

**IN THE INTERNATIONAL COURT OF JUSTICE
THE COMMONWEALTH OF AUSTRALIA, APPLICANT V. JAPAN, RESPONDENT
MEMORIAL OF THE COMMONWEALTH OF AUSTRALIA**

**COMES NOW the Commonwealth of Australia and for their Memorial
Court states the following:**

Statement of facts

1. After the 1986 moratorium, Japan issued itself a permit under which it caught a small number of whales each year for scientific study. This program was known as JARPA I. It started in 1987 and lasted until 2005. When JARPA I expired, Japan announced another round called JARPA II. This phase, however, increased the sample size of the whales taken under the program by 10 percent. Furthermore, JARPA II expanded the the study to include humpback and fin whales.

Jurisdictional Statements and Arguments

1. Article 36, paragraph 2 of the ICJ's statute says
 - a. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
 - a. the interpretation of a treaty;
 - b. any question of international law;
 - c. the existence of any fact which, if established, would constitute a breach of an international obligation;
 - d. the nature or extent of the reparation to be made for the breach of an international obligation.

Australia believes that the Court has jurisdiction over this dispute by reason of the respective declarations made by Australian and Japan under Article 36(2) of the Statute of the Court.

A statement of law (what treaties, customs, or laws apply?)

1. Article VIII(1) of the International Convention for the Regulation of Whaling (ICRW) states
 - a. 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. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.

- b. Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.
 - c. Each Contracting Government shall transmit to such body as may be designated by the Commission, in so far as practicable, and at intervals of not more than one year, scientific information available to that Government with respect to whales and whaling, including the results of research conducted pursuant to paragraph 1 of this Article and to Article IV.
 - d. Recognizing that continuous collection and analysis of biological data in connection with the operations of factory ships and land stations are indispensable to sound and constructive management of the whale fisheries, the Contracting Governments will take all practicable measures to obtain such data.
2. The 1986 moratorium on whaling for commercial purposes
- Paragraph 10(e) of the Schedule to the ICRW specifies that
- a. Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero.
3. Paragraph 7(b) of the Schedule to the ICRW says that:
- In accordance with Article V(1)(c) of the Convention, commercial whaling, whether by pelagic operations or from land stations, is prohibited in a region designated as the Southern Ocean Sanctuary. This Sanctuary comprises the waters of the Southern Hemisphere southwards of the following line: starting from 40 degrees S, 50 degrees W; thence due east to 20 degrees E; thence due south to 55 degrees S; thence due east to 130 degrees E; thence due north to 40 degrees S; thence due east to 130 degrees W; thence due south to 60 degrees S; thence due east to 50 degrees W; thence due north to the point of beginning. This prohibition applies irrespective of the conservation status of baleen and toothed whale stocks in this Sanctuary, as may from time to time be determined by the Commission.
4. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (ban removing from the sea specimens threatened with extinction absent exceptional circumstances)
5. The factory ship moratorium

A detailed argument section, which discusses how the law and facts apply to the merits of the case(how do the laws and facts support your case?)

- 1. Article VIII of the ICRW allows 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. The treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. The criteria under this Article for a treatment of whales to be of scientific purposes are:
 - (1) Defined and achievable objectives that aim to contribute knowledge that is important to the conservation and management of whale stocks;
 - (2) Appropriate methods that are likely to achieve the stated objectives, including:
 - (a) lethal methods only where the objectives of the research cannot be achieved by any other means (for example, by the analysis of existing data and/or the use of non-lethal research techniques);

- (b) setting sample sizes using accepted statistical methodology; and
- (c) linking mathematical and statistical models to data consistently;
- (3) Periodic review of research proposals and results and adjustment in response to such review; and
- (4) The research is designed to avoid adverse effects on the stocks being Studied.

JARPA II fails to satisfy any of the four essential characteristics of a program for purposes of scientific research. In fact, Japan has “retro-fitted” a purported “scientific” research program to justify its true purpose of continuing whaling on a permanent basis.⁵⁸⁷ Japan has commenced with a pre-determined method (killing) without taking the necessary steps of defining an achievable scientific objective or identifying the most appropriate methods to achieve that objective. Instead, Japan has devised vague purported “scientific” objectives to match its pre-determined purpose of continuing whaling. There is no identifiable endpoint at which these objectives may be achieved; instead JARPA II provides for the collection of data through whaling on a permanent basis. The goal of continuing whaling on a permanent basis also explains why Japan fails to adjust its program in response to periodic review, and why it persists with its “research” despite the manifest paucity of useful and reliable results, and sustained critique from independent members of the scientific community. Finally, JARPA II is not designed to avoid adverse effects on the minke, fin and humpback whale stocks targeted.

