

WHALING IN THE ANTARCTIC: SOME REFLECTIONS BY COUNSEL

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On 2 April 2014, the International Court of Justice issued its decision in the *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* case brought by Australia against Japan.¹ By twelve votes to four the decision declared Japan's "JARPA II" whaling programme in the Southern Ocean to be in breach of the International Convention on the Regulation of Whaling (the Whaling Convention).² It ordered Japan to cease that programme. The Court's decision was immediately hailed in media reports in Australia as a "land mark ruling".³ The New Zealand Minister of Foreign Affairs and Trade described it as "a giant harpoon" in the legality of JARPA II.⁴

There are many aspects of the decision that are worthy of detailed analysis from legal scholars over time. This note sets out some reflections on the judgment from the particular perspective of New Zealand's role within the proceedings and its arguments before the Court.

New Zealand's intervention in the *Whaling in the Antarctic case* was only its third appearance before the ICJ in a contentious case and its first in almost twenty years.⁵ As with New Zealand's other contentious appearances (as applicant in the two *Nuclear Tests* cases) there was strong political support for the cause in dispute and active public interest in the outcome. Although New Zealand's role in the case was restricted, and comparatively small, the Court appeared to treat New Zealand's legal arguments with comparable weight to those of the two parties themselves.

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1 *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening) (Judgment)* 31 March 2014 [Judgment].

2 International Convention for the Regulation of Whaling (opened for signature 2 December 1946, entered into force on 10 November 1948) [Convention].

3 See, for example, Mary Gearin "Landmark ICJ ruling bans Japan's southern ocean whale kill" *Australia* (ABC Radio, Australia, 1 April 2014) <www.radioaustralia.net.au>.

4 Murray McCully "ICJ decision harpoons 'scientific' whaling" (press release, 31 March 2014).

5 New Zealand did, however, appear before the Court in the advisory proceedings concerning *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep 66 and *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226.

I. BACKGROUND

Japan's JARPA II programme commenced in the southern summer of 2005/2006. Under JARPA II the Japanese Institute of Cetacean Research was authorised by the Japanese government to catch up to 1035 minke whales, 50 fin whales and 50 humpback whales in the ocean off Antarctica each year for an unspecified period. JARPA II followed the earlier "JARPA" programme, conducted from 1987/1988 to 2004/2005, which allowed for a maximum of 400 minke whales to be taken annually. Japan also conducts whaling in the Northern Pacific under its "JARPNI" programme, although this programme was not addressed in the case.

JARPA II was conducted under a series of Special Permits issued by the Japanese Government purporting to act under art VIII(1), of the Convention. That provision reads:⁶

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.

The central legal issue before the Court in the dispute was whether the JARPA II Special Permits had been validly issued under art VIII. If they had been, then Japan's whaling would be "exempt from" the provisions of the Convention including the prohibitions on commercial catch, the use of factory ships and the killing of whales in the Southern Ocean Sanctuary.⁷ Article VIII(1), was thus at the centre of the legal dispute. At the heart of that provision is the requirement that Special Permits be issued "for purposes of scientific research". It was on that phrase that the Court's decision turned.

The submissions by Australia on the one hand and Japan on the other, painted radically different pictures of the proper interpretation and application of art VIII. On its face, art VIII appears to give a wide measure of discretion to States to issue Special Permits as they see fit. This literal reading was emphasised by Japan in both its written and oral pleadings. The challenge for Australia and New Zealand was to present an interpretation of art VIII that constrained that apparent discretion. New Zealand's submissions, as could be expected, touched on many of the same points as those of Australia. But they added subtle nuances of light and shadow to the picture before the Court.

⁶ Convention, above n 2, art VIII (1).

⁷ Convention, above n 2, Schedule, [7(b)], [10(d)] and [10(e)].

II. PROCEDURAL BASIS FOR NEW ZEALAND'S INTERVENTION

New Zealand participated in the proceedings as an intervener under a little-used provision in art 63 of the Statute of the Court.⁸ Article 63 provides that “[w]henever the construction of a convention to which states other than those concerned in the case are parties is in question”, such states have “the right to intervene in the proceedings”. The advantage to the procedure is that it permits a State party to a treaty to put its interpretation of that treaty before the Court without becoming a full party to the dispute before it. As a corollary, the intervening State must accept the construction of the treaty adopted by the Court.⁹ Although potentially applicable to any dispute involving the interpretation of a plurilateral or multilateral treaty, art 63 has only rarely been invoked before the Court, and never previously with complete success.¹⁰

New Zealand's intervention therefore broke new ground before the Court. In its Declaration of Intervention, New Zealand emphasised that art 63 conferred a “right” of intervention, subject only to the procedural requirements set out in the Court's Rules.¹¹ In this way it differed from the more commonly used discretionary intervention procedure provided under art 62 of the Statute. That was confirmed by the Court, which admitted New Zealand's intervention in an order issued, fittingly enough, on 6 February 2013.¹²

Neither Australia nor Japan had objected to New Zealand's intervention, although Japan had drawn the Court's attention to what it considered to be “certain serious anomalies that would arise from the admission of New Zealand as an intervener”.¹³ In particular, Japan expressed concern that New Zealand's intervention under art 63 circumvented art 31(5) of the Statute, which had permitted Australia to appoint a judge *ad hoc* in the case.¹⁴

8 Statute of the International Court of Justice (opened for signature 26 June 1945, entered into force 24 October 1945) [Statute of the Court].

