic) justified under article VIII ICRW.[8] The article originated from the predecessor of the ICRW, the International Agreement on the Regulation of Whaling of 1937. From the outset this article has been used by some states as the principal justification by which States could legally continue the capture of whales. The IWC has attempted to close the gap multiple times.[9]

> *(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."*[10]

According to The Institute of Cetacean Research,[11] JARPA II was initiated to 'monitor the Antarctic ecosystem; to model competition amongst whale species and future management objectives; monitor temporal and spatial changes in stock structure, and to improve the management procedure for the Antarctic minke whale stocks.'[12] In trying to obtain the required results, the Japanese government has issued permits for the sampling of 850 (±10%) minke whales and 10 fin whales per season under JARPA II.[13] According to the Australian application 840 whales were killed by Japan for scientific research in the 31-year period prior to the moratorium. If this figure is correct one wonders why under the JARPA II-program special permits have been issued for the capture of 850 minke whales *per year*.[14] The notion of Australia that 'the scale of killing (…) carried out under this program greatly outweighs any previous practice undertaken on the basis of scientific permits in the history of the ICW' seems to make perfect sense here.[15]

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[8] JARPA II is a continuation of the first research programme; JARPA I, which ran from 1987 to 2005.
[9] Gillespie, A., *Whaling diplomacy: defining issues in international environmental law*, EE Publishing Limited, Cheltenham, 2005, p.120.
[10] Article VIII International Convention for the Regulation of Whaling, Washington, 2 December 1946.
[11] The Japanese institution executing JARPA, based in Tokyo.
[12] The Institute of Cetacean Research, Media release, *JARPA II Research fleet departs for the Antarctic*, November 2005, Tokyo, available at www.icrwhale.org.
[13] Id.
[14] In comparison, JARPA I, which commenced in the 1987/1988 season and continued until the 2004/2005 season, allowed for the catching of 6800 whales.
[15] Australia's application instituting proceedings against Japan, paragraph 10-11.

Legal assessment

Whereas the ICJ has yet to respond to the application of Australia, here are some considerations to be taken into account in assessing the matter. Should the Court arrive at the merits, it will be in a position to take a stance in environmental protection and to safeguard endangered whale species for present and future generations.

Jurisdiction and admissibility

Neither the ICRW nor its Rules of Procedure contain scenarios to be followed in the case of a dispute between two signatory states concerning the interpretation of the Convention. With regard to the jurisdiction of the ICJ, both governments have made declarations under paragraph 2 of article 36 Statute of the ICJ recognizing the jurisdiction of the ICJ as compulsory in relation to any state accepting the same obligation.[16]

An issue which may be raised is the matter of *ius standi* of Australia. Japan might argue that Australia has no legal interest in Japanese whaling practices and that, therefore, the case should be declared inadmissible. However, the Draft Articles on the Responsibility of States for International Wrongful Acts might lead us here: '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; or (b) the obligation breached is owed to the international community as a whole.'[17] It could be argued that Australia has the right to bring a claim, because the ICRW was established to protect the collective interest of a group of States, and these states are as state parties to the ICRW entitled to a proper execution of the Convention.[18] Moreover, if a treaty partner to the ICRW is not permitted to bring a claim before the ICJ, no one could bring a claim. The issue at hand is an obligation established for the protection of a collective interest, namely the preservation of whales located in waters beyond national jurisdiction. In sum, the jurisdictional requirements seem to pose no obstacles to admissibility to the ICJ.

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[16] For Australia: http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=AU, and for Japan: http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=JP.

[17] Article 48(1) *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001. Other relevant articles are; Article 30: The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require; Article 48(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;(…).

[18] In the South West Africa judgment, the ICJ held that: 'the Applicants did not, in their individual capacity as States, possess any separate self-contained right which they could assert, independently of, or additionally to, the right of the League, in the pursuit of its collective, institutional activity, to require the due performance of the Mandate in discharge of the "sacred trust". This right was vested exclusively in the League, and was exercised through its competent organs.' This might imply that, when an exclusive right is not incorporated in the document, like in the ICRW, this right could also exist for the Member States.

