



Australia v. Japan: JARPA II Whaling Case before the International Court of Justice

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

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Summary

Australia instituted proceedings against Japan in the International Court of Justice (ICJ) on 31 May 2010 with respect to a dispute concerning Japan's JARPA II program on "scientific whaling" (*JARPA II* case).¹ This is the first occasion that Australia has instituted proceedings before the ICJ since the *Nuclear Test* case in 1973,² and Australia last appeared before the court as Respondent in the *East Timor* case commenced in 1991.³ Japan has not appeared before the ICJ as either an Applicant or Respondent in previous proceedings.

Background and Facts

Australia's application is predominantly based upon a dispute between Australia and Japan over interpretation of the 1946 International Convention for the Regulation of Whaling (ICRW).⁴ Under the ICRW, the state parties to the Convention meet annually at the International Whaling Commission (IWC) which is the principal forum with oversight of the ICRW and which also has capacity to make adjustments and modifications to the Schedule of the Convention. Over time the ICRW Schedule has been subject to considerable adjustment by the IWC and has gradually become more conservation orientated. This is particularly reflected in two provisions found within the ICRW Schedule. The first is paragraph 10 (e) which provided for zero catch limits for the take of all whales for commercial purposes as

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¹ *Dispute Concerning Japan's JARPA II Program on "Scientific Whaling"* (Australia v. Japan) Application Instituting Proceedings (31 May 2010) Available at: <[http://www.haguejusticeportal.net/Docs/Court Documents/ICJ/Australia against Japan_Applications instituting proceedings.pdf](http://www.haguejusticeportal.net/Docs/Court Documents/ICJ/Australia%20against%20Japan_Applications%20instituting%20proceedings.pdf)>.

² *Nuclear Tests Case* (Australia v France) (20 December 1974) [1974] ICJ Reports 253.

³ *Case Concerning East Timor* (Portugal v Australia) [1995] ICJ Reports 90.

⁴ 161 UNTS 74.

from the 1985/86 pelagic season and the 1986 coastal season. This effectively creates a moratorium on all commercial whaling. The second is found in paragraphs 7 (a) and (b) which create an Indian Ocean Sanctuary and a Southern Ocean Sanctuary⁵ within which all commercial whaling is prohibited.

Notwithstanding the moratorium on commercial whaling, reference is made to the lethal take of whales in Article VIII of the ICRW which provides that:

...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 ... 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.

Whaling conducted under Article VIII is commonly referred to as 'special permit' or 'scientific' whaling. Very limited whaling is also provided for under a further exception to the ICRW Schedule in the case of aboriginal subsistence whaling and quotas are set from time to time by the IWC for the taking of very small numbers of whales such as bowhead whales in the Bering and Beaufort Sea, gray whales in the North Pacific, fin and minke whales from the West Greenland stock, and humpback whales in the Caribbean Sea.

The introduction of the moratorium on commercial whaling proved to be controversial and was subject to objection by Japan, Norway, Peru, and the then Union of Soviet Socialist Republics. Japan, however, withdrew its objection with effect from 1 May 1987 with respect to commercial pelagic whaling and in the same year announced its intention to commence the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA) in the 1987/88 season. JARPA was continued until the 2004/5 season and had a principal focus upon the taking of minke whales in the Southern Ocean with initially a sample size of 300 (+ or - 10%) being taken each season for research purposes. From the 1995/96 season the sample size was increased to 400 (+ or - 10%).

The conduct of special permit whaling following the introduction of the 1985 moratorium on commercial whaling was the subject of a number of IWC Resolutions in 1986,⁶ 1987⁷ and during the 1990s in which the Commission continually expressed its concern about the issuing by Contracting Governments of special permits. In 2001⁸ and 2003⁹ the IWC called upon Japan to halt the lethal take of minke whales and revise its research program to focus on non-lethal means of research. As JARPA was conducted in the Southern Ocean, issues were also raised within the IWC as to its consistency with the Southern Ocean Sanctuary.¹⁰

⁵ Which became effective from the 1994/5 season. Whaling in the Southern Ocean is conducted during the southern summer and traditionally straddles a period between December-March.

⁶ IWC Resolution 1986-1 'Resolution on Special Permits for Scientific Whaling'.

⁷ IWC Resolution 1987-1 'Resolution on Scientific Research Programs'.

⁸ IWC Resolution 2001-7 'Resolution on Southern Hemisphere Minke Whales'.

⁹ IWC Resolution 2003-3 'Resolution on Southern Hemisphere Minke Whales and Special Permit Whaling'.

¹⁰ IWC Resolution 1996-7 'Resolution on Special Permit Catches by Japan'; IWC Resolution 1998-4 'Resolution on Whaling under Special Permit'.

In 2005 Japan announced its intention to conduct the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) as from the 2005/6 season. Feasibility studies were conducted for the first two years and the full-scale program commenced in the 2007/8 season. The sampling size during the feasibility study of JARPA II was a maximum of 850 (+ or – 10% allowance) minke whales and 10 fin whales. Projected annual sample sizes of JARPA II once the full-scale research program commenced in 2007/8 were 850 (+ or – 10% allowance) minke whales, 50 humpback whales, and 50 fin whales, however at the request of the United States, Japan suspended its take of humpback whales under JARPA II and to date none have been taken under this phase of the research program. Within the IWC, the announcement of JARPA II was met with strong protest with Resolutions adopted by the Commission in 2005¹¹ and 2007¹² requesting Japan to either revise the research program so that it be undertaken by way of non-lethal research means or suspend the lethal aspects of the program.