9 Statute of the Court, art 63(2).

10 Article 63 was invoked by Cuba in the *Haya de la Torre* case, and while its declaration did not satisfy the conditions for a “genuine” intervention, the Court admitted a reduced intervention (*Haya de la Torre (Columbia v Peru) (Merits)* [1957] ICJ Rep 71 at 9-10). The provision was also invoked by the Marshall Islands, Federated States of Micronesia, Samoa and Solomon Islands in the 1995 re-opening of the *Nuclear Tests* case, but the Court's decision precluded any need to address those interventions (*Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case (Provisional Measures)* [1996] ICJ Rep 288 at [67]). The antecedent of art 63 was, however, used successfully by Poland as the basis for its intervention in the *Wimbledon* case before the Permanent Court in 1923 (*SS Wimbledon (UK v Germany)* (1923) PCIJ Ser A, No 1).

11 *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)*, Government of New Zealand, (*Declaration of Intervention*), ICJ 2010 General List No 148 (20 November 2012) at [7]. The relevant procedural requirements are set out in art 82 of the Court's Rules.

12 *Whaling in the Antarctic (Australia v Japan), Declaration of Intervention of New Zealand, Order*, 6 February 2013 [Order].

13 At [16] and [17].

14 At [17].

The Court, however, emphasised that the limited nature of New Zealand's intervention did not make it a party to the case.¹⁵ Consequently, it found that New Zealand's intervention had no effect on Australia's right to appoint a judge *ad hoc* to hear the proceedings.¹⁶

Under the terms of art 63, New Zealand's intervention was restricted to addressing the "construction of" the Whaling Convention. This point was emphasised in the Court's Order, which noted that:¹⁷

... intervention under Article 63 of the Statute is limited to submitting observations on the construction of the convention in question and does not allow the intervener, which does not become a party to the proceedings, to deal with any other aspect of the case before the Court; ...

New Zealand's arguments thus could not address Japan's conduct directly or introduce evidence about its whaling programme. Nor was it necessary for New Zealand to address Japan's objections to the Court's jurisdiction to hear the case. But by placing its legal construction of the Convention before the Court, New Zealand's intervention provided an opportunity to influence the Court's decision – both in relation to its legal conclusions and its approach to the facts before it.

III. FUNCTION OF ARTICLE VIII WITHIN THE CONVENTION

The starting point of the Court's analysis was its consideration of the "function" of art VIII. Japan argued that art VIII formed an "exemption" from the Convention – placing whaling under Special Permit entirely outside the terms of the Convention.¹⁸ Australia on the other hand argued that art VIII was a "limited exception" to the Convention, which must be read narrowly, and could not be used to undermine the remaining provisions of the Convention or its object and purpose.¹⁹

New Zealand took a different approach. It submitted that art VIII formed an "integral part" of the system of collective regulation under the Convention, not an exception or an exemption from it.²⁰ As such, art VIII had to be interpreted and applied consistently with the Convention as a whole; it was "not a *carte blanche* allowing a Contracting Government to side-step

15 At [21].

16 At [21].

17 At [18].

18 *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)*, Government of Japan, (*Counter-Memorial of Japan*) ICJ 2010 General List No 148 (9 March 2012) [*Counter-Memorial of Japan*] at [7.8]-[7.16]; Judgment at [52].

19 *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)*, Government of Australia, (*Memorial of Australia*) ICJ 2010 General List No 148 (9 May 2011) [*Memorial of Australia*] at [4.35], [4.52]-[4.55], and [4.117]; Judgment, above n 1, at [53].

