Whaling in the Antarctic (*Australia v Japan: New Zealand intervening*): progressive judgment or missed opportunity for the development of international environmental law?

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Abstract

This article explains and analyses the judgment of the International Court of Justice (ICJ) in the dispute between Australia and Japan regarding the latter country's whaling operations in the Southern Ocean under the International Convention for the Regulation of Whaling (ICRW). The primary objective is to investigate the broader implications of the judgment for the development of international law as this case presented the ICJ with an opportunity to provide guidance on several issues of importance for the future direction and development of international environmental law. In particular, this article focuses on the ICJ's approach towards arguments raised by the parties regarding the evolution of the ICRW and the role of precaution; as well as the novel standard of review adopted by the ICJ in interrogating state conduct.

INTRODUCTION

On 31 March 2014 the International Court of Justice (ICJ) granted its long-awaited judgment in the dispute between Australia and Japan regarding Japanese whaling operations in the Antarctic Southern Ocean.[1] The dispute was formulated by Australia as concerning the lawfulness of 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 (in terms of article VIII, paragraph 1 of the

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

International Convention for the Regulation of Whaling[2] (ICRW).[3] This provision permits parties to the ICRW to grant special permits authorising the killing, taking and treatment of whales for purposes of scientific research, notwithstanding other provisions of the Convention, such as the moratorium on commercial whaling of all whale species.[4]

The court held that the special permits granted by Japan for the killing of whales in connection with JARPA II did not fall within the scope of article VIII, paragraph 1 and, hence, that JARPA II had to be halted[5]. This decision has been hailed by conservation organisations, perhaps prematurely, as a victory for the efforts in protecting whales in the Southern Ocean.[6] But what are the broader implications of this judgment beyond the immediate context of the parties to the dispute and the ICRW?[7] Is it a victory for the progressive development of international environmental law? Or did the ICJ miss yet another opportunity to provide guidance on important issues such as the role and status of the precautionary principle and the implications of

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

3 It should be noted that in its application instituting proceedings against Japan, Australia described the dispute more broadly as one concerning not only the breach by Japan of obligations under the ICRW but also 'other international obligations for the preservation of marine mammals and the marine environment'. This line of argument was, however, not further pursued by Australia, and the judgment is restricted to the provisions of the ICRW. ICJ Report n 1 above at 9 par 1.

4 Paragraph 10(e) of the Schedule to the ICRW. The Schedule forms an integral part of the Convention. See art I, par 1 of the ICRW.

5 ICJ Report n 1 above at 71–72 par 247.

6 WWF 'World court ruling reaffirms protection of Southern Ocean whales' (31 March 2014), available at: http://wwf.panda.org/?218836/world-court-ruling-reaffirms-protection-of-southern-ocean-whales (last accessed 29 October 2014). Similar sentiments were expressed by other conservation organisations and the government of Australia in the wake of the ICJ's Decision. See for example, Seasheperd 'The whales have won! ICJ Rules Japan's Southern Ocean Whaling "not for scientific research"' (31 March 2014), available at: http://www.seashepherd.org/news-and-media/2014/03/31/the-whales-have-won-icj-rules-japans-southern-ocean-whaling-not-for-scientific-research-1569 (last accessed 19 October 2014); BBC News Asia 'Japan whaling ban welcomed in Australia and New Zealand' (1 April 2014), available at: http://www.bbc.com/news/world-asia-26830505 (last accessed on 29 October 2014).

7 The implications of the judgment for the future of whaling under the ICRW remain to be seen, although indications are that Japan is already manoeuvring to limit the effects of the judgment on its whaling operations. At the 65th meeting of the IWC, Japan reiterated that it would submit a new research plan by autumn 2014 and it sought to emphasise the findings of the ICJ which play in favour of continued (scientific) whaling, such as the fact that the Convention has a dual purpose and that lethal methods in the context of research are not per se unreasonable. See Japan's Opening Statement (IWC/65/OS JAPAN) available at: http://www.icrwhale.org/eng/60OpeningStatement.doc (last accessed 20 March 2015).

the generally increasingly conservation-oriented approach of the international community for interpreting treaty provisions? What of the standard of review adopted by the ICJ? Would this standard, if adopted in future cases, make a contribution to the resolution of environmental disputes?

In investigating the contribution of the judgment towards the development of international environmental law, two primary facets of the judgment will be analysed more closely, after a discussion of the facts and judgment itself. First, the approach adopted by the ICJ towards the question regarding the evolutionary interpretation of treaties. This issue is treated at two levels, one being the 'internal evolution' of the treaty and the other the 'external evolution' of the treaty. That is, the extent to which the ICRW has been moulded by subsequent agreement or practice by the parties to the ICRW; and the extent to which developments in international law, such as the emergence of the precautionary principle and the trend towards conservation-oriented measures have influenced the ICRW.[8] The second facet that will be analysed is the novel standard of review adopted by the ICJ in assessing the lawfulness of the implementation by Japan of its scientific whaling operations.

Before proceeding to analyse the judgment, however, it is perhaps apposite to acknowledge the inherently limited role that international courts, or any other court for that matter, are able to play in the development of law. Judges apply the law, they do not make law.[9] The influence of judgments of international tribunals is further constrained by the fact that they are binding only between the relevant parties and the fact that international law knows, at least in theory, no system of precedent.[10] Despite these limitations, it would be wrong, even foolish, to conclude that international tribunals make no contribution to the development of law. The fact that they do so, albeit in more subtle but yet important ways, such as through the clarification of the rules and principles governing international law, is widely

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8 Both issues are relevant to the interpretation of treaties in terms of art 31(3) of the Vienna Convention on the Law of Treaties (hereafter referred to as the 'Vienna Convention'), 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

9 As far as the International Court of Justice is concerned, this principle is embodied in arts 38 and 59 of the Statute of the court. Also see Boyle & Chinkin *The making of international law* (2007) 266–269. The ICJ itself confirmed the traditional view regarding its law-making capacity in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Reports (8 July 1996) 15 par 18.

10 Article 59 of the Statute of the International Court of Justice; Thurlway 'The International Court of Justice' 586–614 in Evans (ed) *International law* (2010) 606–607.

acknowledged.[11] While recognising, therefore, that the role of the ICJ in fostering the progressive development of international environmental law is constrained, the judgments of the court do have an important, if subsidiary role to play in this regard. No more need be said about this issue, which has been treated extensively in other commentaries.[12]

THE FACTS

At its core, the case before the ICJ was concerned with two issues: the interpretation of article VIII of the ICRW; and the lawfulness of JARPA II.[13] In other words, the issues that stood to be addressed by the ICJ revolved around determining the prerequisites to issuing permits under article VIII, paragraph 1; and the question of whether JARPA II, in practice, had satisfied those requirements and therefore fell within the scope and ambit of the scientific whaling exception.[14]

Japan's scientific whaling programme

JARPA II, described by Japan as a 'long-term research programme' with no specified termination date, commenced in the 2005/2006 whaling season and followed immediately upon Japan's previous scientific whaling programme, known as JARPA.[15] Both programmes entailed lethal methods and thus relied on the granting, by Japan, of special permits authorising the killing of whales 'for purposes of scientific research' in terms of article VIII, paragraph 1.

JARPA was convened in 1987/1988 – immediately after Japan withdrew its objection to the moratorium on scientific whaling – and ran until 2004/2005. It was initially designed to involve an annual lethal take of 825 minke whales and fifty humpback whales although sample sizes were later reduced

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11 For a review of the ways in which the jurisprudence of the ICJ has contributed towards the development of international environmental law in particular, see for example, Vinuales 'The contribution of the International Court of Justice to the development of international environmental law: a contemporary assessment' (2009) 32 *Fordham International Law Journal* 232–258. Also see Sands & Peel *Principles of international environmental law* (3ed 2012) 171–174 and 293–300 and the sources cited there.