Throughout Japan's conduct of JARPA and JARPA II Australia persistently raised its objections to Japan's special permit whaling program within the IWC, in bilateral discussions with Japan, and through the public statements of government Ministers. For example, a 21 December 2007 Aide Memoire to the Government of Japan from Australia and 29 other countries and the European Commission informed Japan of its "strong objection" to the conduct of JARPA II and urged Japan to cease all of its lethal scientific research on whales.¹³ Following the November 2007 election in Australia of the Labor government of Kevin Rudd, the Ministers for Foreign Affairs and the Environment on 19 December 2007 outlined a program of action in response to Japan's ongoing conduct of JARPA II. This included proposals for reform of the IWC, and by implication the Schedule to the ICRW, the appointment of a 'Whales Envoy', and consideration of the commencement of international litigation against Japan to halt its ongoing whaling program in the Southern Ocean. On 28 May 2010 the Rudd government announced its intention to initiate legal action against Japan, and on 31 May instituted those proceedings.

Australian Application

In the Australian Application it is noted that both Australia and Japan have accepted the jurisdiction of the Court by virtue of declarations of acceptance lodged under Article 36 (2) of the Court's Statute made respectively by Australia on 22 March 2002 and Japan on 9 July 2007. The Australian Application then goes on to relate the history of the IWC endorsed moratorium on commercial whaling and endorsement of the Southern Ocean Sanctuary. Japan's conduct of JARPA and JARPA II is noted and there is reference to the status of the stocks of minke, fin and humpback whales. Australia also makes reference to the refusal of Japan to accept IWC recommendations urging it to halt or vary the JARPA or JARPA II program.

¹¹ IWC Resolution 2005-1 'Resolution in JARPA II'.

¹² IWC Resolution 2007-1 'Resolution on JARPA'.

¹³ *Dispute Concerning Japan's JARPA II Program on "Scientific Whaling"* (Australia v. Japan) Application Instituting Proceedings (31 May 2010) [29].

The Australian Application makes reference to the ongoing negotiations within the IWC for the so-called ‘reform’ of the Commission and to the negotiations conducted by the ‘Small Working Group’ between 2008-2010. As part of that process on 22 April 2010 the IWC Chair and Vice-Chair produced a “Consensus Decision to Improve the Conservation of Whales”¹⁴ which was the subject of intense discussions at IWC62 in Agadir, Morocco in June 2010. However, on 23 June 2010 it was announced that further discussions on this IWC agenda item would be suspended. The Australian Application, while lodged before the commencement of IWC62, nevertheless observed that “[i]t has become clear that current and proposed IWC processes cannot resolve the key legal issue that is the subject of the dispute between Australia and Japan, namely the large-scale “special permit” whaling under JARPA II”.¹⁵

Legal Grounds of Application and Remedies Sought

The Australian Application concludes by asserting that Japan has breached and is continuing to breach the obligation under paragraph 10(e) of the ICRW Schedule to observe the zero catch limit in relation to the killing of whales for commercial purposes, and its obligation under paragraph 7(b) to act in good faith and refrain from undertaking commercial whaling of humpback and fin whales in the Southern Ocean Sanctuary.¹⁶ Australia additionally asserts that Japan has breached obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)¹⁷ with respect to the proposed take of humpback whales under JARPA II, and obligations under the Convention on Biological Diversity¹⁸ to ensure that activities under their jurisdiction and control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction.¹⁹

The remedies that Australia seeks from the Court include that Japan cease implementation of JARPA II, that it revoke any authorisations, permits or licenses, and provide assurances that it will guarantee that any further action under JARPA II or similar programs be brought into conformity with international law.²⁰

¹⁴ IWC 62/7 Agenda Item 3 (2010).

¹⁵ *Dispute Concerning Japan’s JARPA II Program on “Scientific Whaling”* (Australia v. Japan) Application Instituting Proceedings (31 May 2010) [29].

¹⁶ *Dispute Concerning Japan’s JARPA II Program on “Scientific Whaling”* (Australia v. Japan) Application Instituting Proceedings (31 May 2010) [36].

¹⁷ 993 UNTS 244.

¹⁸ 1760 UNTS 79.

¹⁹ *Dispute Concerning Japan’s JARPA II Program on “Scientific Whaling”* (Australia v. Japan) Application Instituting Proceedings (31 May 2010) [38].

²⁰ *Dispute Concerning Japan’s JARPA II Program on “Scientific Whaling”* (Australia v. Japan) Application Instituting Proceedings (31 May 2010) [41].

Recent Developments

It is anticipated that the fixing of time limits for the filing of initial written proceedings will occur in July 2010. Australia has also stated its intention to designate an *ad hoc* Judge as there is currently no judge of Australian nationality sitting as an ICJ judge. On 24 June 2010, Julia Gillard became Prime Minister of Australia. As of 1 July 2010 there was no indication from the Gillard Labor government that it would divert from the course of action before the Court commenced by the Rudd Labor government. An election is also anticipated in Australia before the end of 2010, however the Opposition parties have been supportive of Australia taking legal action against Japan over JARPA II. Australia may also seek Provisional Measures from the Court if Japan elects to continue JARPA II during the 2010/11 season, however the Australian government has given no indication as to its intentions on that matter.

Following the conclusion of IWC62, the New Zealand Foreign Minister indicated that New Zealand was giving consideration to joining Australia in the proceedings. If New Zealand took that course of action this would be the second occasion in which Australia and New Zealand have brought joint proceedings before the ICJ following the *Nuclear Test* cases, and the second occasion in which a joint application has been brought against Japan in an international forum following the 1999 *Southern Bluefin Tuna* cases before the International Tribunal for the Law of the Sea.²¹

²¹ *Southern Bluefin Tuna cases* (New Zealand v Japan; Australia v Japan) (Provisional Measures) ITLOS (27 August 1999) (1999) 38 *ILM* 1624.