20 *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)*, Government of New Zealand, (*Written Observations of New Zealand*) ICJ 2010 General List No 148 (4 April 2013) [*Written Observations of New Zealand*] at [43].

the rest of the Convention and the other obligations it has assumed”.²¹ This submission was supported by a careful contextual interpretation, drawing on both the internal language of art VIII and the broader provisions of the Convention.²²

Significantly, the Court adopted New Zealand’s submission that art VIII was “an integral part of the Convention”.²³ That finding allowed the Court to conclude that art VIII “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”.²⁴ Only whaling that was conducted under a Special Permit “which meets the conditions of Article VIII” would not be subject to the obligations under the Convention prohibiting commercial whaling.²⁵

IV. OBJECT AND PURPOSE OF THE CONVENTION

All three countries sought to buttress their interpretations of art VIII by reference to the object and purpose of the Convention.²⁶ Much effort was therefore devoted to identifying that “object and purpose”. Reference was made on all sides to the language of the Preamble of the Convention, its negotiating history and *travaux préparatoires* and academic writings. Particular weight was placed on the final sentence of the Preamble, which records the negotiating parties’ decision “to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry”.²⁷

Japan argued that it was clear from that final sentence that “the orderly development of the whaling industry was the key and final aim of the Convention”.²⁸ The Convention’s objective was thus the exploitation or “sustainable use” of whales.²⁹ Australia argued in contrast that the language of that final sentence gave primacy to the “proper conservation of whale stocks”.³⁰ Australia placed particular reliance on what it described as the “evolving nature” of the Convention – arguing that subsequent resolutions of

21 *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)*, Government of New Zealand, (*Oral Pleadings*) ICJ 2010 General List No 148 (8 July 2013 at 10 am) [New Zealand Oral Pleadings] at 20, [21] (Finlayson).

22 Written Observations of New Zealand, above n 21, at [34]-[43]; Judgment at [54].

23 Judgment, above n 1, at [55]. This characterisation was also adopted by Judges Owada and Bennouna in their dissenting Opinions (Dissenting Opinion of Judge Owada at [19]; Dissenting Opinion of Judge Bennouna at [1]).

24 Judgment, above n 1, at [55].

25 At [55].

26 Applying the interpretative principle of the Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31(1).

27 Convention, above n 2, Preamble.

28 Counter-Memorial of Japan, above n 19, at [6.11].

29 At [6.14]-[6.30].

30 Memorial of Australia, above n 20, at [2.19].

the IWC adopted under the Convention including the 2003 “Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission” had shifted its objective in favour of conservation.³¹

New Zealand’s submission drew on the Preamble as a whole. It emphasised that the objective of the Convention was to regulate whaling in order to provide for the common interest of its parties in “the proper long-term conservation and management of whales”.³² Central to New Zealand’s submission was the concept that the Convention represented a decision by its parties to replace unilateral unregulated whaling with a system of collective regulation.³³ Inherent in that system was an understanding that the provisions of the Convention (including art VIII) were intended to act as a constraint on State action.³⁴

The Court concluded that the final sentence of the Preamble meant what it said. Neither “conservation” nor “the orderly development of the whaling industry” had primacy. The Convention “pursues the purpose of ensuring the conservation of all species of whales while allowing for the sustainable exploitation”.³⁵ In a nod to Australia’s arguments, the Court recognised that the Convention was an “evolving instrument”³⁶ and regulations and recommendations adopted by the IWC under the Convention “may put emphasis on one or more objective” over time.³⁷ But such evolution “cannot alter its object and purpose”.³⁸ In light of that construction of the object and purpose of the Convention the Court concluded that “neither a restrictive nor an expansive interpretation of Article VIII is justified”.³⁹ However, the Court’s subsequent application of art VIII demonstrated that it did, in fact, approach art VIII from a starting point of constraint.

V. DISCRETION TO ISSUE A SPECIAL PERMIT AND THE STANDARD FOR REVIEW

The Court then turned to the extent of the discretion given to States by art VIII to issue Special Permits to authorise whaling.

31 At [2.33]-[2.99].

32 Written Observations of New Zealand, above n 20, at [25].

33 At [22]-[33].

34 New Zealand Oral Pleadings, above n 21, at 19, [14] (Finlayson).

35 Judgment, above n 1, at [56]. The concept of “collective regulation” put forward by New Zealand was not expressly taken on by the majority of the Court, although it was adopted almost in its entirety by Judges Cançado-Trinidad and Sebutinde in their separate Opinions (Separate Opinion of Judge Cançado-Trinidad at [10]-[12]; Separate Opinion of Judge Sebutinde at [3]). The corresponding common interests of states parties to the Convention were also referred to in the Declaration by Judge Keith (at [7]), the separate Opinions of Judge Xue (at [7]) and Judge *ad hoc* Charlesworth (at [12] and [13]), and the dissenting Opinion of Judge Bennouna (at [6]).

