



# Whale wars

## Launching action

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The International Court of Justice is considering Australia's claim that Japan's whaling activities in the Antarctic are breaching international law.

**On 31 May 2010 Australia launched an action against Japan in the International Court of Justice (ICJ), the principal judicial organ of the United Nations, claiming that Japan's whaling activities in the Antarctic breached its obligations under the *International Convention for the Regulation of Whaling (ICRW)*.<sup>1</sup> On 20 November 2012, New Zealand sought to intervene in the case to present its interpretation on the types of whaling permitted by the ICRW.** The hearing concluded on 16 July 2013 and at the time of writing the ICJ was deliberating the outcome. This article discusses what the case is about, its international juridical context, and explores issues and the arguments of the participants, Australia, Japan and New Zealand, as the ICJ decides whose environmental explanation is right.

### What's it all about?

The ICRW was established in 1946 to conserve whale stocks and to provide for the orderly development of the whaling industry.<sup>2</sup> The

Convention set up the International Whaling Commission (ICW) for the control of whaling.<sup>3</sup> The ICRW began by regulating the commercial whaling industry, and now plays an important role in conservation by setting catch limits and creating whale sanctuaries and whaling seasons. Australia and Japan became signatories to the ICRW soon after it was established.

In recent years the ICRW has largely prohibited commercial whaling, both as a general moratorium and by designating a Southern Ocean Sanctuary. However, whaling for scientific purposes is still permitted. Japan remains one of the few countries that has continued its whaling practices, and has issued permits for its citizens to conduct scientific whaling within the sanctuary, which is in Antarctic waters. Australia claims that Japan's scientific research is actually a form of disguised commercial whaling. After diplomatic efforts and deliberations at the ICW failed, Australia decided to bring a case against Japan in the ICJ seeking adjudication on Japan's alleged violations of its international obligations pursuant to the ICRW.



## Whaling convention

Some provisions of the ICRW and its Schedule are central points in the case. The Schedule to the ICRW contains three articles that prohibit commercial whaling. Article 10(e) places a zero catch limit on commercial whaling on all whales (that is, a moratorium). However, this article is kept under review based on scientific advice, and may be subject to a comprehensive assessment which may set other catch limits. Japan initially objected to this article, but the objection was lifted and Japan is now bound by the moratorium. Article 10(d) prevents factory ships or whale catchers from taking, treating or killing all whales with the exception of minke whales.

Article 7(b) creates a Southern Ocean Sanctuary under certain latitudes, where commercial whaling is prohibited. Japan objects to this Article to the extent that it applies to Antarctic minke whales, meaning Japan is prohibited from commercial whaling for all whale species in the Southern Ocean Sanctuary except minke whales.

However, Article 8 states that a government can issue special permits to its nationals to kill, take and treat whales for scientific research purposes. These permits are exempt from the ICRW, so the protections afforded to whales in the Schedule do not apply to whales taken under the permit system.

Australia lodged a case with the ICJ to try to have Japan's scientific whaling program declared commercial and therefore prohibited. Japan has argued first that the ICJ does not have jurisdiction, and second that its whaling program is permitted as scientific research under Article 8 of the Schedule.

## Does the Court have jurisdiction?

Australia claims the ICJ has jurisdiction to hear this case, while Japan claims it doesn't. The ICJ decides its own jurisdiction, and if it does not have it, the case cannot continue.

One way to obtain jurisdiction is for individual countries to submit a declaration accepting the ICJ's compulsory jurisdiction (with reservations permitted). In this case, both Australia and Japan have submitted declarations to the ICJ.

Australia states that these declarations give the ICJ jurisdiction to hear the case.

Japan uses one of Australia's reservations as the basis for its argument against jurisdiction. Australia's declaration contains a reservation that the ICJ cannot hear cases involving the delimitation (boundary) of

maritime zones. This includes actions about the exploitation of a disputed maritime zone. Australia claims part of Antarctica in the Antarctic Treaty, which may include its adjacent ocean waters. Japan claims that the Southern Ocean Sanctuary in Antarctic waters is part of Australia's disputed Antarctic maritime zone, and therefore Australia's reservation stops the case from being heard. This is Japan's main argument.

## Australia's case

Australia claims that Japan is breaching its international obligations under the ICRW with its Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II). Australia states the ICRW has a general moratorium on commercial whaling and contains specialised moratoriums for certain species. Japan has objected to some specialised moratoriums, but is still bound by the general moratorium on commercial whaling under Art. 10(e), the moratorium on factory ships and whale catchers from killing whales under Art. 10(d) and the prohibition on commercial whaling in the Southern Ocean Sanctuary under Art. 7(b) for humpback and fin whales. Japan uses Article 8 of the ICRW as its basis for whaling, issuing special permits for what it claims is scientific research, but what Australia seeks to prove is in fact commercial whaling.

Australia asked the ICJ to declare that Japan breached international obligations using JARPA II in the Southern Ocean, especially in relation to Articles 10(e), 7(b) and 10(d). Australia also asked the ICJ to declare that JARPA II is not a scientific research program, to cease and revoke it, and to declare Japan should refrain from authorising special permits which are not issued for scientific research purposes.

## Japan's case

Japan's main argument is that the ICJ has no jurisdiction. In the alternative, it states that the ICJ should focus on Japan's activities under Article 8. If Japan's special permit JARPA II is permitted under Article 8 as scientific research, then the accusations under Articles 10(e), 10(d) and 7(b) fall apart. While Australia points to Art. 10(e) as a general moratorium on commercial whaling, the text of the section makes it clear it is a temporary suspension on commercial whaling, with the possibility that catch limits may change. Further, Japan argues that JARPA II results in scientific research, as is shown by Japan's deliberations with the ICRW Scientific

Committee, and that the lethal research conducted by JARPA II has no adverse effect on targeted species.

Japan has asked the Court to declare it has no jurisdiction to hear the case and that New Zealand's intervention therefore lapses or, in the alternative, that the claims of Australia are rejected.

## New Zealand intervention

New Zealand intervened in this case to state its views on the interpretation of Article 8 as a state party to the ICRW. Despite some concerns expressed by Japan, New Zealand was allowed to present its views to the Court.

New Zealand found that Article 8 could only permit the killing of whales under certain circumstances. First, an "objective assessment of the methodology, design and characteristics of the program" must demonstrate that killing is only for scientific research purposes. Second, killing needs to be necessary and proportionate to research objectives and must have no adverse effect on conservation stocks. Finally, the government issuing the special permit must cooperate with the Scientific Committee and the International Whaling Commission. According to New Zealand, any whaling not covered by this interpretation of Article 8 or otherwise permitted by the ICRW is prohibited.

## What happens next?

The case proceedings ended in July, and the ICJ is now considering its decision. In his article on "The Regulation of International Whaling: Will Australia v. Japan mark a Turning Point?", E. Merron suggests that Australia may have been better served seeking alternative dispute resolution mechanisms or economic sanctions against Japan with the assistance of other nations, as the ICJ has limited enforcement mechanisms and any ruling against Japan is unlikely to have much impact beyond existing recommendations of the IWC.<sup>1</sup> Stay tuned as the Court's blubbertastic decision is released. In the meantime, read *Moby-Dick* and practise your echolocation as the whale wars conclude. ■

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- 1 ICJ Press Release, No. 2010/16.
- 2 Oberthur, Sebastian "The International Convention for the regulation of Whaling: From Over-Exploitation to Total Prohibition", <http://tinyurl.com/ktpa4gg>.
- 3 ICRW legislative instrument details: <http://tinyurl.com/k7nvej6>.
- 4 <http://tinyurl.com/knpe5yx>.