AUSTRALIA V JAPAN: WHALING IN THE INTERNATIONAL COURT OF JUSTICE

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Few activities have created as much outrage among the public in New Zealand and Australia than the ongoing programme of ‘scientific permit’ whaling undertaken by Japanese vessels in the Southern Ocean. This often takes place in New Zealand and Australia’s search and rescue zones and, even more controversially, in areas of the sea claimed as an exclusive economic zone by Australia. In opposition, Kevin Rudd’s Labour Party adopted a position that, if elected in 2007, they would support bringing a legal claim against Japan in the International Court of Justice (ICJ). This policy was extremely popular with the Australian public. However, it took three years before this policy was carried out. On 1 June 2010 the ICJ announced that Australia had filed an application instituting proceedings against Japan.

I. FACTS GIVING RISE TO THE AUSTRALIAN CLAIM

The history of Japanese whaling in the Southern Ocean is well known. From the commencement of the International Whaling Convention’s (IWC) moratorium on commercial whaling in the 1985/6 season, Japan has undertaken whaling under art VIII of the International Convention for the Regulation of Whaling (ICRW). Article VIII permits a party to the ICRW to issue a special permit allowing nationals to hunt and kill whales for the purposes of scientific research. The first research programme, Japanese Whale Research Programme under Special Permit in the Antarctic (JARPA I), commenced in the 1987/88 season. It initially targeted approximately 300 minke whales per season, and increased this to 400 whales per season from the 1995/96 season. In 2005 Japan began a second phase of its research programme (JARPA II), initially announcing its intention to target 850 minke whales and 10 fin whales as part of a feasibility study. From the 2007/8 season Japan’s target was 850 minke whales, 50 humpback whales and 50 Victoria University of Wellington.

1 Sea and Submerged Lands Act 1973 (Cth), s 10B and Gazette No S 290 (29 July 1994). New Zealand has not claimed an exclusive economic zone off the Ross Dependency.
3 The Australian federal election in August 2010 produced a coalition government led by Prime Minister Julia Gillard. There appears to be no change in government policy about the case.

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fin whales, although it subsequently decided not to target humpback whales. Between the 2005/6 season and the 2008/9 season, Japan has declared a total catch of 2,599 whales in the Southern Ocean.6

In support of its claim that the whaling is for the purposes of scientific research, Japan has regularly submitted reports and papers to the Scientific Committee ("the Committee") of the IWC. The scientific information in these reports has been reviewed by the Committee on a number of occasions. While it appears that the Japanese reports have contributed to an understanding of minke whales in particular, the Committee has not been uncritical of the research.7 A debate has raged in the Committee, and in the IWC generally, about whether there is a need for lethal means to pursue scientific research. For example, this was discussed by an intersessional meeting of the Committee in 1998, and at the review of the JARPA programme in 2006. The Commission has passed many resolutions calling on Japan to end the lethal aspects of JARPA I and II.8

A number of States, including New Zealand, Australia and the United States of America, have opposed the Japanese scientific whaling programme from its inception. However, particular concern over the large scale of JARPA II led to renewed efforts to convince Japan to end its scientific permit whaling in the Southern Ocean. For example, in 2005 the IWC passed a Resolution calling on Japan to withdraw its proposal or revise it so that all information is obtained using non-lethal methods.9

Whilst in opposition, the Australian Labour Party amended its policy to state that if it won the election it would issue legal proceedings against Japan claiming that its scientific permit whaling breached international law. When the Rudd Labour Government came into power it was faced with a range of challenges. In 2008 the Federal Court issued an injunction against the company that conducts the whaling on the basis that the whaling took place within an area claimed by Australia as part of its exclusive economic zone off Antarctica.10 Australian legislation declares the area a whale sanctuary within which it is prohibited to hunt or catch whales. Rather than enforcing the injunction, which would likely have provoked a significant international incident – Japan regards the area as the high seas – the Australian government dispatched a customs vessel to shadow the Japanese fleet to gather evidence for a court case.