36 Judgment, above n 1, at [45].

37 At [56].

38 At [56].

39 At [58].

Australia argued that art VIII was not a self-judging provision.⁴⁰ The question of whether a Special Permit had been issued “for purposes of scientific research” was an objective one.⁴¹ It was to be assessed by reference to the “design and implementation of the whaling programme, as well as any results obtained”.⁴²

New Zealand’s submissions supported and expanded upon those put forward by Australia. The question of whether a Special Permit had been issued “for purposes of scientific research” was not solely to be determined by the State issuing a Special Permit.⁴³ The issuing State enjoyed no special “margin of appreciation”.⁴⁴ Rather, it was obliged to exercise the power to issue a Special Permit properly – for the purpose for which it was provided – and reasonably.⁴⁵ Whether it had done so was a question to be determined by the Court from a consideration of objective factors such as the scale of the programme, its structure, the manner in which it was conducted and its results.⁴⁶ The onus to convince the Court that its whaling was conducted “for purposes of scientific research” lay on Japan.⁴⁷ Although a level of discretion lay with the issuing State to determine the number of whales to be killed under Special Permit, that discretion was also subject to review by the Court.⁴⁸ The number of whales killed must be both necessary and proportionate:⁴⁹

there must be a direct relationship between the number of whales to be taken and the purposes for which a special permit is granted. There can be no rationale, other than scientific rationale, for determining the number of whales to be taken under special permit.

In making that determination, New Zealand invited the Court “to look at whether, according to the expert evidence that the Court has heard, there is a clear scientific reason for the number of whales to be taken”.⁵⁰

Japan, on the other hand, emphasised throughout the proceedings that the discretion to issue a Special Permit under art VIII lay entirely with the issuing State.⁵¹ There was no role under the Convention for approval of Special Permits by the IWC or other States Parties to the Convention.⁵² The issuing State enjoyed a significant “margin of appreciation” in the exercise of

40 Memorial of Australia, above n 19, at [4.37] and [4.116]; Judgment, above n 1, at [60].

41 Memorial of Australia, above n 19, at [4.37] and [4.116]; Judgment, above n 1, at [60].

42 Judgment, above n 1, at [63].

43 Written Observations of New Zealand, above n 20, at [51]-[53].

44 New Zealand Oral Pleadings, above n 21, at 25, [32] and [33] (Finlayson).

45 Written Observations of New Zealand, above n 20, at [45]; New Zealand Oral Pleadings, above n 21, at 26, [38] (Finlayson).

46 Written Observations of New Zealand, above n 20, at [61]-[63]; New Zealand Oral Pleadings, above n 21, at 25, [32]-[33] (Finlayson).

47 New Zealand Oral Pleadings, above n 21, at 29, [47] (Finlayson).

48 Written Observations of New Zealand, above n 20, at [68].

49 New Zealand Oral Pleadings, above n 21, at 36, [4] (Ridings).

50 At 37, [9] (Ridings).

51 Counter-Memorial of Japan, above n 18, at [7.8]-[7.12].

52 At [7.11].

its discretion.⁵³ The Court could review a State's decision to issue a Special Permit only on the grounds of "manifest unreasonableness" or bad faith.⁵⁴ Over the course of the oral hearings, however, Japan relaxed this standard of review to concede that the Court could review whether the decision to issue a Special Permit was "objectively reasonable".⁵⁵ It acknowledged also that the number of whales to be killed under a Special Permit must be "necessary and proportionate" to the objectives of the research.⁵⁶ Those proved to be significant, even fatal, concessions.

The Court concurred with the arguments put forward by Australia and New Zealand. In the central turning point of the case the Court concluded that whether a Special Permit was "for purposes of scientific research cannot depend simply on [the issuing] State's perception."⁵⁷ The grant of a Special Permit therefore was open to the Court's review. The standard of review was an objective one. The Court would examine whether "in the use of lethal methods, the programme's design and implementation are reasonable to relation to achieving its stated objectives".⁵⁸

The standard adopted by the Court for its review was thus the standard of "objective reasonableness" conceded by Japan. In adopting that standard, the Court was able to avoid casting its review in the language of "good faith" or the more problematic assertion of "abuse of right".⁵⁹ The Court was clear that "an objective test [...] does not turn on the intentions of individual government officials".⁶⁰ Although no reference is made to the case in the Court's judgment, its approach appears to build heavily on the Declaration of Judge Keith in the *Mutual Assistance case*.⁶¹ In that case Judge Keith had reviewed France's exercise of the power in contention by asking a series of concrete questions reminiscent of those asked by New Zealand judges when carrying out a judicial review under administrative law.⁶²

53 Judgment, above n 1, at [59].

54 Counter Memorial of Japan, above n 18, at [7.16]; Judgment, above n 1, at [55].

55 *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)*, Government of Japan, (Oral Pleadings), ICJ 2010 General List No 148 (15 July 2013, at 3 pm) at 60, [20] (Lowe).

56 *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)*, Government of Japan, (Oral Pleadings), ICJ 2010 General List No 148 (4 July 2013, at 10 am) [Japan Oral Pleadings 4 July] at 65, [78] (Boyle).

