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COOPERATION AND CONCESSION: WHALING IN THE ANTARCTIC (AUSTRALIA V JAPAN: NEW ZEALAND INTERVENING)

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PART I: INTRODUCTION

In its most recent judgment, the International Court of Justice (ICJ) ruled against Japan on the issue of whether its whaling program, JARPA II, complied with Art VIII of the International Convention for the Regulation of Whaling (ICRW). Interestingly, instead of subjecting JARPA II to an objective review based on the relevant international framework, the Court seemed content to focus on a standard of review based on Japan's own self-conceived and conceded standards. Based on JARPA II's own objectives, the Court then found inconsistencies between those objectives and key elements of JARPA II's methodology; particularly, the usage of lethal sampling. This short commentary will briefly examine the merits of the Court's focus on cooperation and concession, and will discuss whether this cautious approach is the best way forward.

PART II: CASE SUMMARY

Although commercial whaling has been banned ever since a 1982 moratorium adopted by the International Whaling Commission (IWC), Art VIII of the ICRW permits whaling for "purposes of scientific research".[1] Under this veneer of compliance, Japan continued the harvest and distribution of whale meat for consumption under the auspices of its allegedly scientific whaling programs—JARPA and JARPA II. The controversial program continued into the 21st century, until 2010 where Australia formally instituted proceedings against Japan.

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[1] *International Convention for the Regulation of Whaling*, 2 December 1946, 161 UNTS 74, [1948] ATS 18.

In argument, Australia submitted that JARPA II should be subjected to an objectively ascertained standard of scientific rigour. Japan countered that each nation reserved the right to issue whaling permits at its own discretion, and that any resolutions proposing an objective standard were at best recommendatory. Although the court agreed that the standard of "scientific purpose" cannot depend simply on each state's perception,[2] it ultimately declined to define an objective standard, noting that "scientific research" is not defined in the ICRW.[3] Instead, the Court based its review on JARPA II's own stated research objectives. Ultimately, inconsistencies between its objectives, methodology and implementation led to the finding that the lethal sampling of whales under JARPA II was not reasonable in relation to achieving its objectives.[4]

PART III: DISCUSSION

The overall tenor of academic response to the decision has been rather subdued. Most were disappointed by what they perceived as the Court's failure to enunciate a clear standard of scientific review. However, due consideration must be given to motives behind the Court's rather cautious approach. By declining to give a definitive meaning to "scientific research", the Court probably had an eye on acting *de lege ferenda*; amidst a sea of obligations both binding and non-binding, the Court was rightly wary of transforming mere recommendations into binding orders.[5] In so doing, the Court deftly sidestepped the need to give a definition of a controversial and multifaceted term. Instead of imposing its own interpretation of an international framework on Japan, the Court based its decision on relatively uncontroversial benchmarks—JARPA II's own stated research objectives, as well as legal obligations which Japan conceded it owed. Doling out equal parts justice and diplomacy, the Court astutely framed Japan's obligation in terms of a duty to cooperate within a self-conceived and conceded standard of review.[6]

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[2] *Case concerning Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, Judgment of 31 March 2014, online: International Court of Justice < http://www.icj-cij.org/docket/files/148/18136.pdf> [*Whaling*] at para 61.

[3] *Ibid*, at para 86.

[4] *Ibid*, at para 127.

[5] Erik Franckx, "The Legal Nature of Resolutions of Intergovernmental Organizations: The Contribution of the Whaling in the Antarctic Case" (Lecture delivered at the Japanese Society of International Law), at 9.

[6] Ibid, at 13.

A growing willingness to defer to each state's interpretation of what constitutes a scientifically rigorous research plan seems evident in the Court's approach of 'reasonableness'. Telesetsky, Anton and Koivurovac argue that the Court's focus on 'reasonableness' shifted the burden of proof from Australia having to prove bad faith, to Japan needing to demonstrate that its methodology, design and implementation of JARPA II was reasonable.[7]

It has been further argued that the 'reasonableness' test formulated might be exported to other issues that are not necessarily scientific in nature.[8] If this approach were adopted in a general manner, it would underscore the greater emphasis on cooperation and concession in the enforcement of international law.

PART IV: THE WAY FORWARD

The cautious approach undertaken by the Court has left questions as to its efficacy. A few months after JARPA II was shut down by the ICJ, Japan announced that its whaling program would be resurrected under a scaled-down program called NEWREP-A.[9] A similar but smaller whaling program which Japan conducts in the North Pacific, JARPN, was not even the subject of argument during the proceedings, and will carry on unhindered.[10] Conservationists may be forgiven for thinking that the decision confers no lasting legal protection on whales.

Be that as it may, the Court's approach represents a win from a compliance perspective. Although NEWREP-A is a whaling program similar in many respects to JARPA II, Japan acknowledged the decision and stated that it would abide by it. NEWREP-A is only at the proposal stage, and Japan has made clear that it would consider the advice of the IWC's Scientific

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[7] Anastasia Telesetsky, Donald K Anton & Timo Koivurova, "ICJ's Decision in *Australia v Japan*: Giving up the Spear or Refining the Scientific Design?" (2014) 45:4 Ocean Development & International Law 328 at 336.

[8] *Ibid*.

[9] Japan, Ministry of Agriculture, Forestry and Fisheries, *Proposed Research Plan for New Scientific Whale Research Program in the Antarctic Ocean (NEWREP-A)* (Nov 2014).

[10] Jeffrey J Smith, "Evolving to Conservation?: The International Court's Decision in the Australia/Japan Whaling Case" (2014) 45:4 Ocean Development & International Law, 301 at 303.

Committee in ensuring that the program design complies with the spirit of the Australia v Japan decision.[11]

In sum, the Court's cautious approach based on cooperation and concession deserves credit where it is due. Although it does not go far enough to please hardline conservationists, it has nudged Japan in the direction of greater accountability. By confining its comments strictly to JARPA II, the Court succeeded in stopping JARPA II and programs of its scale, without foreclosing the possibility of smaller programs by Japan. The Court has thus once again showed its penchant for eschewing a winner-takes-all solution in favour of one which gives both parties something to take home.

[11] Japan, Chief Cabinet Secretary, *Statement by Chief Cabinet Secretary, the Government of Japan, on International Court of Justice "Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*", 31 March 2014, <http://www.mofa.go.jp/press/danwa/press2e_000002.html>.