

## REGIONAL FOCUS & CONTROVERSIES

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# The Whaling Dispute in the South Pacific: An Australian Perspective

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*In May 2010 Australia commenced litigation against Japan in the International Court of Justice over the legality of Japanese scientific whaling in the Southern Ocean. This article considers the background to the litigation, the basis of Australia's opposition to whaling, and the grounds upon which Australia is mounting its challenge. The interpretation of the 1946 International Convention for the Regulation of Whaling and the operation of the International Whaling Commission are considered in light of the precautionary principle. The article concludes that Australia's success depends upon a broad reading of the Convention that takes into account its objects and purposes, as well as wider developments in international law. Any guidance that the International Court of Justice can provide on the modern interpretation of this now dated Convention is to be welcomed.*

### Keywords

International Convention for the Regulation of Whaling, Scientific Whaling, Japanese whaling, Southern Ocean, International Whaling Commission, Whaling Litigation

## 1. Introduction

On May 31, 2010, Australia instituted legal proceedings against Japan before the

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International Court of Justice (“ICJ”) on the question of Whaling in the Antarctic.<sup>1</sup> The litigation concerns the second phase of Japan’s Whale Research Program under Special Permit in the Antarctic (“JARPA II”).<sup>2</sup> Since Australia ended commercial whaling in the late 1970s, it has actively campaigned to put an end to the practice internationally. Australia opposes whaling on a number of grounds and has been dismayed by the escalation of whaling under scientific permit since the introduction of the moratorium in 1982. Australia has worked extensively through the International Whaling Commission (“IWC”) to pursue its conservation agenda and in particular to promote the use of non-lethal techniques for scientific research while seeking an end to lethal scientific research. As diplomatic efforts have so far failed to have any impact on the conduct of JARPA,<sup>3</sup> Australia has instituted proceedings in the ICJ to enforce various international legal obligations which, in Australia’s view, are not being met by the continuance of the research program.

The Australian arguments may broadly be divided into two: those based on the 1946 International Convention for the Regulation of Whaling (“ICRW”),<sup>4</sup> and those based upon other international environmental law agreements. This paper will focus upon the former of these two lines of argument. In relation to the ICRW, the application argues as follows. First, Japan is in breach of its obligation under Paragraph 10(e) of the ICRW Schedule “to observe in good faith the zero catch limit in relation to the killing of whales for commercial purposes.” Second, Japan is in breach of its obligation under Paragraph 7(b) of the ICRW Schedule “to act in good faith to refrain from undertaking commercial whaling of humpback and fin whales in the Southern Ocean Sanctuary.” Third, the JARPA II program “cannot be justified” under the scientific whaling provision in Article VIII of the ICRW.<sup>5</sup> In addition, the application argues that Japan is in breach of multiple obligations under the Convention on International Trade in Endangered

<sup>1</sup> See Application Instituting Proceedings (hereinafter Australian Application), available at [http://www.haguejusticeportal.net/Docs/Court%20Documents/ICJ/Australia%20against%20Japan\\_Applications%20instituting%20proceedings.pdf](http://www.haguejusticeportal.net/Docs/Court%20Documents/ICJ/Australia%20against%20Japan_Applications%20instituting%20proceedings.pdf) (last visited on Oct. 1, 2011).

<sup>2</sup> See JARPA II Research Plan, available at [http://www.icrwhale.org/JARPA\\_IIResearchPlan.htm](http://www.icrwhale.org/JARPA_IIResearchPlan.htm) (last visited on Oct. 1, 2011). The case concerns JARPA II, Japan’s Antarctic research program, although the application notes that in Australia’s opinion, the northern hemisphere JARPA II program raises similar concerns and is also in breach of Japan’s international obligations. See Australian Application, para. 34.

<sup>3</sup> Within the IWC, both Japan and Australia have participated in the discussions of the Small Working Group on the Future of the IWC in 2008. See IWC, Future of the IWC: Meeting of the Small Working Group on the Future of the IWC and associated documents, available at <http://www.iwcoffice.org/commission/future.htm> (last visited on Oct. 1, 2011). Australia has also appointed a “Special Envoy on Whale Conservation whose role is to engage with Japan ... with a view to progressing Australia’s position on Japan’s special permit whaling programs.” See Australian Application, para. 33.

<sup>4</sup> The International Convention for the Regulation of Whaling of 1946, entered into force on Nov. 10, 1948.

<sup>5</sup> See Australian Application paras. 36-37.