12 See Boyle & Chinkin n 9 above at 266–269 and the sources cited there.

13 ICJ Report n 1 above at 22 par 42.

14 The dispute between the parties extended to two further issues that are, however, not of direct relevance in the context of this contribution. One issue was a preliminary nature and concerned Japan's objection to the jurisdiction, which was dismissed by the ICJ. The other issue which will not be investigated further relates to the potential breach by Japan of procedural obligations set out in par 30 of the Schedule to the ICRW.

15 For a concise description of both JARPA and JARPA II, see ICJ Report n 1 above at 35–41.

significantly.[16] Over the eighteen-year operational phase of JARPA it resulted in the taking of over 6 700 whales.[17] According to Japan, the programme was launched with a view to collecting data that would contribute to the review of the moratorium by estimating stock size and that would improve knowledge of the marine ecosystem in the Antarctic.[18]

The research objectives of JARPA II, overall similar to those of JARPA, were four-fold, and according to Japan two of these objectives, namely those related to the monitoring of the Antarctic ecosystem and the modelling of competition among different whale species in the Southern Ocean, rendered lethal takings of whales 'indispensable'.[19] JARPA II documentation proposed annual lethal sample sizes of 50 fin and humpback whales and 850 minke whales, subject to a fluctuation of 10 per cent) *ie* a max of 935 (for minke whales).[20] According to Japan, based on current population estimates, these proposed sample sizes were too small to have any adverse implications for conservation efforts.[21] In practice, JARPA II resulted in the taking of significantly fewer whales than specified in terms of the programme's sample sizes.[22]

The parties' position regarding the legitimacy of JARPA II

According to Australia, JARPA II could not be characterised as a programme 'for purposes of scientific research' within the meaning of article VIII, paragraph 1 of the ICRW.[23] Instead, it was submitted that the programme amounted to commercial whaling under the guise of scientific research.[24] Australia further argued that the granting of special permits by Japan under article VIII, paragraph 1 permitting the killing and taking of whales pursuant to this programme resulted in the breach of several substantive treaty obligations, including, *inter alia*, the obligation to respect the moratorium on commercial whaling of all whale species;[25] and the

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16 ICJ Report n 1 above at 36 par 104.

17 *Ibid*.

18 *Ibid*.

19 ICJ Report n 1 above at 40 par 122.

20 *Id* at 41 par 123.

21 *Id* at 41 par 126.

22 *Id* at 59 par 199. 18 fin whales were taken over the first seven years, thereafter none were taken. No humpback whales were ever killed, and on average the annual take of minke whales amounted to 450 whales per season, notwithstanding the much larger declared sample size of 850 whales.

23 ICJ Report n 1 above at 24 par 48.

24 *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* Memorial of Australia 71–75 par 3.15–3.24.

25 Paragraph 10(e) of the Schedule to the ICRW.

obligation not to undertake commercial whaling of fin whales in the Southern Ocean Sanctuary.[26] Australia thus sought a declaration to the effect that the programme did not fall within the scope of article VIII of the ICRW and an order requiring Japan to 'cease with immediate effect the implementation of JARPA II; and to revoke any authorisation, permit or licence that allows the implementation of JARPA II'.[27]

Japan, unsurprisingly, contested Australia's allegations and submitted that its activities under JARPA II fell within the scope of the exemption provided by article VIII, paragraph 1. As such, Japan argued that 'none of the obligations invoked by Australia applies to JARPA II'.[28] It thus prayed for the dismissal of Australia's claims.[29]

THE JUDGMENT

This part of the contribution first provides an overview of the ICJ's judgment, with a view to facilitating and informing the analysis of the contribution of the judgment towards the development of international environmental law. It delves deeper into the arguments advanced by Australia and Japan in support of their respective positions regarding the legitimacy of JARPA II, and examines the most salient aspects of the ICJ's reasoning that informed the judgment.

Overview

The judgment on the merits commenced with a general overview of the ICRW and its historical context and origins.[30] In this analysis, the court acknowledged the significant role played by the International Whaling Commission (IWC), which is empowered to adopt amendments to the Schedule, which in turn contains the conservation measures agreed by the parties to the ICRW.[31] In the ICJ's view 'the functions conferred on the Commission have made the Convention an evolving instrument'.[32] No further clarification as to what this means, or the implications of the status of the Convention as an evolving instrument was provided by the court.

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26 Paragraph 7(b) of the Schedule to the ICRW.
27 ICJ Report n 1 above at 15 par 25.
28 *Id* at 5–16 par 25.
29 *Ibid*.
30 ICJ Report n 1 above at 22–24 par 42–47.
31 The IWC is created in terms of Art III, par 1 of the ICRW and is empowered to adopt amendments to the Schedule in terms of Art V, par1. Such amendments are required to be adopted by a three-fourths majority in terms of Art III, par 2.
32 ICJ Report n 1 above at 23 par 45.

The court then proceeded with the interpretation of article VIII, paragraph 1 of the ICRW, thereafter assessing the implementation of JARPA II in light of this interpretation, and found ultimately, that JARPA II did not fall within the ambit of the scientific whaling exception.[33] The court's interpretation of article VIII, paragraph 1, focused on the meaning of the phrase 'for purposes of scientific research', which the court accepted consists of two constitutive elements of a cumulative nature, namely that of 'scientific research' and 'for purposes of'. In other words, and with regard to the latter element, the ICJ stated that:

> Even if a whaling programme involves scientific research, the killing, taking and treating of whales pursuant to such a programme does not fall within Article VIII unless the activities are also 'for purposes of scientific research.[34]

In broad terms, JARPA II was found to comply with the first element; the programme could be described as one that entails scientific research.[35] The programme, however, failed at the second hurdle. The lethal whaling operations could not be classified as activities 'for purposes' of research.[36]

The finding that JARPA II did not fall within the scope of the exception, led the court to enquire into the implications of the non-compliance with article VIII, paragraph 1. This was with a view to determining whether this non-compliance led to violations of Japan's obligations under the Schedule, in particular its obligations to respect the moratorium on commercial whaling and not to undertake commercial whaling of fin whales in the Southern Ocean Sanctuary.[37] Ultimately, the ICJ held that JARPA II was not conducted 'for purposes of' scientific research, and therefore also did not comply with the obligations to respect the moratorium on commercial whaling and the prohibition of commercial whaling in the Southern Ocean Sanctuary.

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33 ICJ Report n 1 above at 25–35 par 48–97 and 36–65 par 98–227, respectively.

34 *Id* at 30 par 71.

35 *Id* at 41 par 127. This finding was based on the fact that the Programme's objectives and related activities involve systematic collection of data by scientific personnel as well as the fact that research objectives fall within categories of research identified as relevant in the Guidelines utilised by the Scientific Committee in terms of par 30 of the Schedule to the IWC.

36 ICJ Report n 1 above at 36–65 par 98–227 and 65 par 227.

37 *Id* at 66–68 par 228–233.

Interpretation of Article VIII

One of the first issues the ICJ had to settle was whether to adopt a restrictive or wide approach in interpreting Article VIII. This was a crucial issue as the interpretative approach would have a marked influence on the level of discretion afforded to an authorising state under the exception, and hence the extent to which the exercise of the right to grant scientific whaling permits was subject to review and interrogation by the court.[38] A restrictive interpretation, as advocated by Australia, would have implied that the authorising state's discretion in granting scientific whaling permits would be constrained and hence that strict limitations would be placed on the use of lethal methods for purposes of scientific research.

