Case Review

Whaling in the Antarctic (Australia v Japan; New Zealand intervening) ICJ Judgment of 31 March 2014

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I. PROCEDURAL BACKGROUND

On 31 May 2010, Australia instituted proceedings before the International Court of Justice (ICJ) against Japan, arguing inter alia 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) violated the obligations assumed by Japan under the International Convention for the Regulation of Whaling (ICRW)'.[1] On 20 November 2012, New Zealand filed the Declaration of Intervention under Article 63, paragraph 2, of the Statute, which was found admissible by the Court in its Order of 6 February 2013. Public hearings were held between 26 June and 16 July 2013. The judgment was delivered on 31 March 2014.

II. THE ISSUES

The case involved both procedural and substantive issues. With regard to the former, Japan contested the Court's jurisdiction. Australia sought to establish the jurisdiction of the Court on the basis of the declarations by both parties under Article 36, paragraph 2, of the Statute. Japan argued that the case falls within the scope of Australia's reservation which excludes from the jurisdiction of the Court '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'.[2]

The merits concerned the interpretation and application of the ICRW. Australia argued that JARPA II is not a programme for purposes of scientific research within the meaning of Article VIII of the ICRW which allows States parties to '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 other conditions as the Contracting Government thinks fit'.[3] . It further argued that Japan has breached and continued to breach three substantive obligations and has breached the procedural obligation under the Schedule,

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1 *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* [2014] ICJ Rep 234, para 1.

2 Ibid, para 31.

3 International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948) 161 UNTS 72.

which forms an integral part of the ICRW. The three substantive obligations were: first, the obligation to respect the moratorium setting zero catch limits for the killing of whales from all stocks for commercial purposes in paragraph 10(e) of the Schedule; secondly, the obligation not to undertake commercial whaling of fin whales in the Southern Ocean Sanctuary in paragraph 7(b); and thirdly, the obligation to observe the moratorium on the taking, killing or treating of whales, except mink whales, by factory ships or whale catchers attached to factory ships in paragraph 10(d) of the Schedule. The procedural obligations as set forth in paragraph 30 of the Schedule concerned the procedural requirements for proposed scientific permits. Japan argued that JARPA II falls within the scope of Article VIII, paragraph 1, of the ICRW.

III. FINDINGS

On the issue of the Court's jurisdiction, the judges were unanimous. They found that the Court had jurisdiction to entertain Australia's application in all aspects. The reservation made by Australia was found to be inapplicable to this case, for the present dispute was neither the dispute about maritime delimitation nor the dispute relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation. With regard to the latter, the Court reaffirmed its position that for a maritime area to become under dispute, there must be overlapping claims between relevant parties. The mere fact that Japan contested Australia's claim without claiming any sovereign rights of its own in the same area does not suffice to constitute a disputed area.[4]

The merits proved to be more divisive. First and foremost, the Court, by twelve votes to four, found that JARPA II does not constitute whaling for the purposes of scientific research within the meaning of Article VIII, paragraph 1, of the ICRW. It was held that the standard of review to ascertain whether the programme is for purposes of scientific research is the test whether the elements of the programme's design and implementation are *reasonable* in relation to its stated scientific objectives. The relevant paragraph, which is decisively important for the present case, deserves to be quoted in full:

> 'When reviewing the grant of a special permit authorizing the killing, taking and treating of the 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'[5]

In applying this standard, the Court examined at least seven factors: first, decisions regarding the use of legal methods, second, the scale of the programmes' use of lethal sampling, third, the methodology used to select sample sizes, fourth, a comparison of the target sample sizes and the actual take, fifth, the time frame associated with a programme, sixth, the programme's scientific output, and seventh, the degree to which a programme co-ordinates its activities with related research projects.[6] The Court further held that the States parties to the

4 *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* [2014] ICJ Rep 234, para 39.

5 Ibid, para 67.

6 Ibid, para 88.

ICRW 'should give due regard to recommendations calling for an assessment of the feasibility of non-lethal alternative',[7] as enunciated resolutions adopted by the International Whaling Commission (IWC). It was found by the Court that JARPA II involved 'activities that can broadly be characterized as scientific research',[8] but the evidence available before the Court did not establish that the design and implementation of JARPA II were reasonable in relation to achieving its stated objectives. Therefore, the special permits granted by Japan for 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.

Similarly, by fourteen votes to two, the Court found that Japan violated paragraph 10(e), paragraph 10(d), and paragraph 7(b) of the schedule to the ICRW. On the other hand, by thirteen votes to three, the Court found that Japan has complied with the procedural obligations under paragraph 30 of the Schedule.

As a consequence, the Court decided that Japan is under an obligation to revoke the authorization, permit or license granted in relation to JARPA II, and refrain from granting any permits in the future.

IV. SUBSEQUENT DEVELOPMENTS

Upon the delivery of the judgment, Mr Koji Tsuruoka, the agent of Japan in this case, gave the remark that 'Japan will abide by the Judgment of the Court'.[9] The very similar statement was made on the same day by the Chief Cabinet Secretary of the Japanese Government, who added that Japan would consider its 'concrete future course of action carefully, upon studying what is stated in the judgment.'[10] Japan has published the plan for the new scientific whaling programme in the Antarctic Ocean to be submitted to the secretary to the IWC and the Scientific Committee where it explained its understanding of the Court's judgment.[11]

Very recently, Japan amended its reservation to the declaration accepting the Court's compulsory jurisdiction. The instrument was posited on 6 October 2015, and the reservation now reads: the 'declaration does not apply to … any disputes arising out of, concerning, or relating to research on, or conservation, management or exploitation of, living resources of the sea.'[12]

V. COMMENTS

This case is part of the decade-long negotiating process between Australia and Japan on the whaling policy. It involved a number of significant issues, both procedural and substantive. Concerning the former, the most interesting issue is perhaps that of standing or *locus standi* of

7 Ibid, para 83.

8 Ibid, para 227.

9 Remarks by the Agent of Japan, Koji Tsuruoka, 'Whaling in the Antarctic (Australia v Japan: New Zealand intervening)' at the International Court of Justice.