9 Resolution on JARPA II, above n 6.
It seems that the Australian government hoped to seek a diplomatic solution for it was not until 31 May 2010 that it instituted proceedings against Japan in the International Court of Justice. The timing was significant, as it preceded the June 2010 meeting of the IWC in Agadir, Morocco at which the Parties were to discuss a proposed compromise to break the deadlock between pro-whaling and anti-whaling nations. The proposal was the result of a small working group that had been exploring options since 2008. The announcement of the case provoked controversy among anti-whaling supporters. Some were concerned that the bringing of the case undermined the efforts to broker a compromise on the scientific whaling question. Other concerns were expressed about the potential impact on the anti-whaling effort if the case is unsuccessful. In the event, the discussions at the 2010 IWC meeting ended with no compromise solution agreed upon.

II. The Legal Claim

A. Jurisdiction

Australia argues that the ICJ has jurisdiction over the dispute on the basis that both countries have deposited optional declarations on the jurisdiction of the Court under art 36(2) of the Statute of the ICJ. Australia lodged its declaration on 22 March 2002. Among the usual reservations the only one of interest for this dispute is that the declaration excludes disputes “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”. It seems unlikely that Japan could challenge jurisdiction on this basis as the dispute is phrased in terms of the International Convention for the Regulation of Whaling and other international law conventions rather than an issue relating to the exploitation of a maritime zone. Japan lodged its declaration on 9 July 2007. There appear to be no unusual reservations which it could rely on to deny jurisdiction.

B. Legal Arguments Based on the International Convention on the Regulation of Whaling

The essence of Australia’s claim is that Japan is in breach of the obligation to observe in good faith the moratorium on commercial whaling in paragraph 10(e) of the Schedule to the ICRW and the obligation to act in good faith to refrain from taking humpback and fin whales in the Southern Ocean Sanctuary proclaimed under art 7(b) of the Schedule. Australia claims that


12 Australian Application, above n 5, at [36]. Australia acknowledges that Japan objected to the Southern Ocean Sanctuary in relation to minke whales and so is not bound by those provisions for minke whales.
Japan cannot argue that art VIII of the ICRW, which establishes a right for States to conduct scientific whaling, justifies Japan’s conduct.\(^{13}\) The key to the argument is the legal principle that States are expected to conduct their international affairs in good faith. This is codified in art 26 of the Vienna Convention on the Law of Treaties, but is also arguably a principle of customary international law.

From the facts set out in the application, it seems likely that Australia will argue that Japan is not conducting itself in good faith based on a number of factors, some of which are detailed above. First, that Japan’s JARPA I and II programmes have caught numbers of whales far in excess of what was caught prior to the moratorium: 831 whales in the 31 year period before the moratorium.\(^{14}\) Second, that the whaling activities risk depleting stocks, particularly fin and humpback whales. Third, that the whale meat was available for commercial sale. Fourth, that Japan has ignored a number of resolutions from the IWC calling on it to cease or change its programme. Fifth, Japan has ignored a range of other calls to withdraw or change its programme.

Japan has consistently argued in the IWC and elsewhere that its scientific permit whaling programme is consistent with international law. In particular, Japan has relied on the words of art VIII of the ICRW. Article VIII states:

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.

2. Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.

3. Each Contracting Government shall transmit to such body as may be designated by the Commission, in so far as practicable, and at intervals of not more than one year, scientific information available to that Government with respect to whales and whaling, including the results of research conducted pursuant to paragraph 1 of this Article and to Article IV. …