57 Judgment, above n 1, at [61].

58 At [67].

59 Both lack of good faith and abuse of right were pleaded by Australia in its Memorial (Memorial of Australia, above n 19, at [5.122]-[5.128]). In the course of the oral hearing, however, Australia clarified that those arguments were made only in the alternative: (*Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)*, Government of Australia (Oral Pleadings), ICJ 2010 General List No 148 (10 July 2013, at 3 pm) at 34, [2]-[3] (Gleeson)). Neither argument was addressed directly by the Court in its judgment.

60 Judgment, above n 1, at [97].

61 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep 177 (Declaration of Judge Keith).

62 The issue of the appropriate standard of review was discussed further in the Declaration of Judge Keith (at [7]-[8]) and in the Separate Opinions of Judges Xue (at [14]-[17]) and Sebutinde (at [6]-[14]). For an interesting discussion of the potential of an emerging

Significantly, the Court also agreed with New Zealand's submission that the responsibility to demonstrate that its programme was "for purposes of scientific research" fell to Japan. The Court, it said, would "look to the authorizing State, which has granted special permits, to explain the objective basis for its determination."⁶³ Although not expressed in the terms of burden of proof, the effect was to place that burden on Japan. That decision underpinned the Court's approach to the facts and evidence before it.

VI. "FOR PURPOSES OF SCIENTIFIC RESEARCH"

Having agreed that it could review Japan's decision to issue the JARPA II permits under art VIII, the Court then turned to the question of whether those permits were "for purposes of scientific research". The Court adopted Australia's argument that the requirement that a Special Permit be "for purposes of scientific research" had two cumulative elements.⁶⁴ First, the whaling conducted under the Special Permit must be "scientific research". Second, it must also be conducted "for purposes of" scientific research.

Australia devoted considerable effort in both its written and oral submissions to the question of whether JARPA II was "scientific research". It called an expert witness to define the term "scientific research" by reference to four criteria.⁶⁵ Building on that evidence, together with resolutions adopted by the IWC, Australia argued that a legitimate programme of "scientific research" under art VIII could use lethal methods only where the objectives of the research could not be achieved by any other means.⁶⁶ Japan challenged Australia's definition, and argued that the question of whether a programme was "scientific research" was a matter of "science policy" and not easily determined by a Court.⁶⁷ For its part, New Zealand also sought to draw on resolutions and guidelines adopted by the IWC to demonstrate the type of "scientific research" that was contemplated under the Convention, again emphasising the importance of non-lethal alternatives.⁶⁸

administrative law standard of review in international law see Stephan Schill & Robyn Briese "If the State Considers: Self-Judging Clauses in International Dispute Settlement" (2009) 13 Max Planck UNYB 61.

63 Judgment, above n 1, at [68].

64 At [70] and [71]. Note that Judge Xue in her separate Opinion disagreed with this approach, which she described as unduly complicating the interpretation of art VIII(1) (at [16]).

65 Memorial of Australia, above n 19, at [4.93].

66 Memorial of Australia, above n 19, at [4.100]-[4.107] and [4.119].

67 *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)*, Government of Japan, (*Written Observations on the Written Observations of New Zealand*), ICJ 2010 General List No 148 at [50]; Japan Oral Pleadings 4 July, above n 58, at 19, [24] (Lowe).

68 *Written Observations of New Zealand*, above n 20, at [55]-[60]. Both Australia and New Zealand had argued that resolutions adopted by the IWC were relevant to the interpretation of art VIII as evidence of "subsequent practice" of the parties to the Convention consistent with the rule in the Vienna Convention, above n 26, art 31(1); Memorial of Australia, above n 19, at [4.64]-[4.80]; *Written Observations of New Zealand* at [11]; *New Zealand Oral Pleadings*, above n 21, at 30, [51] (Finlayson). New Zealand also argued that such resolutions could be referred to as supplementary means of interpretation under the rule in art 32 of

The Court, however, gave relatively little consideration to the question of whether JARPA II was “scientific research”. It was “not persuaded” by Australia’s definition of scientific research and felt no need to substitute another.⁶⁹ The Court recognised that art VIII expressly contemplated that “scientific research” could include the use of lethal methods, although it agreed with Australia and New Zealand that certain resolutions of the IWC required the issuing State to assess non-lethal alternatives⁷⁰ – a point that proved important in its later analysis.⁷¹ In the Court’s view, JARPA II could “broadly be characterized as ‘scientific research’”.⁷² The real question, therefore, was whether it had been conducted *for purposes of* scientific research.