Australia advanced several arguments in support of a restrictive interpretation. One of such was based on the object and purpose of the Convention.[39] Although recognising that the Preamble to the ICRW evidences two objectives, namely conservation and exploitation of whales, Australia emphasised the former objective, arguing that exploitation of whales was intended to be contingent upon the proper conservation of the species. As such, it viewed conservation as the preeminent purpose of the Convention. In addition, it submitted that the manner of achieving the Convention's purpose had evolved over time towards a focus on conservation.[40] This warranted that the exception should be interpreted in a manner which does not undermine the effectiveness of the overall regime but rather gives effect to the measures adopted by the parties, including the moratorium on commercial whaling and the establishment of whale sanctuaries.

Australia further buttressed its view that article VIII, paragraph 1 ought to be interpreted restrictively, and thus stringent limitations should be placed on the use of lethal methods for purposes of scientific research, on the basis of IWC resolutions and guidelines.[41] According to Australia, these resolutions and guidelines emphasised the use of non-lethal methods of research and meant that the Convention had taken on a predominantly

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38 The fact that the extent of the court's power to interrogate is a function of the level of discretion afforded to the authorising state is also confirmed in the Declaration of Judge Keith. *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* Declaration of Judge Keith 2 par 7.

39 ICJ Report n 1 above at 27 par 57; Memorial of Australia n 24 above at 158–159 par 4.49–4.51 and 15–17 par 2.15–2.20.

40 Memorial of Australia n 24 above at 15–52 par 2.15–2.99.

41 ICJ Report n 1 above at 31 par 78–79.

conservationist-focus. It argued that lethal methods were permissible only in so far as non-lethal methods were not available.[42] Similarly, it advanced the argument that the international community had, since the 1970s adopted an 'increasingly conservation-oriented approach' and that this trend supports a narrow interpretation of article VIII, paragraph 1.[43] Furthermore, in its submissions it highlighted the endorsement of the precautionary approach in several international environmental agreements and emphasised its relevance in the context of the ICRW.[44] Taken collectively, Australia therefore argued that the increasingly conservation-oriented approach both within and outside of the ICRW, and the precautionary approach, dictated an interpretation of article VIII, paragraph 1 that restricts the killing of whales and that limits the level of discretion afforded the authorising state.[45]

Japan, on the other hand, emphasised the objective of sustainable exploitation, advancing the argument that the ultimate purpose and objective of the ICRW was to provide for the orderly development of the whaling industry and that it did not evidence a conservation objective *per se* – conservation was relevant only as far as it would ensure sustainable whaling.[46] Japan also refuted Australia's submission that there had been a shift in purpose towards conservation either through subsequent agreement and practice (as evidenced by resolutions and Guidelines) or through other relevant rules of international law.[47] While acknowledging the precautionary approach, Japan disagreed with Australia that precaution demanded a restrictive interpretation of article VIII.[48] In any event, Japan's case was that the level of 'exploitation' under JARPA II was precautionary and did not pose a threat to stock levels.[49] It also contested Australia's version that the grant of permits under article VIII, paragraph 1 was permissible only if non-lethal methods were not available, citing in support of its views the fact that the provision expressly permits the granting of such permits and that the resolutions and guidelines did not amount to subsequent agreement or practice that altered the provisions of the Convention.[50]

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42 *Ibid.*
43 Memorial of Australia n 24 above at 172–173 par 4.84–4.85.
44 *Id* at 173–175 par 4.87–4.90.
45 *Id* at 173–176 par 4.87–4.91.
46 *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* Countermemorial of Japan 309 par 6.11 and 320 par 6.35.
47 *Id* at 309 par 6.11 and 329 par 7.23.
48 *Id* at 314 par 6.22.
49 ICJ Report n 1 above at 41 par 126.
50 ICJ Report n 1 above at 31 par 80.

In Japan's view, the ordinary and natural meaning of article VIII was clear. It viewed the article as a free-standing provision that affords the authorising state a wide discretion to grant permits in the sense that no other state, or the IWC, could overturn decisions of an authorising state.[51] Japan further expressed the view in its written submissions that the ICJ's power to review the granting of permits was limited to determining whether that right had been exercised in good faith.[52] On such an interpretation, the court would have been required to respect Japan's decision to grant permits unless that decision proved to be irrational. In other words, the ICJ's power to review the decision would have been limited to ascertaining whether the decision to grant permits was 'arbitrary or capricious', 'manifestly unreasonable' or exercised in bad faith.[53] During the oral proceedings, however, Japan revised its position on the level of discretion, and hence power of review, to acknowledge that the court was empowered to determine whether the 'decision is objectively reasonable, or "supported by coherent reasoning and respectable scientific evidence and … , in this sense, objectively justifiable."'[54]

The court's interpretation of the relevant provision proceeded from the acceptance of the arguments advanced by both Japan and Australia that article VIII, paragraph 1 stood to be interpreted in light of the object and purpose of the Convention, and taking into account its context, as demanded by article 31(1) of the Vienna Convention.[55] Unlike Australia and Japan, however, the ICJ viewed the purpose and objective of the ICRW as a dual one – the conservation of whales and their sustainable exploitation.[56] The court was not convinced by Australia's arguments regarding the shift of the purpose of the ICRW towards conservation, nor Japan's argument that the end-game always remained sustainable use of the resource. Instead, the ICJ emphasised that amendments to the Schedule (such as the adoption of the moratorium on commercial whaling) or recommendations of the IWC in the form of resolutions, could emphasise one or the other of these dual objectives, subject to the caveat that the ultimate purpose of the Convention remained constant and unaltered.[57]

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51 Countermemorial of Japan n 46 above at 324 par 7.11 and 340 par 7.45.

52 ICJ Report n 1 above at 28–29 par 65.

53 *Ibid*.

54 *Id* at 29 par 66.

55 *Id* at 25–26 par 51–55. Article 31(1) of the Vienna Convention provides that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to terms of the treaty in their context and in light of its object and purpose'.

56 *Id* at 26 par 56.

57 *Id* at 27 par 56.

In coming to the above conclusions the court did not offer any views or explanations as to how the finding that the ultimate purpose of the Convention cannot be moulded relates to its earlier finding that the ICRW is an 'evolving instrument'. The court also did not offer any views on the argument advanced by Australia that the general trend towards conservation has implications for the interpretation of article VIII. Similarly, although the court recognised the precautionary approach in passing,[58] the judgment provides no further clues regarding the court's view on the implications of this emerging principle for the interpretation of article VIII.

The court only dealt expressly with Australia's argument that resolutions and guidelines under the ICRW had the effect of rendering the grant of permits under VIII, paragraph 1 permissible only as far as no other means were available. In this regard, the court held that Australia had overstated the importance of these resolutions and recommendations, and that they did not constitute subsequent agreement or practice, particularly since Japan did not support all of the resolutions cited by Australia.[59] By the same token however, the ICJ emphasised that parties to the ICRW were under a duty to cooperate and that this duty entailed parties paying due regard to the recommendations of the IWC, and hence the resolutions and guidelines adopted by the IWC.[60] The court did not expand upon the basis and origins of this duty.

Having found in favour of a middle road in interpreting the relevant provision, rather than an expansive or restrictive interpretation, the court turned to the question of the level of discretion enjoyed by the authorising state in granting permits for scientific whaling under article VIII, paragraph 1. Contrary to Japan's contention for a wide discretion, the court held that the grant of permits must be adjudged by objective criteria.[61] The court held further that although the authorising state enjoys some discretion in granting permits for scientific whaling, that discretion is not unfettered or left to the views of the authorising state alone.[62] Apart from a summary of the positions

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58 *Id at* 31 par 81.