The IWC's opinion on JARPA's scientific value

One of the most important questions *in casu* is whether Japan is acting in good faith in its adherence to the ICRW by executing JARPA II and by continuing the application of lethal research methods for scientific purposes. A sub-question thereto could be whether JARPA II is actually contributing to the preservation of whales in the Antarctic. In assisting the Commission in finding the answer to these questions, the commission has the availability of a Scientific Committee, which evaluated the results of JARPA. A major task of the Committee, composed of over 200 whale biologists, is to supply the IWC with scientific evidence and advice, on the basis of which the Commission can develop its Regulations for the preservation of whales and the control of whaling. [19] Another task lies in the evaluation of proposed Scientific Permits, although the ultimate responsibility for their issuance lies with the Member States, and is not subject to an eventual negative advice of the Scientific Committee.

In 2007, the Committee indicated that 'the results from JARPA, […], have the potential to improve management of minke whales in the Southern Hemisphere,' and that 'JARPA had set the stage for answering many questions about long term changes in minke whales in the JARPA research area.'[20]

However, the IWC itself has expressed deep concern with regard to the continuing lethal research within the Southern Ocean Sanctuary under JARPA II and has requested Japan to 'suspend indefinitely the lethal aspects of its whaling program.' The IWC has also recommended that scientific research involving the killing of cetaceans should only be permitted where 'critically important research needs are addressed'. Furthermore, the IWC claimed that it 'was convinced that 'the aims of JARPA II do not address [those] critically important research needs.' Finally, the IWC stated that 'fin whales in the Southern Hemisphere are currently classified as endangered.'[21] Nevertheless, the fact remains that the statements and resolutions of the IWC are not capable of binding State Parties.

The Japanese Objections

The sanctuary in the Southern Ocean (the SOC) came into being after an Amendment to the Schedule in 1994, and was enshrined in paragraph 7(b) Schedule. The government of Japan lodged objections to this new paragraph within the prescribed period to the extent that it applies to the Antarctic minke whale stocks.[22] The website of the IWC states that 'this procedure may be used when a government considers its national interests or sovereignty are unduly affected.' Furthermore, the website states that 'this mechanism has been strongly

[19] See: http://www.iwcoffice.org/commission/iwcmain.htm#committee.
[20] IWC Report, extract of the full report of the JARPA review workshop, available at www.iwcoffice.org.
[21] IWC Resolution 2007-1, available at www.iwcoffice.org.
[22] Based on Article V(3) International Convention for the Regulation of Whaling, Washington, 2 December 1946.

criticized as rendering the Commission 'toothless', but [that] without it the Convention would probably have never been signed.'[23] According to the Schedule, paragraph 7(b) Schedule came into force for all contracting governments on 6 December 1994, except for Japan. Similarly, the government of Japan lodged objections to paragraph 10(e) Schedule (the 'moratorium on commercial whaling'), but withdrew them 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.[24] Almost simultaneously, Japan initiated JARPA I, which ran until 2005.[25]

Although it constitutes a different instrument to treaties than the possibility of making 'objections', a comparison with a 'reservation' made by Iceland might be in order. Iceland did explicitly attempt to make a reservation to paragraph 10(e) Schedule in 2001 in its instrument of adherence. At first, they considered themselves not to be bound by the entire passage. However, the IWC did not accept the exclusion of applicability of the paragraph to Iceland and claimed that the reservation was against the object and purposes of the ICRW. Subsequently, the country was denied membership of the IWC.[26] Iceland was only accepted after it amended its reservation to paragraph 10(e) Schedule in such a way as to satisfy the requirements if the IWC. Iceland's reservation now reads as follows:

> *'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.*[27] *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.'* [28]

Despite these textual changes, many governments still objected to the Icelandic reservation. Earlier reservations made upon accession by other countries, such as Chile and Peru, did not constitute a problem to the IWC because those reservations did not 'relate to the business of the ICRW'.[29] This line of reasoning can also be found in the Vienna Convention on the Law

