

ICJ Judgment
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This document is intended to provide main points of the ICJ Judgment on the whaling case (Whaling in the Antarctic, Australia v. Japan: New Zealand intervening) to the 65th meeting of the International Whaling Commission (IWC) for the purpose of facilitating informed discussions under the agenda items about Special Permit programs and related issues.

It is not intended to present interpretations of the whole or parts of the ICJ Judgment but to make a fair and balanced presentation, using quotations from the Judgment that form the background of and/or have implications in pertinent agenda items. Japan has no wish of repeating or revisiting the issues considered at the ICJ.

As stipulated in Article 59 of the Statute of the ICJ, the decision of the Court has no binding force except between the parties (to the case) and in respect of that particular case.

The IWC as an independent international organization does not have legal obligations to obey the ICJ Judgment unless it makes a decision to that effect. On the other hand, Japan recognizes that the Judgment may have certain implications to the discussions at the IWC.

*The followings are the direct quotations from the Judgment. Underlines are added by the presenter.

1 Operative Clause 247

THE COURT.

(1) Unanimously,

Finds that it has jurisdiction to entertain the Application filed by Australia on 31 May 2010;

(2) By twelve votes to four,

Finds that the special permits granted by Japan in connection with JARPA II do not fall within the provisions of Article VIII, paragraph 1, of the International Convention for the Regulation of Whaling;

(3) By twelve votes to four,

Finds that Japan, by granting special permits to kill, take and treat fin, humpback and Antarctic minke whales in pursuance of JARPA II, has not acted in conformity with its obligations under paragraph 10 (e) of the Schedule to the International Convention for the Regulation of Whaling;

(4) By twelve votes to four,

Finds that Japan has not acted in conformity with its obligations under paragraph 10 (d) of the Schedule to the International Convention for the Regulation of Whaling in relation to the killing, taking and treating of fin whales in pursuance of JARPA II;

(5) By twelve votes to four,

Finds that Japan has not acted in conformity with its obligations under paragraph 7 (b) of the Schedule to the International Convention for the Regulation of Whaling in relation to the killing, taking and treating of fin whales in the “Southern Ocean Sanctuary” in pursuance of JARPA II;

(6) By thirteen votes to three,

Finds that Japan has complied with its obligations under paragraph 30 of the Schedule to the International Convention for the Regulation of Whaling with regard to JARPA II;

(7) By twelve votes to four,

Decides that Japan shall revoke any extant authorization, permit or licence granted in relation to JARPA II, and refrain from granting any further permits in pursuance of that programme.

2 Interpretation of Article VIII, paragraph 1, of the Convention

(1)The function of Article VIII

Paragraph 55

The Court notes that Article VIII is an integral part of the Convention. It therefore has to be interpreted in light of the object and purpose of the Convention and taking into account other provisions of the Convention, including the Schedule. However, since Article VIII, paragraph 1, specifies that “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 a special permit which meets the conditions of Article VIII is not subject to the obligations under the Schedule concerning the moratorium on the catching of whales for commercial purposes, the prohibition of commercial whaling in the Southern Ocean Sanctuary and the moratorium relating to factory ships.

(2)The relationship between Article VIII and the object and purpose of the Convention

Paragraph 56

The preamble of the ICRW indicates that the Convention pursues the purpose of ensuring the conservation of all species of whales while allowing for their sustainable exploitation. Thus, the first preambular paragraph recognizes “the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks”. In the same vein, the second paragraph of the preamble expresses the desire “to protect all species of whales from further over-fishing”, and the fifth paragraph stresses the need “to give an interval for recovery to certain species now depleted in numbers”. However, the preamble also refers to the exploitation of whales, noting in the third paragraph 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”, and adding in the fourth paragraph 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” and in the fifth that “whaling operations should be confined to those species best able to sustain exploitation”. The objectives of the ICRW are further indicated in the final paragraph of the preamble, which states that the Contracting Parties “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”. Amendments to the Schedule and recommendations by the IWC may put an emphasis on one or the other objective pursued by the Convention, but cannot alter its object and purpose.

(3) The issuance of special permits

Paragraph 61

The Court considers that Article VIII gives discretion to a State party to the ICRW to reject the request for a special permit or to specify the conditions under which a permit will be granted. However, 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.

(4) The standard of review

Paragraph 67

When reviewing the grant of a special permit authorizing the killing, taking and treating of whales, the Court will assess, first, whether the programme under which these activities occur involves scientific research. Secondly, the Court will consider if the killing, taking and treating of whales is "for purposes of" scientific research by examining whether, in the use of lethal methods, the programme's design and implementation are reasonable in relation to achieving its stated objectives. This standard of review is an objective one. Relevant elements of a programme's design and implementation are set forth below (see paragraph 88).