59 *Id* at 32 par 83.

60 *Ibid.*

61 *Id* at 27–28 par 59–61. Judge Keith advanced a convincing argument in support of an objective standard in his declaration to the effect that wording of the provision is not subjective at its very core as it does not state that the authorising state may grant permits 'for what it considers to be scientific research'. See Declaration of Judge Keith n 38 above at 2 par 7.

62 ICJ Report n 1 above at 28 par 61.

of the two parties on this aspect, the court, offered no reasons for its findings in this regard.

The finding that the discretion of the authorising state is circumscribed of course raised the issue of what the appropriate standard is for assessing or reviewing the authorising state's decision to grant special permits. According to the court, the standard of review to be adopted was one of reasonableness.[63] Again, no reasons were offered by the court for adopting this standard of review, other than the apparent acceptance by Japan during oral proceedings of the test of objective reasonableness, which was also advanced by Australia as the appropriate test.[64]

Having established the baseline for interpreting article VIII, paragraph 1, the court was left with the task of determining the meaning of the phrase 'for purposes of scientific research' in article VIII, paragraph 1. The court agreed with Australia that the phrase consists of two cumulative requirements. The first is 'scientific research' and the second that the lethal methods authorised by the state are 'for purposes of' such research.[65] The former element is not defined in any depth in the judgment, due to the court deciding that a closer examination of the term 'scientific research' was not necessary in the circumstances of the case.[66] This was so as there was sufficient evidence to conclude that JARPA II did in fact include at least elements of scientific research since it involved the 'systematic collection and analysis of data by scientific personnel'.[67] The court's lack of analysis regarding the meaning of 'scientific research' has been lamented as a gap in its reasoning by several commentators.[68]

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63 *Id* at 29 par 67.

64 *Id* at 28 par 60 and 63; Memorial of Australia n 24 above at 161–163 par 4.57–4.63.

65 Australia's arguments in this regard were uncontested by Japan, a fact which appears to be the court's only explanation to adopting this two-fold approach to the interpretation of the provision. ICJ Report n 1 above at 29 par 70.

66 *Id* at 32–33 par 86.

67 *Id* at 41 at par 127.

68 Smith 'Evolving to conservation?: The International Court's decision in the Australia/Japan whaling case' (2014) 45 *Ocean Development and International Law* 309; Telesetsky, Anton & Koivurova 'ICJ's decision in *Australia v Japan*: giving up the spear or refining scientific design?' (2014) 45 *Ocean Development and International Law* 332. Although Australia advanced that in order to qualify as scientific research a programme would have to satisfy four distinct criteria, and the court proceeded to analyse those, it ultimately concluded that it was not convinced those criteria necessarily had to be met, nor did it think it necessary to devise alternative criteria or reference points for identifying whether activities amounted to scientific research.

On the second requirement that the activities are 'for purposes of' research, the ICJ called for an enquiry into the reasonableness of the design and implementation of the programme – the test being whether the design and implementation of JARPA II were reasonable in light of its stated objectives.[69] In deciding this question, the court further held that it would look to the authorising state for a motivation, as the onus of proof did not fall on Australia.[70] A finding otherwise would have required Australia to demonstrate that JARPA II was unreasonable or constituted something other than scientific research – essentially proving a negative. The ICJ held that the enquiry into the reasonableness of the design and implementation of JARPA II would be based on a number of criteria advanced by the parties, including the methodology used to decide on sample sizes; the scale of lethal sampling; a comparison of the sample sizes to actual take; the time frame of the programme; scientific output; and degree of coordination with other research projects.[71] No underpinning reasons were offered for the choice of criteria, other than the fact that these factors were advanced by the parties themselves.

Implementation of JARPA II

This portion of the judgment entails the judicial review of the decision by Japan to grant permits authorising lethal research methods in the context of JARPA II. Having found that JARPA II activities, including the lethal sampling of whales broadly fit within the parameters of 'scientific research', the court was left with the remaining enquiry as to whether the lethal methods were reasonable in light of the objectives of JARPA II and in accordance with the various criteria advanced by the parties.[72]

The first factor to be analysed by the ICJ related to Japan's decision to employ lethal methods of research as part of JARPA II. The criterion was essentially concerned with an analysis and assessment of how Japan had arrived at that decision. Although the ICJ categorically stated that the use of lethal methods was not *per se* unreasonable even if other methods were available,[73] JARPA II fell short of what was required of Japan in the context of article VIII, paragraph 1. This was so because Japan could not demonstrate that it had assessed the feasibility and practicality of reducing

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69 ICJ Report n 1 above at 29 par 67.
70 *Id* at 29 par 68.
71 *Id* at 33 par 88.
72 *Id* at 41 par 127.
73 *Id* at 43 at par 135 and 137.

the use of lethal methods.[74] This lack of analysis could not be reconciled with Japan's obligation to give due regard to IWC resolutions calling for careful consideration of the use of lethal methods.[75]

The second overarching criterion analysed by the court in assessing the reasonableness of the design and implementation of JARPA II related to the scale of sampling, based on three individual factors: first, a comparison of JARPA and JARPA II sample sizes; second, the process and reasoning underpinning sample sizes under JARPA II; and third, a comparison between sample sizes and actual take. With regard to the comparison between JARPA and JARPA II, the court found that the explanation offered by Japan for the much larger sample sizes under JARPA II to the effect that JARPA II was 'more sophisticated' and therefore required larger sample sizes, notwithstanding the striking similarities of the objectives of the two research programmes, was weak.[76]

The second enquiry into the determination of the sample sizes of the individual species forming part of JARPA II was essentially concerned with the question of whether there was a coherent scientific rationale underpinning this decision. The court held that 'in the context of article VIII, however, the evidence regarding the selection of minimum sample sizes should allow one to understand why that sample size is reasonable in relation to achieving the objectives' of JARPA II.[77] Contrary to this requirement, an analysis of the process by which Japan had determined the sample sizes of the various species, revealed only limited information regarding Japan's decision in this regard.[78]

Lastly, the court noted as problematic the significant deviation between sample sizes and actual taking of whales in the course of implementing JARPA II. The significantly smaller take in relation to sample size, in the court's view cast doubt on the ability of JARPA II to meet its objectives, which according to Japan's own version depended on the much larger sample sizes compared to those under JARPA.[79] The court also questioned the lack of any revision of JARPA II notwithstanding this significant change

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74 *Id* at 43–45 par 137–144.
75 *Id* at 45 par 144.
76 *Id* at 47–48 par 154–156.
77 *Id* at 57 at 195.
78 *Id* at 53–54 par 181 and 57 par 195.
79 *Id* at 62 par 210–212.

in its implementation.[80] Overall the court concluded as far as sample sizes were concerned that these were not reasonable in relation to JARPA II objectives.[81]

In addition to the above, the ICJ noted several other aspects of JARPA II which, taken together with the above analysis, cast serious doubt on the reasonableness of its design and implementation in relation to the stated objectives. The court noted the open-ended time frame adopted by JARPA II and stated that in the light of ICRW Guidelines a time frame with tangible targets would have been 'more appropriate'.[82] The court also noted the very limited scientific output generated by JARPA II to date, despite the fact that the first research period had been concluded in 2010/2011.[83] Only two peer-reviewed articles had been published, and neither related to JARPA II research objectives. Finally, the court noted that given the ecosystem assessment goals of JARPA II, more cooperation and coordination with other research projects could have been expected.[84]

Ultimately, the court therefore concluded that 'evidence does not establish that the programme's design and implementation are reasonable in relation to achieving its stated objectives'.[85] The permits granted by Japan were therefore not 'for purposes of scientific research'.