In approaching that question the Court did not accept the argument put forward by both Australia and New Zealand that art VIII required that scientific research was the *exclusive* purpose for which whaling could be conducted under Special Permit.⁷³ A government could “seek to accomplish more than one goal when it pursues a particular policy”.⁷⁴ The fact that the meat of whales killed under Special Permit was to be sold to fund JARPA II did not in itself mean that the Special Permit fell outside art VIII.⁷⁵ Nevertheless, apparently mirroring language put forward by New Zealand,⁷⁶ the Court concluded that “the research objectives alone must be sufficient to justify the programme as designed and implemented”.⁷⁷ “[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.”⁷⁸

the Vienna Convention (Written Observations of New Zealand at [11]; New Zealand Oral Pleadings at 30, [51] (Finlayson)). The Court agreed that IWC resolutions “*when they are adopted by consensus or by a unanimous vote, [...] may be relevant for the interpretation of the Convention or its Schedule*” (Judgment, above n 1, at [46], emphasis added). It also agreed with New Zealand’s contention that states parties to the Convention were obliged by their duty of meaningful cooperation “to give account” to the conditions set out in those resolutions (New Zealand Oral Pleadings at 30, [52] (Finlayson); Judgment at [83]). The interpretative value of resolutions of the IWC is discussed in greater depth by Judge Greenwood in his Separate Opinion (at [5]-[7]).

69 Judgment, above n 1, at [86].

70 At [83].

71 At [137].

72 At [127].

73 Memorial of Australia, above n 19, at [4.39]-[4.42], and [4.117]; Written Observations of New Zealand, above n 20, at [48]-[50].

74 Judgment, above n 1, at [97].

75 Convention, above n 2, art VIII(2).

76 “There can be no rationale, other than scientific rationale, for determining the number of whales to be taken under special permit.” (New Zealand Oral Pleadings, above n 21, at 36, [4] (Ridings)).

77 Judgment, above n 1, at [97].

78 At [94]. This point was emphasised further in the separate Opinion of Judge Xue (at [25]-[29]).

The Court further agreed with both Australia and New Zealand that the “purposes” of a programme of whaling could be determined by reference to objective factors. In assessing “whether the design and implementation of a programme are reasonable in relation to achieving its stated objectives” the Court indicated that it would consider a range of factors, including:⁷⁹

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.

Those factors appeared to draw on elements put forward by both Australia and New Zealand, which emphasised specific aspects of the ‘design and implementation’ of the programme, including its scale and results.⁸⁰

VII. APPLYING THE STANDARD – WAS JARPA II “FOR PURPOSES OF SCIENTIFIC RESEARCH”?

The Court then turned to assess those factors in relation to JARPA II. The Court had a variety of evidence before it. Australia’s written pleadings contained an extensive analysis of the structure and operation of JARPA II. This was supported by briefs of evidence from two expert witnesses. Japan also supported its explanation of JARPA II with evidence from one expert witness. Further material was also introduced by both parties during the course of the oral hearing. All three expert witnesses gave evidence in person at the hearing and were subjected to cross-examination by the opposing party as well as questioning by the members of the Court.⁸¹

True to the adage that the “*law is determined by the facts*”, it is clear from the Court’s judgment that the two parties’ respective presentations of the evidence were critical to the Court’s finding. In contrast to its earlier tradition, which deferred heavily to the statements made by the States appearing before it, the Court showed a marked determination to engage with the evidence directly. Significant reliance was placed on the evidence of expert witnesses including statements made during the course of the hearing. Certain concessions made by the expert witness for Japan under a remorseless cross-examination by Australian counsel proved to be its undoing.⁸² Similarly, Japan’s failure to respond fully to questions asked of it by members of the Court was also a significant factor in the Court’s findings.⁸³

79 At [88].

80 At [63]; New Zealand Oral Pleadings, above n 21, at 32-33, [55]-[62] (Finlayson).

81 Consistent with its role as intervener in the case, New Zealand did not engage directly with the evidence before the Court or put questions to the expert witnesses.

82 See, for example, Judgment, above n 1, at [159].

83 See, for example, at [138]-[141].

On a totality of the evidence, the Court found that JARPA II was “not for purposes of scientific research”. In assessing the individual elements identified above, the Court considered that:

- Japan had provided no evidence to demonstrate that it had considered the feasibility or practicability of non-lethal research methods when setting the sample sizes under JARPA II.⁸⁴ Further, the Court found that one paper to which Japan had referred “suggeste[d] a preference for lethal sampling because it provide[d] a source of funding to offset the cost of the research”.⁸⁵
- Japan’s explanations did not justify the scale of the use of lethal sampling in JARPA II. The Court noted that there was no significant difference between the objectives of JARPA and JARPA II sufficient to justify the dramatic increase in sample size in JARPA II.⁸⁶ That, together with Japan’s decision to proceed with JARPA II before a full review had been completed of JARPA “len[t] support to the view that those sample sizes and the launch date for JARPA II were not driven by strictly scientific considerations”.⁸⁷
- Japan could not adequately explain the methodology used to set the individual sample sizes for JARPA II. The sample sizes for fin and humpback whales were calculated on a 12 year research period while that of minke whales was calculated on a 6 year period.⁸⁸ The sample sizes for fin and humpback whales were too small to gather all of the information required to meet JARPA II’s research objectives.⁸⁹ Japan’s own expert witness had stated that the fin whale proposal was “not very well conceived”.⁹⁰ The evidence relating to the minke whale sample size “provide[d] scant analysis and justification for underlying decisions that generate[d] the overall sample size”.⁹¹
- Japan had failed to adjust its research objectives despite a significant gap between the JARPA II target samples sizes and the actual take. At no point during JARPA II had Japan actually taken the number of whales identified in its research proposal. Japan’s continued assertion that JARPA II could nevertheless achieve scientifically useful results raised doubts as to whether the target sample size was reasonable in relation to achieving the stated objectives of JARPA II.⁹² The fact that no humpback whales had ever been taken undermined the multi-species ecosystem model that

