

Whaling
Student Materials

- Decided by the International Court of Justice in March 2014
- Key topics: making international law (treaty interpretation); environment

Learning Objectives

- Understand and apply:
 - methods of treaty interpretation
 - timing of treaty interpretation (original versus evolutionary interpretation)
- Analyze and evaluate:
 - how different treaty interpretations can yield different outcomes
 - how states use international law to protect the environment

Background Information

In 1946, countries signed the International Convention for the Regulation of Whaling (ICRW) and created the International Whaling Committee (IWC) to oversee implementation of the treaty. After decades of lobbying by environmental groups and elaborate attempts to shape political control over the institution, the IWC voted in 1982 to end commercial whaling. However, because the original ICRW text explicitly allowed whaling “for purposes of scientific research”, the IWC allowed its members to issue Scientific Permits for continued legal whaling.¹ Japan was one of a handful of countries that consistently opposed the whaling ban. Once the ban went into effect, Japan created a scientific whaling program known as JARPA, which was subsequently expanded in 2005 under the name JARPA II.² In 2010, Australia (with the support of New Zealand) sued Japan, arguing that JARPA II violated the IWC ban on commercial whaling. Japan defended itself by arguing that JARPA II was permitted under the 1946 ICRW, as it was a whaling program that was run “for purposes of scientific research”.

¹ The IWC also allowed aboriginal groups to continue hunting whales for their subsistence.

² The Japanese Whale Research Program under Special Permit in the Antarctic (JARPA) ran from 1987 to 2005. Its successor program (JARPA II) began in 2005.

Relevant Legal Texts

International Convention for the Regulation of Whaling (1946)

Article VIII, paragraph 1

Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention ...

Majority Judgment

The Court began by summarizing the legal issue in the case, and the positions of the two litigants.

The present proceedings concern the interpretation of the International Convention for the Regulation of Whaling and the question whether special permits granted for JARPA II are for purposes of scientific research within the meaning of Article VIII, paragraph 1, of the Convention ...

Australia alleges that JARPA II is not a program for purposes of scientific research within the meaning of Article VIII of the Convention. In Australia's view, it follows from this that Japan has breached and continues to breach certain of its obligations under ... the ICRW ... Japan argues that [JARPA II] has been undertaken for purposes of scientific research and is therefore covered by the exemption provided for in Article VIII, paragraph 1, of the Convention ...

The Court begins by discussing the Preamble of the Treaty, which is often important in determining a treaty's object and purpose. It then notes the differing positions of the states about whether it should use a restrictive or expansive interpretation of Article VIII. It notes that neither approach is justified because "scientific research" doesn't clearly relate to either of the proposed object-and-purposes of the treaty.

The Court notes that Article VIII is an integral part of the Convention. It therefore has to be interpreted in light of the object and purpose of the Convention and taking into account other provisions of the Convention ... The Preamble of the ICRW indicates that the Convention pursues the purpose of ensuring the conservation of all species of whales while allowing for their sustainable exploitation. Thus, the first preambular paragraph recognizes “the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks”. In the same vein, the second paragraph of the Preamble expresses the desire “to protect all species of whales from further overfishing”, and the fifth paragraph stresses the need “to give an interval for recovery to certain species now depleted in numbers”. However, the Preamble also refers to the exploitation of whales, noting in the third paragraph that “increases in the size of whale stocks will permit increases in the number of whales which may be captured without endangering these natural resources”, and adding in the fourth paragraph that “it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress” and in the fifth that “whaling operations should be confined to those species best able to sustain exploitation”. The objectives of the ICRW are further indicated in the final paragraph of the Preamble, which states that the Contracting Parties “decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry” ...

In order to buttress their arguments concerning the interpretation of Article VIII, paragraph 1, Australia and Japan have respectively emphasized conservation and sustainable exploitation as the object and purpose of the Convention in the light of which the provision should be interpreted. According to Australia, Article VIII, paragraph 1, should be interpreted restrictively because it allows the taking of whales, thus providing an exception to the general rules of the Convention which give effect to its object and purpose of conservation. New Zealand also calls for “a restrictive rather than an expansive interpretation of the conditions in which a Contracting Government may issue a Special Permit under Article VIII”, in order not to undermine “the system of collective regulation under the Convention”. This approach is contested by Japan, which argues in particular that the power to authorize the taking of whales for purposes of scientific research should be viewed in the context of the freedom to engage in whaling enjoyed by states under customary international law.

Taking into account the Preamble and other relevant provisions of the Convention ..., the Court observes that neither a restrictive nor an expansive interpretation of Article VIII is justified. The

Court notes that programs for purposes of scientific research should foster scientific knowledge; they may pursue an aim other than either conservation or sustainable exploitation of whale stocks ...

The Court then shifts into a plain-text reading of Article VIII. It notes that for a whaling program to satisfy Article VIII, it must both include “scientific research” and be “for purposes of” that research.

In the view of the Court, the two elements of the phrase “for purposes of scientific research” are cumulative. As a result, even if a whaling program involves scientific research, the killing, taking and treating of whales pursuant to such a program does not fall within Article VIII unless these activities are “for purposes of” scientific research ...

The Court examines two features of Japan’s whaling program that caused Australia concern.