Violation of Japan's obligations in terms of the Schedule

This part of the judgment is concerned with the implications of the ICJ's finding that the permits had not been granted 'for purposes of scientific research'. The ICJ concluded that as far as the permits granted fall outside the scope of article VIII, paragraph 1, the lethal taking of whales would automatically result in the breach of the relevant Schedule obligations as claimed by Australia.[86] Although both paragraph 7(b) and 10(e) of the Schedule refer to 'commercial whaling', the court found that it was not necessary for Australia to demonstrate that activities not only did not amount to scientific research but were instead undertaken for commercial purposes.

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80 *Id* at 61 par 209.
81 *Id* at 64 par 224.
82 *Id* at 63 par 216.
83 *Id* at 63 par 219.
84 *Id* at 64 at par 222.
85 *Id* at 65 par 227.
86 *Id* at 66 par 230.

Remedies

Having found that JARPA II did not fall within the scope of the scientific whaling exception and therefore resulted in the breach of substantive treaty obligations, the court ordered Japan to revoke any extant permits and to refrain from granting further permits in connection with JARPA II.

MISSED OPPORTUNITY OR PROGRESSIVE JUDGMENT?

Evolutionary interpretation of the ICRW

Evolutionary treaty interpretation is a process of construing treaty provisions in such a manner as to ensure that the treaty remains of validity and relevance notwithstanding the ever changing context within which treaties operate.[87] Treaty interpretation is often an act of judicial tight-rope walking, demanding of the international tribunal on the one hand an innovative approach that recognises that treaties may evolve over time in order to address the changing societal context within which they operate, whilst on the other hand being careful not to usurp the 'legislative' powers of state parties to the instrument at hand – after all the parties to a treaty are always free to amend its provisions or adopt protocols.

Notwithstanding the dangers inherent in evolutionary treaty interpretation, the ICJ and other international tribunals have on numerous occasions acknowledged that treaties are not static but are instead 'living instruments', thus paving the way for the interpretation of treaty provisions to be shaped and guided by the context within which the document operates.[88] So too, in the present context, the ICJ expressly characterised the ICRW as an 'evolving instrument', thus signifying a willingness to allow the interpretation of the scientific whaling exception to be shaped by the context within which that provision operates. But did the court follow through on the impression created by its characterisation of the treaty?

Internal evolution of the ICRW

In this regard, Australia submitted that the ICRW had evolved – on the basis of resolutions and guidelines – into a conservation-dominated regime in which lethal methods for purposes of research may only be resorted to where

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87 Boyle & Chinkin n 9 above at 276.

88 For an exposition of the various judgments in which the ICJ acknowledges the nature of conventions as living instruments, see *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* Separate Opinion of Judge Trindade 9–10 par 29–33. Also see Boyle & Chinkin n 9 above at 245. Evolutionary treaty interpretation is particularly prominent in the human rights field. See in this regard Boyle & Chinkin n 9 above at 276–278.

there are no other available means. This argument was expressly rejected by the ICJ. The ICJ found that the various resolutions and guidelines (collectively referred to as 'recommendations') relied upon by Australia

> 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[89]

Consequently, the court reiterated later in the judgment that the reliance on lethal methods *per se* did not automatically result in a research programme falling outside the scope of article VIII, notwithstanding the fact that other methods might have been available to achieve the same objective.[90]

At first glance this finding seems to be at odds with the court's characterisation of the ICRW as an evolving instrument, particularly given the great number of recommendations adopted by the IWC which are critical of scientific whaling and which emphasise the need to rely on such permits conservatively.[91] However, the court's finding is perhaps not as surprising as it might seem if the following factors are taken into consideration. Firstly, the ICJ found that substantively the recommendations, although calling for a consideration of the availability of alternative research methods, did not establish a requirement that lethal methods only be employed as a measure of last resort.[92] Secondly, the ICJ was acutely aware of the divergence of views amongst ICRW member states regarding whaling and the fact that it is not the court's role to resolve these policy issues, but rather to determine a specific dispute between two parties to the ICRW regarding the interpretation and implementation of the Convention.[93] The dichotomy of views of ICRW member states regarding whales and whaling policy also meant that not all recommendations reflected the consensus of all ICRW member states. In particular, several of the resolutions relied upon by Australia had been adopted without the concurrence of Japan.[94] In the circumstances, therefore, the court can hardly be faulted for concluding that the recommendations relied upon by Australia did not constitute subsequent

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89 ICJ Report n1 above at 32 par 83.
90 *Id* at 43 par 137.
91 For an overview of the most pertinent recommendations, see Memorial of Australia n 24 above at 163–170 par 4.65–4.80.
92 ICJ Report n 1 above at 32 par 83.
93 *Id* at 29 par 69.
94 *Id* at 32 par 83.

agreement or practice amongst the parties which led to an evolution of the meaning of the provision, and neither for finding that lethal methods *per se* were not automatically outside the ambit of article VIII even where alternative methods might be available. Had these factors not been present, the court might well have been swayed by Australia's arguments.

Describing the ICJ's findings in this regard as having denied the potential evolutionary role of the recommendations adopted by the IWC would also overlook the importance of the court's recognition of the duty of cooperation. According to the court this duty, the origins or basis of which are never investigated by the court,[95] implied that member states were required that due regard be paid to recommendations of the IWC and thus to assess the feasibility of non-lethal methods.[96] The court was therefore prepared to rely on the recommendations to formulate a baseline requirement in the implementation of article VIII that asks of states at the very least to consider whether other methods of research are practically available.

Although the recommendations, in the view of the court, did not amount to subsequent practice or agreement within the meaning of article 31(3) of the Vienna Convention, they were, in a subtle manner, held to be of a normative content that influenced the court's interpretation of article VIII. It should also be noted that the requirement to undertake such a feasibility assessment – essentially read into article VIII, paragraph 1 by the court – was one of the factors which ultimately led to the demise of JARPA II as Japan could not demonstrate that such assessment had taken place.

With regard to the internal evolution, the ICJ therefore adopted an innovative and subtle route to ensuring that the IWC recommendations, which collectively emphasise the importance of conservation and encourage non-lethal research methods, were factored into the equation, notwithstanding the strictures within which the ICJ must render its decisions and the factual circumstances in the present case. This approach allowed the court to steer away from entering into the policy debate amongst ICRW member states regarding whaling, while at the same time, factoring the overall trend towards conservation evidenced by the IWC recommendations into its determination of the lawfulness of JARPA II.

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95 The court's willingness to find in favour of such a duty may have been influenced by Japan's apparent acceptance of a duty to give due consideration to recommendations. ICJ Report n 1 above at 31 par 80.

96 *Id* at 32 par 83.

At the same time, however, this part of the court's judgment may be criticised for the lack of analysis and lack of reasons underpinning the judgment, particularly in relation to the duty of cooperation. As alluded to above, the ICJ did not explain the basis for concluding that Japan was under a duty to cooperate, nor did it indicate the origins of that duty as either being based on the ICRW or, perhaps, more broadly sourced from international law in general. The ICJ also did not engage on a principled basis with the varying nature of the recommendations that may be adopted under the ICRW and whether the different nature of recommendations as consensus-based, or majority-based, or the distinction between guidelines and resolutions plays any role with regard to the extent to which they may influence treaty interpretation.