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13 Australian Application, above n 5, at [37].
14 Ibid at [10].
Japan maintains that art VIII gives a State total discretion to grant permits and to direct the taking of whales for scientific research. There is no upper limit on the numbers of whales that may be taken for these purposes; nor does the Article give an oversight role to the IWC. Rather, the only substantive obligations on Japan under art VIII are to report to the IWC about which permits it has granted, and to report annually to the Scientific Committee. Greenberg, Hoff and Goulding have suggested “[i]t is harder to imagine a broader statement of the treaty parties’ ability to carry out certain activities by national decision.” In addition, the Article anticipates that the whales may be sold following the research and again the ‘proceeds’ can be dealt with according to the discretion of the State. Japan is likely to argue that when art VIII is interpreted in good faith and 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, there is no limitation on the numbers of whales that can be taken under this provision. In addition, Japan has defended the number of whales taken in the Southern Ocean on the basis of seeking statistically significant research results. In terms of non-lethal research, Japan claims that there is vital information that can only be obtained by lethal methods, including the age of whales, which is obtained from the internal earplugs of the whale.

The idea that the Japanese scientific permit whaling programme is an abuse of rights has been proposed by a number of commentators. Triggs has suggested that a court would have to decide whether the Japanese programme is for a ‘scientific purpose’ or is a ‘sham or device to avoid the primary treaty obligation’, that is the moratorium on commercial whaling. As noted by Klein, not all international lawyers accept that a principle of abuse of rights exists under international law. Certainly there have been only a few instances of reliance on this concept at international law. The most significant contemporary recognition of the principle was in the Appellate Body of the World Trade Organisation in the Shrimp-Turtle Case. The Appellate Body recognised that the chapeau of art XX of the General Agreement on Tariffs and Trade was an expression of the principle of good faith.

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16 Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980), art 31. The Preamble of the ICRW refers to the need to conserve whale stocks for the development of the whaling industry. This has led both pro-whaling and anti-whaling advocates to claim that the purpose of the treaty supports their preferred interpretation.
18 Ibid.
20 Triggs, above n 19, at 52.
21 Klein, above n 2, at 86; Greenberg, Hoff and Goulding, above n 15, at 177.
One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably'. An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other members and, as well, a violation of the treaty obligation of the Member so acting.23

Byers, in a comprehensive discussion of the concept of abuse of rights, acknowledges the position of a number of scholars that the concept does not amount to an independent source of obligation.24 However, he argues that the concept “provides the threshold at which a lack of good faith gives rise to a violation of international law, with all the attendant consequences.”25

Australia's success in the ICJ may well turn on its ability to argue that Japan has exceeded the purposes and intention of art VIII's drafters, and that in undertaking such an extensive programme Japan was seeking to avoid its obligations not to conduct commercial whaling and thus abusing its right in art VIII. Given the apparently open-ended nature of art VIII26 this may be difficult to establish.

C. Legal Arguments Under Other International Conventions

Australia has also claimed that Japan is in breach of obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora27 (CITES) and the Convention on Biological Diversity.28 In terms of CITES, there is an obligation in art II not to introduce from the sea an Appendix 129 listed specimen other than in exceptional circumstances. Minke, fin and humpback whales are listed in Appendix I. Japan has entered reservations to the minke and fin whales listing and therefore the claim in this respect can only apply to catching humpbacks under the JARPA II programme. The problem is that to date Japan has not actually caught any humpbacks, having been persuaded to suspend that aspect of JARPA II. However, Anton has suggested that if the Japanese have issued a permit for the harvest of humpback whales this could be the basis for a convincing argument that it has breached CITES.30