2. Japan’s breach of commercial whaling moratorium:

Under JARPA II Japan killed a reported total of 3,264 minke whales and 19 fin whales in the six whaling seasons from 2005/06 to 2010/11. This killing is not for scientific purposes. Moreover, JARPA II is clearly not aboriginal subsistence whaling. Given the ICRW regime for whaling is comprehensive, the killing is therefore “for commercial purposes”, rendering Japan in breach of the moratorium. This fact indicates that Japan has violated paragraph 10(e) of the schedule to the ICRW which says that:

i. Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero.

2. According to paragraph 7(b) of the Schedule to the ICRW:

a. In accordance with Article V(1)(c) of the Convention, commercial whaling, whether by pelagic operations or from land stations, is prohibited in a region designated as the Southern Ocean Sanctuary. This Sanctuary comprises the waters of the Southern Hemisphere southwards of the following line: starting from 40 degrees S, 50 degrees W; thence due east to 20 degrees E; thence due south to 55 degrees S; thence due east to 130 degrees E; thence due north to 40 degrees S; thence due east to 130 degrees W; thence due south to 60 degrees S; thence due east to 50 degrees W; thence due north to the point of beginning. This prohibition applies irrespective of the conservation status of baleen and toothed whale stocks in this Sanctuary, as may from time to time be determined by the Commission.

b. Japan’s expanded activities on fin and humpback whales are prohibited from the Convention. Thus, the prohibition under paragraph 7(e) is the same as the prohibition under paragraph 10(b). As a result, the treatment of Japan towards such species is banned under the Convention.

3. The Convention on International Trade (CITES):

The Parties to CITES describe an activity as having a commercial purpose if it “is directed toward resale, exchange, provision of a service or any other form of economic use or benefit”. In the Oil Platforms Preliminary Objection Judgment, the Court has considered the term “commerce” to include “not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce”. Also, in the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), the Court regarded certain activities precedent and antecedent to purchase and sale as taking place “for the purposes of commerce”

a. JARPA II has a “commercial” for-profit nature that is revealed through its involvement and direction towards production sale and distribution of whale-meat. The “scientific” nature of whaling through JARPA is actually used for the supply and demand that produces whale meat with the sales sustaining ongoing operations and maintain the economic security or participating industries. Whale meat is processed on board the Nisshin-Maru and then, pursuant to Government regulations and arrangements between the Institute of Cetacean Research and its Sales Agents, is on-sold and distributed to the market and to other consumers. Japan characterizes its distribution of whale meat not in regards to scientific purposes but as being directed towards public interest and commercial purposes including wholesale and local markets, restaurants and other consumers and distributors.

5. The factory ship moratorium

a. Paragraph 10(d) of the Schedule, inserted in 1979, establishes the factory ship moratorium: Notwithstanding the other provisions of paragraph 10 there shall be a moratorium on the taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships. This moratorium applies to sperm whales, killer whales and baleen whales, except minke whales.

b. Fin and humpback whales, two of the targeted whale species under JARPA II, are both in fact species of baleen whales which the factory ship moratorium applies to. Japan has acquired 19 fin whales under JARPA II and has also authorized the acquirement of humpback whales under JARPA II. Therefore JARPA II breaches the factory ship moratorium with regards to the “taking, killing or treating” of humpback and fin whales “factory ships or whale catchers”. Furthermore, the term “factory ship” is defined by the ICRW as “a ship in which or on which whales are treated either wholly or in part”. Japan’s Nisshin-Maru which is described as a research vessel by JARPA II is indeed a “factory ship” by convention. Whales caught under JARPA II are processed on the Nisshin-Maru including being cut up into whale meat products for sale and consumption.

A summary and prayer for relief (What do you want the Court to do?)

1. Australia requests that the Court declare that Japan is in breach of its international obligations in implementing the JARPA II program in the Southern Ocean.
2. Australia urges the Court to order Japan to cease the implementation of JARPA II, and
3. Revoke any authorizations, permits or licenses allowing the activities which are subject to the application to be undertaken, and
4. Provide assurances and guarantees that it will not take any further action under the JARPA II, or any other similar program, until such program has been brought into conformity with Japan’s obligations under international law.