Sound and well-reasoned judgments are of vital importance in maintaining the legitimacy of the ICJ as an institution and in maintaining and supporting the 'compliance pull' of its judgments.[97] A demonstrably sound reasoning process is even more critical where the ICJ is called upon to adjudicate in a controversial area of international relations, such as whaling. Moreover, in the context of the development of international environmental law, and assuming that the ICJ viewed the duty of cooperation as arising from international law in general rather than arising from a specific provision of the ICRW, the ICJ missed an opportunity to build on its previous jurisprudence and those of other international tribunals regarding the duty of cooperation.[98]

A closer analysis of the duty of cooperation would have been even more valuable in this case as the duty seems to have been applied by the ICJ in a manner different from that in previous cases, where the ICJ characterised this duty as entailing requirements of notification and consultation with other affected states.[99] In the present case, however, the ICJ relied upon the duty to signify an obligation to take seriously the recommendations of the IWC, rather than an obligation to consult with the IWC or other member states regarding proposed scientific whaling operations. The court does not

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97 Boyle & Chinkin n 9 above at 300–306 and 310–311.

98 This jurisprudence includes *inter alia* the following cases: *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep (25 September 1997); *Pulp Mills on the River Uruguay* Judgment) [2010] ICJ Rep. (20 April 2010); Case No 12, *Case concerning land reclamation by Singapore in and around the straits of Johor (Malaysia v Singapore)* [2003] ITLOS Rep, Provisional Measures (8 October 2003); and Case No 10, *MOX Plant case (Ireland v United Kingdom)* [2001] ITLOS Rep, Provisional Measures (3 December 2001). Also see Sands & Peel n 11 above at 203–205.

99 Sands & Peel n 11 above at 203–205.

explore or pronounce upon the question whether this amounts to an extension of the duty to cooperate or whether it is merely a different facet of the duty. Similarly, the court does not pronounce upon the extent to which, or the circumstances in which, a failure to cooperate (or to cooperate fully) results in the breach of substantive obligations. In *Pulp Mills* the duty was characterised as a procedural obligation, and a failure to act in accordance with that duty did not automatically result in the breach of substantive obligations.[100] In the present case, however, the duty seems to have taken on a stronger role, in the sense that the ICJ relied on this duty to read a substantive obligation to consider alternative research methods into article VIII, thus suggesting that the duty to cooperate can take on the character of a very specific substantive obligation, depending on the context within which it applies.

External evolution of the ICRW

Australia also advanced arguments based on article 31(3)(c) of the Vienna Convention, which calls for a consideration of 'any relevant rules of international law applicable in the relations between the parties' in the process of treaty interpretation. In its Memorial, Australia submitted that a number of rules of international law which committed both countries to protecting bio-diversity and which called for the application of specific principles, such as the precautionary approach, were required to be taken into account in interpreting article VIII of the ICRW.[101] The relevant developments in international law, in the view of Australia, lent 'strong support to an interpretation of the article VIII exception that is restrictive and that contributes to – rather than undermines – the conservation of whales'.[102]

Despite having characterised the ICRW as an evolving instrument, and notwithstanding previous jurisprudence to the effect that treaties are not static but rather open to emerging norms of international law, the ICJ never engaged with all the arguments relating to external influences on the ICRW. In fact, although both parties to the dispute, as well as New Zealand as the intervening party, raised arguments surrounding the role and impact of the precautionary principle, the court only makes mention of the precautionary

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100 Sands &Peel n 11 above at 634–635 and *Pulp Mills* ICJ Report n 98 above at 66 and 67 par 144, 147 and 157.

101 Memorial of Australia n 24 above at 171 par 4.81. For Australia's specific submissions regarding the applicable rules and principles of international law, see 171–176 par 4.81–4.91.

102 *Id* at 172 par 4.83.

approach in passing. At no point in the judgment does the court engage with this controversial concept in more detail.[103]

Had the court engaged with these arguments, as was done in the two separate opinions of Judges Trindade and Charlesworth (with Trindade engaging both with the trend towards conservation and various emerging principles of international environmental law, and Charlesworth focusing on the precautionary principle), the court might have come to a very different conclusion regarding the interpretation of article VIII. Both judges concluded, *inter alia*, that article VIII only permits lethal methods where they are indispensable in the sense that no other methods are available.[104] An in-depth engagement with these arguments might have led to an interpretation of article VIII that is much more akin to that advanced by Australia, and which imposes more arduous restrictions on the authorising state in exercising its right to grant such permits. Given this potential alternative interpretation of article VIII, the lack of engagement by the ICJ with the issue, is no doubt an enormous disappointment to anti-whaling factions within the ICRW. The court's lack of engagement is also disappointing from the broader perspective of international environmental law. The court showed itself to be extremely reluctant to engage with emerging principles of international environmental law which are in need of judicial interpretation and guidance.

It is also regrettable that the ICJ did not seize the opportunity to investigate the influence, if any, of a general trend towards conservation as evidenced by a myriad of treaties in the field of international environmental law, for specific treaty obligations. Such investigation and judicial guidance on this aspect might have implications for the interpretation of treaty provisions in other contexts, such as for example, within the context of the UN Convention on the Law of the Sea and debates surrounding the content and scope of the duty of states to take conservation measures on the High Seas.[105]

Australia's arguments in this regard also play into the broader question surrounding the potential existence, and implications of an *erga omnes*

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[103] ICJ Report n 1 above at 31 par 81.

[104] Separate Opinion of Judge Trindade n 87 above at 24 par 81; *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* Separate Opinion of Judge Charlesworth at 3 par 10. For a summary of the separate opinions of Judges Trindade and Charlesworth, see Smith n 68 above at 315–316.

[105] Articles 116–120 of the United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

obligation to protect the environment. Recognition of such an obligation would represent a move away from a narrower conceptualisation of states' environmental duties and responsibility, based on harm to an individual state, towards a far more holistic approach to conservation in the sense that any state would have the legal standing to lay a claim against another for failing to adopt conservation measures even in the absence of specific harm to the state.[106] An *erga omnes* obligation to that effect might enhance or clarify the duties of states in at least one area of international law that remains subject to debate and controversy (although there may of course be others), namely conservation of bio-diversity and living resources in areas beyond national jurisdiction. An *erga omnes* obligation would imply that bio-diversity and living resources in such areas are first and foremost, subject to the legitimate interest of the international community to ensure the preservation of the environment without having to establish specific harm to the particular claimant state.[107] This in turn might lend support to the adoption and enforcement of minimum conservation measures, such as the establishment of marine protected areas, notwithstanding the traditional principles of freedom of the high seas and flag state primacy.

To date, though the concept of *erga omnes* obligations in the context of international environmental law has been discussed in the jurisprudence of the ICJ,[108] international law has not developed to consider conservation of bio-diversity or natural resources as an *erga omnes* obligation.[109] The recognition of an increasingly conservation-oriented approach by the ICJ in the context of this case, would have provided evidence at least of an emerging trend in the direction of the existence of such an obligation. The court thus missed an opportunity to engage with an issue that could be vital for the future direction and development of international environmental law.

Similarly, the reluctance on the part of the court to investigate the precautionary principle more closely continues a trend which has seen the ICJ shy away from explicit treatment of this principle.[110] This lack of

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106 Borg *Conservation on the High Seas: harmonizing international regimes for the sustainable use of living resources* (2012) 38–39.

107 *Id* at 39.

108 Most notably in *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Report (5 February 1970). See Vinuales n 11 above at 242.