Paragraph 68

In this regard, the Court notes that the dispute before it arises from a decision by a State party to the ICRW to grant special permits under Article VIII of that treaty. Inherent in such a decision is the determination by the State party that the programme's use of lethal methods is for purposes of scientific research. It follows that the Court will look to the authorizing State, which has granted special permits, to explain the objective basis for its determination.

(5) Meaning of the phrase 'for purposes of scientific research'

(a) The term '*scientific research*'

Paragraph 83

Article VIII expressly contemplates the use of lethal methods, and the Court is of the view that Australia and New Zealand overstate the legal significance of the recommendatory resolutions and Guidelines on which they rely. First, many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of subparagraphs (a) and (b), respectively, of paragraph (3) of

Article 31 of the Vienna Convention on the Law of Treaties.

Secondly, as a matter of substance, the relevant resolutions and Guidelines that have been approved by consensus call upon States parties to take into account whether research objectives can practically and scientifically be achieved by using non-lethal research methods, but they do not establish a requirement that lethal methods be used only when other methods are not available.

The Court however observes that the States parties to the ICRW have a duty to cooperate with the IWC and the Scientific Committee and thus should give due regard to recommendations calling for an assessment of the feasibility of non-lethal alternatives. The Court will return to this point when it considers the Parties' arguments regarding JARPA II (see paragraph 137)."

(b) The meaning of the term 'for purposes of' in Article VIII, paragraph 1

Paragraph 88

The stated research objectives of a programme are the foundation of a programme's design, but the Court need not pass judgment on the scientific merit or importance of those objectives in order to assess the purpose of the killing of whales under such a programme. Nor is it for the Court to decide whether the design and implementation of a programme are the best possible means of achieving its stated objectives.

In order to ascertain whether a programme's use of lethal methods is for purposes of scientific research, the Court will consider whether the elements of a programme's design and implementation are reasonable in relation to its stated scientific objectives (see paragraph 67 above). As shown by the arguments of the Parties, such elements may include: decisions regarding the use of lethal methods; the scale of the programme's use of lethal sampling; the methodology used to select sample sizes; a comparison of the target sample sizes and the actual take; the time frame associated with a programme; the programme's scientific output; and the degree to which a programme co-ordinates its activities with related research projects (see paragraphs 129-132; 149; 158-159; 203-205; 214-222 below).

Paragraph 94

As the Parties and the intervening State accept, Article VIII, paragraph 2, permits the processing and sale of whale meat incidental to the killing of whales pursuant to the grant of a special permit under Article VIII, paragraph 1. In the Court's view, the fact

that a programme involves the sale of whale meat and the use of proceeds to fund research is not sufficient, taken alone, to cause a special permit to fall outside Article VIII. Other elements would have to be examined, such as the scale of a programme's use of lethal sampling, which might suggest that the whaling is for purposes other than scientific research. In particular, 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.

3 JARPA II in light of Article VIII of the Convention

(1) Description of the programmes

Paragraph 107

The RMP requires a brief explanation. The Parties agree that the RMP is a conservative and precautionary management tool and that it remains the applicable management procedure of the IWC, although its implementation has not been completed. Australia maintains that the RMP “overcomes the difficulties faced by the NMP” the mechanism that the Commission previously developed to set catch limits because it takes uncertainty in abundance estimates into account and “does not rely on biological parameters that are difficult to estimate”. Japan disputes this characterization of the RMP and argues that its implementation requires “a huge amount of scientific data” at each step. Thus, the Parties disagree on whether data collected by JARPA and JARPA II contribute to the RMP.

(2) Whether the design and implementation of JARPA II and reasonable in relation to achieving the programme's stated research objectives

Paragraph 127

The Court observes that the JARPA II Research Plan describes areas of inquiry that correspond to four research objectives and presents a programme of activities that involves the systematic collection and analysis of data by scientific personnel. The research objectives come within the research categories identified by the Scientific Committee in Annexes Y and P (see paragraph 58 above). Based on the information before it, the Court thus finds that the JARPA II activities involving the lethal sampling of whales can broadly be characterized as “scientific research”. There is no need therefore, in the context of this case, to examine generally the concept of “scientific research”. Accordingly, the Court's examination of the evidence with respect to JARPA II will focus on whether the killing, taking and treating of whales in pursuance of JARPA II is *for purposes of* scientific research and thus may be authorized by special permits granted under Article VIII, paragraph 1, of the Convention. To this end and in light of the applicable standard of review (see paragraph 67 above), the Court will examine whether the design and

implementation of JARPA II are reasonable in relation to achieving the programme's stated research objectives, taking into account the elements identified above (see paragraph 88).

Paragraph 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.

Paragraph 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.

4. Remedies

Paragraph 246

The Court sees no need to order the additional remedy requested by Australia, which would require Japan to refrain from authorizing or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII. That obligation already applies to all States parties. It 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.