In order to ascertain whether a program's use of lethal methods is for purposes of scientific research, the Court will consider whether the elements of a program's design and implementation are reasonable in relation to its stated scientific objectives ... Australia raises two features of a program that, in its view, bear on the distinction between the grant of a special permit that authorizes whaling “for purposes of” scientific research and whaling activities that do not fit within Article VIII ...

First, Australia acknowledges that Article VIII, paragraph 2, of the Convention allows the sale of whale meat that is the by-product of whaling for purposes of scientific research ... However, Australia considers that ... the sale of that meat, can cast doubt on whether the killing, taking and treating of whales is for purposes of scientific research ...

In the Court's view, the fact that a program involves the sale of whale meat and the use of proceeds to fund research is not sufficient, taken alone, to cause a special permit to fall outside Article VIII. Other elements would have to be examined, such as the scale of a program's use of lethal sampling, which might suggest that the whaling is for purposes other than scientific research. In particular, a state party may not, in order to fund the research for which a special permit has been granted, use lethal sampling on a greater scale than is otherwise reasonable in relation to achieving the program's stated objectives.

Secondly, Australia asserts that a state's pursuit of goals that extend beyond scientific objectives would demonstrate that a special permit granted in respect of such a program does not fall within Article VIII. In Australia's view, for example, the pursuit of policy goals such as providing employment or maintaining a whaling infrastructure would indicate that the killing of whales is not for purposes of scientific research ...

The Court observes that a state often seeks to accomplish more than one goal when it pursues a particular policy. Moreover, an objective test of whether a program is for purposes of scientific research does not turn on the intentions of individual government officials, but rather on whether the design and implementation of a program are reasonable in relation to achieving the stated research objectives. Accordingly, the Court considers that whether particular government officials may have motivations that go beyond scientific research does not preclude a conclusion that a program is for purposes of scientific research within the meaning of Article VIII. At the same time, such motivations cannot justify the granting of a special permit for a program that uses lethal sampling on a larger scale than is reasonable in relation to achieving the program's stated research objectives. The research objectives alone must be sufficient to justify the program as designed and implemented ...

The Court then turns to the lethal sampling levels of JARPA II—that is, how many whales it allows to be killed. This is key to its interpretation and applications of the phrase “for purposes of”—namely, assessing *why* Japan was running this program. To assess whether JARPA II is reasonable, it compares the design of the program to its predecessor, JARPA. It notes multiple problematic aspects of the program.

The Court finds that the use of lethal sampling *per se* is not unreasonable in relation to the research objectives of JARPA II. However, as compared to JARPA, the scale of lethal sampling in JARPA II is far more extensive with regard to Antarctic minke whales, and the program includes the lethal sampling of two additional whale species. Japan states that this expansion is required by the new research objectives of JARPA II ... In the view of the Court, however, the target sample sizes in JARPA II are not reasonable in relation to achieving the program's objectives.

First, the broad objectives of JARPA and JARPA II overlap considerably. To the extent that the objectives are different, the evidence does not reveal how those differences lead to the considerable increase in the scale of lethal sampling in the JARPA II Research Plan. Secondly, the

sample sizes for fin and humpback whales are too small to provide the information that is necessary to pursue the JARPA II research objectives based on Japan's own calculations, and the program's design appears to prevent random sampling of fin whales. Thirdly, the process used to determine the sample size for minke whales lacks transparency, as the experts called by each of the Parties agreed ... Fourthly, some evidence suggests that the program could have been adjusted to achieve a far smaller sample size, and Japan does not explain why this was not done. The evidence before the Court further suggests that little attention was given to the possibility of using non-lethal research methods more extensively to achieve the JARPA II objectives and that funding considerations, rather than strictly scientific criteria, played a role in the program's design.

The Court then discussed how the program was implemented. Namely, whether and how many whales were actually killed to achieve JARPA II's scientific objectives. The Court questions how Japan could achieve its scientific objectives given that fewer whales were killed than necessary.

These problems with the design of JARPA II must also be considered in light of its implementation. First, no humpback whales have been taken, and Japan cites non-scientific reasons for this. Secondly, the take of fin whales is only a small fraction of the number that the JARPA II Research Plan prescribes. Thirdly, the actual take of minke whales has also been far lower than the annual target sample size in all but one season. Despite these gaps between the Research Plan and the program's implementation, Japan has maintained its reliance on the JARPA II research objectives—most notably, ecosystem research and the goal of constructing a model of multi-species competition—to justify both the use and extent of lethal sampling prescribed by the JARPA II Research Plan for all three species. Neither JARPA II's objectives nor its methods have been revised or adapted to take account of the actual number of whales taken. Nor has Japan explained how those research objectives remain viable given the decision to use six-year and 12-year research periods for different species, coupled with the apparent decision to abandon the lethal sampling of humpback whales entirely and to take very few fin whales. Other aspects of JARPA II also cast doubt on its characterization as a program for purposes of scientific research, such as its open-ended time frame, its limited scientific output to date, and the absence of significant co-operation between JARPA II and other related research projects.

The Court then summarized its findings and concluded that JARPA II was not excused under Article VIII of the ICRW.

Taken as a whole, the Court considers that JARPA II involves activities that can broadly be characterized as scientific research ..., but that the evidence does not establish that the program's design and implementation are reasonable in relation to achieving its stated objectives. The Court concludes that the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II are not “for purposes of scientific research” pursuant to Article VIII, paragraph 1, of the Convention ...