109 Borg n 106 above at 39; Birnie, Boyle & Redgwell *International law and the environment* (3ed 2009) 232–233.

110 For a brief overview of the debates surrounding the meaning and implications of the precautionary principle see Van der Zwaag 'The ICJ, ITLOS and the precautionary approach: paltry progressions, jurisprudential jousting' (2013) 35 *University of Harvard*

engagement perpetuates the uncertainty regarding both the status and precise meaning of the concept.[111] At the very least, one would have expected the ICJ to acknowledge, as Judge Trindade did, that both parties to the dispute, as well as the intervening party, thought the principle important enough to address it in their written submissions and oral arguments. This fact is surely one which ought to have been recognised as evidence pointing towards the (gradual) formation of the precautionary principle as a rule of customary international law.

The trend towards the acceptance of the precautionary approach as a rule of customary international law has also been recognised by another international tribunal, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, on the basis of the growing number of conventions that incorporate this principle.[112] Given this general trend, it seems that the time was ripe for the ICJ to engage substantively and in a detailed manner with the precautionary approach in the context of its most recent judgment.

It might be that the ICJ was indirectly swayed by arguments relating to the general conservation trend and the need for precaution in adopting an objective standard of reasonableness and in formulating the requirements for the assessment of the design and implementation of JARPA II. For one, as Judge Trindade opined in *Pulp Mills,* precaution requires a 'reasonable assessment' before a particular course of action is adopted.[113] This aspect of the precautionary principle would seem to support an objective standard of assessment of Japan's decision to grant special permits based on reasonableness. Secondly, other commentators have argued that the criteria relied upon by the court in assessing the implementation of JARPA II are essentially precautionary in character.[114] This seems to be true with regard to at least some of the criteria analysed by the ICJ. Thirdly, the court's reasoning for imposing the burden of proof regarding the legitimacy of JARPA II on Japan may have indirectly been informed by a version of the precautionary approach, in which the principle has the effect of reversing the burden of proof. In other words, instead of requiring of the aggrieved party

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Law Review 617–618 and 620–621.

111 *Ibid.*

112 Case No 17, *Responsibilities and obligations of states sponsoring persons and entities with respect to persons and entities in the Area (Advisory Opinion)* [2011] ITLOS Seabed Disputes Chamber Report (1 February 2011).

113 Van der Zwaag n 110 above at 627.

114 Smith n 68 above at 318.

to show that a course of action may lead to significant harm, it requires of the implementing state to demonstrate environmental safety. One would have liked the court to deal with this issue in an express manner, particularly given the debates that have surrounded the reach of the ICJ's finding in *Pulp Mills* that precaution does not result in the reversal of the burden of proof.[115]

Even if some of the court's findings might have been influenced by developments in international law, a progressive approach disguised under the cloak of judicial restraint, and in which the court is swayed by unexpressed considerations, seems inappropriate. The court's explicit engagement with the arguments surrounding external influences on the ICRW could have made an important contribution to the development of international environmental law. Instead, commentators are left guessing about the possible views held by the court on issues such as precaution and the influence of a growing emphasis on the conservation duties of the international community.

The standard of review

In assessing the implementation of JARPA II with a view to determining whether it was conducted 'for purposes of' scientific research', the ICJ adopted the standard of reasonableness, the test being whether the design and implementation of JARPA II were reasonable in light of the programme's objectives. To put it slightly differently, and in the words of Judge Keith, what the court tested was whether the authorising state's decision to grant special permits was 'objectively justifiable in the sense that the decision is supported by coherent scientific reasoning'.[116]

The adoption of this standard of review is one of the more adventurous, innovative and, therefore, progressive elements of the judgment. In embracing reasonableness as the standard of review, the ICJ rejected the far more deferential standard of review initially advanced by Japan, in favour of an objective standard.[117] In terms of that objective standard the court tested the coherency of Japan's decision by evaluating how scientific

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115 Van der Zwaag n 110 above at 621.

116 Declaration of Keith n 38 above at 2 par 7.

117 The application of an objective standard should be regarded as the correct approach, since an unfettered discretion would undermine the very purpose of establishing a collective regime for the regulation of whaling, and on a more specific level, based on the wording of art VIII, par 1. With regard to the latter argument, see the Declaration of Judge Keith n 38 above at 2 par 7.

evidence was used to reach the decision to grant permits under article VIII, paragraph 1.[118]

As has been recognised by other commentators, in many ways the test devised by the ICJ makes sense.[119] The standard of reasonableness allows a court to test the rationality, coherency or justifiability of a decision based on the factors that underpin the decision. It allows a court to ask the question whether the ultimate decision that is being questioned, is supported by underlying considerations which could lead a reasonable person to render that very same decision, or which, in other words, are legitimate and valid considerations (even if one might disagree about the correctness of the ultimate decision). The standard is closely related to the finding that the decision to grant permits must be adjudged by an objective standard, which implies that the court should be able to comprehend and retrace the decision-making process of Japan and that the decision must ultimately be justifiable in light of those considerations.

In adopting the standard of reasonableness as the basis for reviewing JARPA II, the ICJ was careful to point out that what it would review is the dialectic reasonableness of the decision, rather than the substantive reasonableness.[120] A careful and considered reading of the court's assessment of JARPA II in light of the criteria adopted by it reveals that the court was indeed careful throughout this assessment to adhere to the distinction between dialectic and substantive reasonableness.[121] For example, in reviewing Japan's decision to rely on lethal methods, the ICJ does not pass judgment on the appropriateness or scientific need for such methods, but rather focuses on the manner in which Japan had arrived at that decision and the issue of whether there was evidence that Japan had considered alternative options for

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[118] According to Japan, the court's power to review ought to have been restricted to determining whether the decision was 'manifestly unreasonable' or exercised in bad faith, with the court's role being limited to securing 'the integrity of the process by which the decision is made' rather than reviewing the decision itself. ICJ Report n 1 above at 28–29 par 65.

[119] Telesetsky, Anton & Koivurova n 68 above at 333.

[120] ICJ Report n 1 above at 33 par 88. The ICJ states that it 'need not pass judgment on the scientific merit or importance of [JARPA II] … . Nor is it for the court to decide whether the design and implementation of a programme are the best possible means of achieving its [JARPA II's] stated objectives.'

[121] In fact the ICJ noted that there was a difference of scientific opinion amongst the parties regarding the need for lethal methods to collect some of the information required by JARPA II but the court does not attempt to resolve this conflict because doing so would have dragged the court into an investigation of the scientific merit of the respective views of the parties. ICJ Report n 1 above at 43 par 134–135.

collecting the required data. Similarly, in reviewing the determination of sample sizes, the court does not ask whether the size of those samples are scientifically necessary or reasonable but rather whether there was coherent evidence showing how Japan had arrived at the various sample sizes.

Admittedly, the dividing line between dialectic and substantive reasonableness is a fine one as the standard of reasonableness cannot be divorced entirely from an assessment of the substance of a decision. An international tribunal is required to probe into the underlying considerations that led to the decision to assess whether those considerations were reasonable. This analysis cannot be undertaken in isolation of the facts related to a decision. However, so long as the tribunal does not substitute its own decision for that of the original decision-maker, there is no reason why a review for reasonableness should not be regarded as properly falling within the purview of international tribunals. Application of this standard merely means that the tribunal concerned must remain mindful of the need to strike an appropriate balance between deference to a state's decision and the tribunal's power to adjudge compliance with the international obligations of states, even in the context of discretionary powers conferred by treaty provisions. In the present case, the ICJ struck the appropriate balance. For example, while it is true that in assessing the lawfulness of JARPA II, the ICJ was called upon to consider factual information such as the process for determining sample sizes of individual species, the court only does so with a view to determining whether that process was underpinned by coherent reasoning in relation to the programme objectives. At no point does the court pass judgment on the scientific merit of the sample sizes.[122]

As alluded to above, what is missing from the judgment, however, is a reasoned explanation of how the ICJ arrived at the conclusion that this objective standard of review was appropriate in the circumstances of the case. It has been pointed out by commentators that there are alternative tests that the court could have chosen.[123] Other possible tests that have been suggested are a 'necessity' test, asking whether lethal methods were necessary for purposes of JARPA II, and a 'but for' test, asking whether lethal methods were a *sine qua non* for reaching the research objectives, or testing whether JARPA II was designed in the least harmful way.[124]

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[122] *Id* at 51–52 par 172.