10 Statement by Chief Cabinet Secretary, the Government of Japan, on International Court of Justice 'Whaling in the Antarctic' (Australia v Japan: New Zealand intervening).

11 Proposed Research Plan for New Scientific Research Program in the Antarctic Ocean (NEWREP-A).

12 *See* Text of Declaration by Japan.

Australia. In its oral pleading, Australia made clear that it did not seek to establish standing on the basis of the concept of an 'injured state'. In the words of its counsel:

> 'Australia does not claim to be an injured State because of the fact that some of the JARPAII take is from waters over which Australia claims sovereign rights and jurisdiction. … Every party has the same interest in ensuring compliance by every other party with its obligations under the 1946 Convention. Australia is seeking to uphold its collective interest, an interest it shares with all other parties.'[13]

This pleading was given after the delivery of the ICJ's judgment in *Belgium v Senegal* in 2012 where the Court made it crystal clear that the mere status as a party to the Convention against Torture (CAT) is sufficient to give rise to standing to invoke responsibility for breaches of obligations *erga omnes partes* under the CAT. The Court defined obligations *erga omnes partes* as the obligations with which each State party has an interest in its compliance in any given case.[14] It would be interesting to see how the Court would relate the concept of 'collective interest', invoked by Australia in the statement above, with another concept of 'common interest' which is central to the Court's conception of obligations *erga omnes partes* in *Belgium v Senegal* in 2012 and, much earlier, in the Court's understanding of the rules governing reservations to treaty in the *Reservations to the Genocide Convention* opinion.[15] However, the issue of standing was not contested by Japan,[16] and the Court was completely silent on the issue. No judges discussed the matter in details in their opinions, either. Nevertheless, in light of the criteria laid down by the Court in *Belgium v Senegal*, it is safe to conclude that the obligations in the Schedule breached by Japan are obligations *erga omnes partes*.[17] Therefore Australia can prove its standing to institute proceedings before the ICJ simply by virtue of its status as a party to ICRW.

The merits of the case appear to have centred around the interpretation of Article VIII, paragraph 1, the ICRW. But on the closer analysis, this may not necessarily be the case. In an apparently interpretative process, the ICJ referred to the concept of 'standard of review', and it introduced the requirement of reasonableness which demands that States give reasons in

13 CR 2013/18, pp 33-34, paras 19-20 (Burmester).

14 *Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ 449 – 450, paras 68-69.

15 *Convention on Genocide (Advisory Opinion)* [1951] ICJ 23.

16 For the thoughtful analysis on the reasons why Japan did not raise the issue of standing, see H Shotaro, 'Procedural Questions in the Whaling Judgment: Admissibility, Intervention and Use of Experts', Annual Meeting of the Japanese Society of International Law, Niigata, Japan, 19 September 2014.

17 In the words of Professor Crawford, 'Australia invokes an obligation *erga omnes partes* under the International Convention for the Regulation of Whaling, despite basing the jurisdiction of the Court on Article 36(2) of its Statute and the respective declarations of acceptance of Australia and Japan.' James Crawford, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts' in U Fastenrath *et al* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (United Kingdom: Oxford University Press, 2011) 235.

details of the number of whales to be sampled by lethal methods. The point was discussed extensively in a number of dissenting opinions.[18]

This standard of review seems to be understood by the Court as a two-step process, as explained in the paragraph cited above. The Court emphasised that 'it would look to the authorizing State, which has granted the special permit, to explain the objective basis for its determination'.[19] After elaborating on the standard, it went on to ascertain whether the design and implementation of JARPA II are reasonable in relation to achieving its stated objectives 'based on the evidence'.[20] At one point, it observed that the purpose was 'not to second-guess the scientific judgments made by individual scientist of by Japan, but rather to examine whether Japan … has demonstrated a reasonable basis for annual sample sizes pertaining to particular research items.'[21] The Court's conclusion was that 'the evidence does not establish' that the design and implementation were reasonable. In this process of applying the reasonableness standard, it appeared that the Court employed the standard of review to shift the burden of proof from Australia to Japan. If this is actually the case, the reasoning by the Court will leave a lot to be desired. The point received strong criticisms by some judges in their dissenting opinion.[22]

The way in which the Court introduced the concept of standard of review and the reasonableness requirement into the reasoning is also very curious. This is particularly so, given the fact that the case is the first occasion where the Court used the expression 'standard of review'.[23] It was not very clear from where and how the Court has derived these standard and requirement. Were they the outcome of an ordinary process of treaty interpretation or were they used as a general principle of law that exists independently? To put it differently, is the test specific to the ICRW or is it generally applicable to the case where international courts and tribunals are required to review State's decisions? It is interesting to see how the Court will apply – or refine – this approach in future cases.

18 *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (Dissenting opinion of Judge Owada) [2014] ICJ 312-317, paras 29-40; *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (Dissenting opinion of Judge Abraham) [2014] ICJ Rep 327-331, paras 27-36; *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (Dissenting opinion of Judge Yusuf) [2014] ICJ Rep 386-388, paras 12-17.

19 Above n 1, para 68.

20 *Ibid*, para 98.

21 *Ibid*, para 185.

22 See in particular, Dissenting opinion of Judge Abraham, above n 18.

23 On the concept of standard of review in international legal practice and literature, see generally, C Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (United Kingdom: Cambridge University Press, 2011), 14-17.