84 At [137]-[141].

85 At [144].

86 At [153].

87 At [156].

88 At [178].

89 At [179].

90 At [180].

91 At [198].

92 At [209].

Japan used to justify its increased catch of minke whales.⁹³ “This evidence suggest[ed] that the target sample sizes [were] larger than [were] reasonable in achieving JARPA II’s stated objectives”.⁹⁴

- JARPA II was conducted on the basis of an open-ended time frame, whereas a “time frame with intermediate targets’ would have been more appropriate”.⁹⁵
- The scientific output from JARPA II “appear[ed] limited”, with only two peer-reviewed papers published to date.⁹⁶ The Court contrasted this with the fact “that JARPA II ha[d] been going on since 2005 and ha[d] involved the killing of about 3,600 minke whales”.⁹⁷
- Japan had provided no evidence of co-operation between JARPA II and other research institutions.⁹⁸ Such co-operation “could have been expected in light of the programme’s focus on the Antarctic ecosystem and environmental changes in the region”.⁹⁹

Thus, the Court concluded that, taken as a whole, “the evidence [did] not establish that the programme’s design and implementation [were] reasonable in relation to achieving its stated objectives.”¹⁰⁰

VIII. BREACHES OF THE CONVENTION

On that basis, the Court concluded that the Special Permits granted by Japan for JARPA II were not “for purposes of scientific research”¹⁰¹ and “fell outside” art VIII(1).¹⁰² As a consequence, the Court adopted Australia’s argument that Japan’s whaling automatically fell under the remaining rules of the Convention¹⁰³ including three substantive prohibitions: the “moratorium” on commercial whaling;¹⁰⁴ the prohibition on the use of factory ships to catch whales (other than minke whales);¹⁰⁵ and the prohibition on the taking of whales (other than minke whales) in the Southern Ocean Sanctuary.¹⁰⁶ The Court thus, rather deftly, found that it was not necessary to establish also that Japan’s whaling was “commercial” in character in order to bring it

93 At [210] and [211].

94 At [212].

95 At [216].

96 At [219].

97 At [219].

98 At [220]-[222].

99 At [222].

100 At [227].

101 At [227].

102 At [230].

103 Memorial of Australia, above n 19, at [2.110]; Judgment, above n 1, at [230].

104 Convention, above n 2, Schedule, [10(e)].

105 Convention, above, n 2, Schedule, [10(d)].

106 Convention, above n 2, Schedule, [7(b)]. The Government of Japan maintains an objection to paragraph 7(b) to the extent that it applies to the Antarctic minke whale stocks.

within the Convention's rules.¹⁰⁷ This finding allowed the Court to avoid any pronouncement on what Japan's "true" motivations in respect of JARPA II might have been.

The Court concluded that, on the facts before it, Japan had committed each of the breaches alleged by Australia. It had taken whales at a time when the catch limit was zero in breach of the "moratorium".¹⁰⁸ It had used a factory ship, the *Nisshin Maru*, to take fin whales in the course of JARPA II.¹⁰⁹ And it had taken fin whales in the Southern Ocean Sanctuary.¹¹⁰

The Court did not, however, accept Australia's allegation that Japan had also breached its procedural obligations in issuing the Special Permits for JARPA II. Paragraph 30 of the Schedule requires an issuing State to submit a Special Permit to the IWC for "review and comment" by the Scientific Committee before it is issued. During the course of the oral hearings Australia challenged whether Japan had in fact done so.¹¹¹ It also drew on arguments put forward by New Zealand, that Paragraph 30 gave rise to a duty of "meaningful cooperation" such that the issuing State was obliged to demonstrate that it had taken account of the views of the Scientific Committee and IWC on its proposed Special Permit.¹¹²

On the basis of the evidence before it, the Court concluded that the research plan and Special Permits presented by Japan had fulfilled the requirements of Paragraph 30.¹¹³ However, it agreed with New Zealand's submission that Paragraph 30 "must be appreciated in light of the duty of cooperation with the IWC and its Scientific Committee that is incumbent on all States parties to the Convention".¹¹⁴ The implementation of JARPA II had differed in significant respects from the design set out in the research plan originally submitted to the Scientific Committee. "Under such circumstances consideration by a State party of revising the original design of the programme for review would demonstrate co-operation by a State party with the Scientific Committee".¹¹⁵ The Court fell short, however, of determining a failure of co-operation on the part of Japan.