[123] Rolland 'Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)' (2014) 108 *American Journal of International Law* 500.

[124] *Ibid*.

However, if one analyses these proposed tests more closely, and considers the kind of issues that the ICJ would have been called upon to take into account in applying these alternative tests, it seems that the issues to be considered by the court would have been much the same. For example, the necessity test would have called for an investigation of the objectives of JARPA II and available research methods to determine whether other methods might have been available. Similarly, this test probably would have led the court to consider whether the scale of sampling was necessary to achieve the stated objectives.

Moreover, an application of the alternative tests might have required the ICJ to delve deeper into an assessment of the science underpinning JARPA II than is called for in the context of the standard of reasonableness. For example, analysing whether lethal methods were necessary for purposes of the JARPA II objectives appears to call for a consideration of the science underpinning that decision, rather than merely asking whether Japan had considered the feasibility of other methods, as the court did. It also would have required the court to assess actual sample sizes, instead of asking whether there was a logical explanation for how Japan had arrived at the sample sizes, which is the question that was posed by the court in accordance with the reasonableness test.

It could be, therefore, that the ICJ was prompted to adopt the standard of reasonableness, in part at least, because that standard allows it both to interrogate the decision taken by Japan on an objective basis, whilst at the same time maintaining an appropriate level of deference to Japan's decision by steering away from an interrogation of the scientific merit of JARPA II.[125] Based on the above analysis, it seems that the reasons that might have swayed the court to apply the standard of reasonableness must have been convincing ones in light of the objective standard of assessment called for by the provision, and because this standard effectively seeks to maintain an appropriate level of deference to the authorising state. This standard of review, if adopted by the court in future cases, could make a contribution to the resolution of at least some environmental disputes, which often raise difficult questions of a scientific nature. So long as the ICJ remains mindful of the fact that it is not called upon to adjudge the scientific merit of a

[125] It should be noted that some judges are of the view that the ICJ went too far in its assessment of JARPA II and in fact did assess the scientific merit of Japan's decision. See *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* Dissenting Opinion of Judge Owada 6–7 par 19–21.

decision, the standard of reasonableness seems to provide an appropriate middle road between assessing state conduct and maintaining deference to state sovereignty and recognition of the court's limited ability to engage in the assessment of matters of science.

The ICJ never engaged in an analysis that would explain its choice regarding the applicable standard of review. The adoption of this standard therefore, remains unjustified and the court's reasoning process open to speculation. A reasoned approach to this issue would have been all the more important as the standard of reasonableness is a novel approach for testing discretionary acts of states within ICJ jurisprudence.[126] Without a reasoned approach to this matter, arguments, such as those advanced by Judge Yusuf that the standard is 'extraneous' to the Convention and is not 'grounded in law or practice of this Court' will carry weight going forward, and cast doubt on whether a similar standard may legitimately be relied upon by the ICJ in future cases, notwithstanding its apparent logic and appropriateness as a standard of review.[127] In light of the role that this kind of test could play in at least a subset of future environmental disputes (*ie* those that involve discretionary state conduct), the possibility that this test could be considered as less than legitimate or ill-founded in subsequent cases, is disappointing.

While the adoption of the standard of review is an innovative and progressive move on the part of the ICJ, which could make a contribution to the development of international environmental law, the lack of sound reasoning casts doubt on the future value and impact of this novel development.

CONCLUSIONS

The judgment of the ICJ in this matter displays some innovative and progressive elements which could make a contribution to the development of international environmental law. Two aspects in particular, deserve mention. First, the court reiterated the importance of cooperation, which plays a central role in matters related to the environment. Moreover, the

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126 As pointed out by Judge Yusuf in his Dissenting Opinion, although reasonableness has been used as a criterion by the ICJ in the past, it has rarely (and it seems only one other case) been relied upon in the context of testing the exercise of state discretion. *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* Dissenting Opinion of Judge Yusuf 4 par 15. Other contexts in which 'reasonableness' has been relied upon as a criterion include the maritime boundary delimitation cases. Telesetsky, Anton & Koivurova n 68 above at 333.

127 Dissenting Opinion of Judge Yusuf n 126 above at 4 par 15.

court applied the duty of cooperation in such a manner as to establish a very specific substantive obligation. This seems to go beyond the role of that duty played in previous cases such as *Pulp Mills*, where the duty was relegated to playing a procedural role. Second, the court demonstrated its willingness to take a progressive stance in adopting the novel standard of reasonableness in reviewing the implementation of discretionary state conduct.

There are also other progressive elements to the judgment which have not been discussed, primarily because these elements do not relate to the broader implications of the judgment for international environmental law but rather relate more specifically to the future of scientific whaling under the ICRW. For example, one of the more progressive elements of the judgment is the fact that the ICJ was prepared to take the leap to find that whaling which was not 'for purposes' of scientific research automatically breaches the substantive obligations relating to, *inter alia*, the prohibition of commercial whaling. This was done without the challenging state having to go so far as to establish that whaling not within the scope of article VIII, paragraph 1 did in fact amount to something other than research – that is commercial whaling. Such a finding would have imposed an additional and difficult hurdle to pass for the challenging state.[128]

However, while the judgment displays some progressive aspects, the value of these contributions to the development of international environmental law is undermined by the 'judicial economy' of the ICJ.[129] Many of the findings of the ICJ are unsupported by reasons or judicial engagement with the arguments advanced by the parties to the dispute. This is true, both with regard to the duty of cooperation and the adoption of the standard of review. The lack of analysis and judicial reasoning potentially undermines the value of the substantive decisions reached by the court for future disputes.

Even more disappointing than the court's lack of reasoning in respect of some of the more innovative aspects of the judgment is the complete lack of engagement with submissions relating to the external evolution of the ICRW. It is this aspect of the dispute that could have resulted in the most valuable contribution to the progressive development of international environmental law. Similarly, the ICJ leaves open the question of what it

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[128] This hurdle would have been significantly more difficult for Australia to satisfy, particularly given the court's finding that the sale of whale meat would not in and of itself invalidate a programme from being classified as one for scientific research. ICJ Report n 1 above at 34 par 94.

[129] Rolland n 123 above at 499.

meant by characterising the ICRW as an evolving instrument. In light of the court's failure to engage with the possible external evolution of the treaty, this statement seems to be mean little more than that the parties to a treaty can shape the application of that treaty by adopting amendments; and perhaps, to a limited extent by adopting recommendations. Viewed in this manner, the finding of the court merely seems to reiterate the obvious.

In conclusion, the judgment displays some innovative and possibly progressive elements but it also represents a missed opportunity for the development of international environmental law. The ICJ missed an opportunity to engage with issues that could shape the future of international environmental law in a significant way. In addition, the lack of judicial reasoning casts doubt on the contribution that the judgment will make to the future development of international environmental law. Overall, therefore, while having been hailed as a victory by anti-whalers, the judgment is of questionable value to the future development of international environmental law.