[23] See: http://www.iwcoffice.org/commission/iwcmain.htm#committee.
[24] Footnotes to paragraph 7(b) and 10(e) Schedule.
[25] See: http://www.icrwhale.org/JARPAResults.htm.
[26] Gillespie, p.388.
[27] In pursuit of the objectives set out by the Schedule, the Scientific Committee of the IWC spent over eight years developing the Revised Management Procedure (RMP), a 'scientifically robust method of setting safe catch limits for certain stocks. The RMP will be implemented in the Revised Management Scheme (RMS), containing 'non-scientific issues, including inspection and enforcement, and the humaneness of killing techniques.' For more information, see: http://iwcoffice.org/conservation/rms.htm.
[28] Footnote to paragraph 10(e) Schedule.
[29] Gillespie, p.390-391. These reservations, for example, relate to claims of exclusive economic zones.

of Treaties,[30] and, for example, in the advisory opinion of the ICJ on reservations to the Convention on the Prevention of Genocide:

> *…" a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention(…), can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention;"…*[31]

Iceland, by making a reservation to paragraph 10(e) Schedule, was objecting to a paragraph, which is considered at the core of the functioning and the object and purpose of the ICRW. The importance of the paragraph is also stressed by the fact that its negotiating history has been very complex and the period the IWC needed to incorporate a ban on commercial whaling spanned more than two decades.[32] The IWC accepted the new formulation of Iceland, thereby acknowledging the possibility for other States Parties to make a similar reservation to the Schedule, if properly formulated.

Conclusion

Keeping in mind that the moratorium enshrined in paragraph 10(e) Schedule is an essential part of the document and the overall ICRW-system, and considering the fact that Japan withdrew its objections but started its scientific programs virtually simultaneously, one might come to the conclusion that Japan is circumventing the ban on commercial whaling, and therefore defeating the object and purpose of the ICRW, and thus its performance in good faith of the Convention.

With regard to the objection to paragraph 7(b) Schedule, the ICRW declares the paragraph concerning the Southern Ocean Sanctuary, not applicable to the government of Japan with regard to minke whales.[33]

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[30] Article 19(3) Vienna Convention: 'A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: […] the reservation is incompatible with the object and purpose of the treaty.'

[31] See: http://www.icj-cij.org/docket/files/12/4283.pdf, p. 18.

[32] Gillespie, A., *Icelands's Reservation at the International Whaling Commission*, EJIL 2003, Vol. 14, No. 5, p. 991-992. A similar situation unfolded at the Annual Commission Meeting 2010, which took place in Agadir, Morocco, from 27 May to 25 June 2010. The main discussion during the Meeting was a compromise between pro- and anti-whaling Member States devised by the Chair, allowing for limited commercial whaling under strict review of the IWC. In doing so, the IWC hoped to persuade Japan and other whaling nations to reduce their catch quotas and at the same time improve IWC-control over their whaling practices. An amendment to the Schedule would require a three-quarters majority vote from the 88 Member States. Australia and New Zealand had already indicated that they will never allow the moratorium to be lifted or eased. Furthermore, Japan was accused of 'buying' votes in the IWC and the Japanese government allegedly claimed to leave the IWC if the ban on commercial whaling was not dealt with. At the end of the meeting, no agreement was reached and the talks between pro- and anti-whaling States on a plausible solution were, again, put on hold. Information retrieved from the IWC website; and the New York Times website: http://www.nytimes.com/2010/06/22/world/22whale.html?scp=2&sq=whaling&st=cse; http://www.nytimes.com/2010/06/24/world/24whale.html?_r=1&scp=1&sq=IWC%20Morocco&st=cse.

[33] Article V(3) ICWR concerning objections to amendments.

However, Japan's intention to catch 10 fin whales per season under JARPA II, a species not exempted in the Japanese objection and classified as endangered, can be considered not compatible with the Convention. If the ICJ rules that the aforementioned objection might have the same characteristics as the reservations made by Iceland, and it follows the reasoning used by the IWC at that time, it might come to the conclusion that Japan's behavior is incompatible with a proper execution of the ICRW. It remains to be seen whether the ICJ, when testing these practices in the light of a 'performance in good faith' of the ICRW by Japan, can come to a firm legal conclusion on the matter.