107 Judgment, above n 1, at [230]. Note, however, that Judge Bhandari considered that there was "ample evidence on the record" to conclude that JARPA II was, in fact, a commercial whaling programme (Separate Opinion of Judge Bhandari at [21]).

108 Judgment, above n 1, at [231].

109 At [232].

110 At [233].

111 At [234]-[236].

112 Written Observations of New Zealand, above n 20, at [94]-[96] and [106].

113 At [242].

114 At [240]. The substantive content of the duty of cooperation was emphasised further in the separate Opinions of Judges Cançado-Trinidad (at [16]-[18]), Greenwood (at [31]) and Bhandari (at [7] and [8]), and Judge *ad hoc* Charlesworth (at [11]-[15]). Judge Sebutinde went even further to adopt New Zealand's characterisation of the duty as one of "meaningful" cooperation (Separate Opinion of Judge Sebutinde at [15]; see also [16]-[18]).

115 Judgment, above n 1, at [240].

IX. ORDERS

In light of the ongoing nature of JARPA II the Court accepted Australia's argument that declaratory relief was not sufficient.¹¹⁶ In addition to orders finding that JARPA II did not fall within art VIII and that Japan had therefore breached the provisions of the Schedule, the Court ordered 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".¹¹⁷

The Court's orders were thus specific to JARPA II. It remains possible for Japan to continue its existing JARPN II programme in the North Pacific or to commence a new Antarctic programme under art VIII in the future, should it wish to do so. However, it would be doing so in the knowledge that its actions would be open to review by the Court. The onus would lie with Japan to demonstrate that the design and implementation of its whaling programme were reasonable in relation to achieving its stated objectives. In order to satisfy that test a clear and objectively reasonable justification would need to be given for both the use of lethal research methods and the sample size to be taken. Further, Japan would need to identify the extent to which it had considered and taken into account the comments of the Scientific Committee and IWC in the design and implementation of its programme. "Scientific whaling" under art VIII therefore remains, but the conditions for its exercise have been significantly constrained.

X. CONCLUSIONS

Many legal commentators had expressed concerns about the case's prospects of success. Although the "Paris Project" and other groupings of lawyers had sought to argue that Japan's whaling was clearly in breach of the Convention,¹¹⁸ creative and sophisticated argument was required to convince the Court of that conclusion. Even if the Court could be persuaded on the legal arguments, it was still necessary to establish a breach of law on the facts. Going into the hearing it was by no means certain how the Court would approach the evidence, nor the degree to which it would be willing to reach a finding that Japan had acted for purposes other than its declared purposes of "scientific research".

Japan committed throughout the proceedings to abide by the Court's ruling. Shortly after the judgment was issued, Japan announced that it would not conduct whaling under Special Permit in the Antarctic in the 2014/2015 summer season, although it proposed to design a new research

116 At [245].

117 At [247(7)].

118 See, for example, the *Report of the International Panel of Independent Legal Experts on Special Permit ("Scientific") Whaling Under International Law* (Paris, 12 May 2006) <www.ifaw.org>.

programme for the 2015/2016 season.¹¹⁹ Japan also reduced its proposed catch under its 2014 JARPN II programme from 380 to 210 in light of the Court's ruling.¹²⁰

Japan's Special Permit whaling, particularly its JARPA II Antarctic programme, has been a flashpoint within the IWC for years. The Court's decision does not bridge the central divide within that body, between pro-conservation States opposed to anything other than aboriginal subsistence whaling on the one hand, and pro-whaling States committed to the resumption of commercial whaling on the other. This divide played out in the discussions within the IWC at the 65th meeting in Slovenia in September 2014 over a resolution proposed by New Zealand on whaling under special permit, which sought to ensure that the Court's findings would be taken into account in the evaluation of special permits by the IWC. Passed in the end by majority vote, the resolution includes instructions to the Scientific Committee on the steps that must be taken before special permits are issued.¹²¹ It nevertheless remains to be seen whether the Court's decision will be the catalyst for change and enhance the prospects for longer lasting co-operation on Antarctic whaling.

119 See, for example, "Japan to redesign whale hunt in Antarctic despite ICJ ruling" *ABC News* (Australia, 19 April 2014).

120 See, for example, "Japan to continue northwest Pacific whaling" *NHK World* (Japan, 18 April 2014).

121 IWC Resolution 2014-5.