23 Ibid at [158].
25 Ibid.
26 The Paris Panel argued that because art VIII is an exception to the general rules in the Schedule, then it should be interpreted narrowly. See Klein, above n 2, at 203.
29 The Convention on International Trade in Endangered Species of Wild Fauna and Flora imposes different levels of protection on species depending on which Appendix they are listed in. Appendix I establishes the most stringent restrictions on trade of the species.
In a thorough discussion of the issue, Sand has argued that the Japanese scientific whaling for sei whales in the northern research programme amounts to a breach of CITES, an argument that would also apply to the catch of humpbacks in the Southern Ocean. Sand concludes that the catching and importation of whales into Japanese territory is ‘trade’ as defined in CITES, and they are Appendix 1 species subject to the trade ban under art 3 of CITES. Second, introduction from the sea is permissible only on the condition that the introduction will not be detrimental to the survival of the species, and that the products are “not to be used for primarily commercial purposes” as certified by the competent CITES Management Authority. CITES Conference Resolution 5.10 defined ‘primarily commercial purposes’ as “all uses whose non-commercial aspects do not clearly predominate”. Sand suggests that the taking of sei whales in the northern research programme would breach this requirement due to the level of income obtained from whale meat and the fact that the sale of whale meat amounts to 85% of the research costs of the Japanese programme. Assuming that Australia can pass the initial hurdle that Japan has only planned to catch and has not in fact caught any humpbacks, the non-commercial character of the programme will be central to this ground.

The final argument raised by Australia’s application relates to breaches of the Convention on Biological Diversity, particularly the obligations to ensure that activities within Japan’s jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction (art 3), to cooperate with other Contracting Parties, whether directly or through a competent international organisation (art 5), and to adopt measures to avoid or minimise adverse impacts on biological diversity (art 10(b)). There is some support in the literature for the view that large scale harvesting of “protected marine mammals” would amount to a violation of these provisions. However, the difficulty facing a State relying on the Convention on Biological Diversity is that its obligations, including those described above, are stated in very general terms and are usually qualified.

32 Ibid at 62-63.
34 Sand, above n 31, at 64. The Australian Application only refers to the potential catch of humpback whales and not sei whales.
35 Australian Application, above n 5, at [38](b).
D. Remedies Sought by Australia

Australia has requested the ICJ declare that Japan is in breach of its international obligations in implementing the JARPA II programme in the Southern Ocean.\[^{37}\] In addition, Australia is seeking orders that Japan: cease JARPA II; revoke any authorisation allowing the scientific permit whaling to take place; and provide assurances that it will not take any further action under JARPA II or any similar programme until it complies with international law.\[^{38}\]

III. Implications of the Case

The timing of the announcement of the case was interesting: Australia announced its intention to bring the case just weeks before the next IWC meeting in Agadir, Morocco. On the agenda of the meeting was a discussion about a potential compromise solution that was hoped could break the deadlock between pro-whaling and anti-whaling nations, allowing for the resumption of some limited commercial whaling in return for a decrease in scientific whaling. However, that compromise proposal was not successful, and the matter is now left for consideration at the next meeting of the IWC. Some consternation was expressed about the announcement coming just before the consideration of the compromise proposal, with some arguing that it would cause Japan to harden its position. Others hoped it would remind Japan that Australia was serious about its case. Whether it had either of these effects is now academic: the proposal failed and immediate prospects of movement out of deadlock were lost.

Australia is engaged in a high stakes endeavour. If the ICJ accepts the Japanese argument that it is permitted to conduct its JARPA II programme under art VIII of the ICRW, then Australia (and the anti-whaling States) in the IWC will have lost a powerful diplomatic argument in support of whaling conservation. Even if the ICJ finds fully or partially in favour of Australia, there is always the possibility that Japan could decide to withdraw from the IWC, removing the most important of the restrictions on its whaling activities. However, a win would certainly clarify the legal position in relation to scientific whaling, which is clearly the result Australia is hoping for.

New Zealand, to date, has resisted the call to join Australia in its action at the ICJ. The New Zealand government has preferred to put its energy into finding a diplomatic resolution to the crisis at the IWC.\[^{39}\] However, it has not ruled out the prospect of joining Australia.\[^{40}\] It is possible to speculate

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\[^{37}\] Australian Application, above n 5, at [40].

\[^{38}\] Australian Application, above n 5, at [41].


that New Zealand has concerns at the strength of the Australian legal case, or concerns about the strategic implications of the case. However, so far the New Zealand government has chosen not to join Australia in the case against Japan.