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2. TREATY INTERPRETATION: THE JUDICIAL FUNCTION BETWEEN THE APPRECIATION OF STATES PARTIES AND OF INSTITUTIONAL BODIES

Judgment of 31 March 2014, Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)

The dispute between Australia and Japan concerned the conformity of a Japanese research programme (JARPA II) with the 1946 International Convention for the Regulation of Whaling. According to the Schedule, which forms an integral part of the Convention, States Parties to the Convention are under the obligation to respect the moratorium on the catching of whales for commercial purposes, the prohibition of commercial whaling in the Southern Ocean Sanctuary, and the moratorium relating to factory ships. However, Article VIII of the Convention provides that States Parties can grant to their nationals special permits «to kill, take and treat whales for purposes of scientific research». Thus, the substantive obligations under the Schedule do not apply to scientific research programmes falling under Article VIII of the Convention. On the other hand, paragraph 30 of the Schedule imposes procedural obligations on the State availing itself of the possibility to grant special permits under Article VIII.

Australia alleged that JARPA II was not a scientific programme within the meaning of Article VIII and therefore that Japan violated both substantive and procedural obligations under the Convention. Japan replied that JARPA II was a programme undertaken for purposes of scientific research; that it was covered by the exemption provided under Article VIII of the Convention; and that it was duly submitted for review to the competent institutional bodies according to paragraph 30 of the Schedule.

The Court found that «the special permits granted by Japan in connection with JARPA II do not fall within the provisions of Article VIII, paragraph 1, of the International Convention for the Regulation of Whaling» and therefore that Japan has not acted in conformity with its substantive «obligations under paragraph 10 (e)», «paragraph 10 (d)», and «paragraph 7 (b) of the Schedule» (par. 247). By contrast, the Court found that Japan had complied with its procedural obligations «under paragraph 30 of the Schedule».

It is apparent that the dispute essentially raised issues of treaty interpretation. The following remarks will focus on a particular aspect, namely, the role that the unilateral

position taken by the different actors involved in the conclusion or the implementation of a treaty can play in the interpretation of its provisions.

1. The Court's jurisdiction

As a preliminary point, the Court found that it had jurisdiction to entertain Australia's application according to the declarations made by both parties under Article 36, para. 2, of the Statute, and that the dispute between Australia and Japan did not fall within the reservation made by Australia. Australia's reservation excludes from the Court's jurisdiction «any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation» (*idem*, para. 31). The Court held that the reservation only concerned situations of maritime delimitation and therefore it did not apply to the dispute before the Court (*idem*, para. 39-40).

The decision on the Court's jurisdiction did not require the interpretation of a treaty but that of a unilateral declaration under Article 36, para. 2, of the Statute. However, previous cases had already raised the question of the possible reliance on the rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties when the interpretation of unilateral declarations is at stake. The decision in *Whaling in the Antarctic* seems to mark a step forward in the evolution of the Court's case law on the matter.

While in *Nicaragua* the Court simply stated that «[unilateral declarations] should be treated, by analogy, according to the law of treaties» (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, *ICJ Reports* 1984, para. 63), it subsequently adopted a more rigorous approach. Notably, in 1998 it considered that «the régime [for unilateral] declarations of acceptance of compulsory jurisdiction […] *is distinct* from the régime envisaged for treaties by the Vienna Convention» (*Land and maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, *I.C.J. Reports* 1998, para. 30, emphasis added).

This strict separation between the law of treaties and the regime applicable to unilateral acts was nuanced a few months later. The Court confirmed that «the régime relating to the interpretation of declarations made under Article 36 of the Statute *is not identical* with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties» (*Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Competence, *I.C.J. Reports* 1998, para. 46, emphasis added). It also specified that «the provisions of that Convention *may only apply analogously to the extent compatible* with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction» (*idem*, emphasis added), gradually reducing the gap between treaties and unilateral acts in terms of the applicable rules on interpretation.

In *Whaling in the Antarctic* this gap has almost disappeared. As the Court emphasized, it is true that, in principle, the intention of the author of a unilateral act should be accorded a special weight in the interpretation of that act (para. 36 of the Judgment). However, the Court omitted to refer to the famous statement of the Permanent Court according to which: «it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it» (PCIJ, *Jaworzina*, Advisory Opinion No. 8, 6 December 1923, *Series B*, p. 37).

When interpreting Australia's reservation the Court adopted a strictly «objective» method of interpretation; the intention of the author of the declaration was used merely to confirm the meaning resulting from the text of the unilateral act. In particular, the «intention» of the author taken into account by the Court was that expressed at the time of the adoption of the unilateral act and not the position taken subsequently during the proceedings before the Court (para. 38 of the Judgment).

In addition, the Court carefully avoided any reference to the Vienna Convention or to the fact that its provisions can be relied upon *only* under certain circumstances. The Court seems simply to have applied the objective method of treaty interpretation as codified in article 31 of the VCLT. As a result, the Court has marginalized the role that the intention of the author of the declaration could have played.

And its approach is perfectly understandable. Suppose the author of a unilateral declaration advances an interpretation of its declaration aimed at depriving the Court of its jurisdiction. If a primary role were accorded to this «authoritative interpretation», the risk would be to make the interpretation of unilateral declarations dependent on the position pleaded by the party, and, in the end, to undermine seriously the power of the Court to determine its own competence.

2. The interpretation of Article VIII

Turning to the merits of the case and the interpretation of Article VIII of the 1946 Convention, the Court had to take into account Japan's claim to possess broad discretion in determining whether JARPA II was a scientific research programme, on the one hand, and the position taken by institutional bodies on the doubtful conformity of JARPA II with Article VIII, on the other.

a) States' Margin of Appreciation

Under Article VIII, special permits are granted «subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit». Japan inferred from that wording that the State granting special permits has a «margin of appreciation» in evaluating whether a programme is intended for purposes of scientific research and therefore whether it falls within the scope of Article VIII (para. 59 of the Judgment). The Court rejected this approach: «whether the killing, taking and treating of whales pursuant to a requested special permit is for purposes of scientific research cannot depend simply on that State's perception» (*idem*, para. 61).

In interpreting Article VIII, the Court separated two issues. The first question is whether «the programme under which these activities occur involves scientific research». The second is whether «the killing, taking and treating of whales is "for purposes of" scientific research» (*idem*, para. 67).

As to the first question, the Court did not «consider it necessary to […] offer a general definition of "scientific research"» (*idem*, para. 86). But in practice, and without using the expression «margin of appreciation», the Court accepted that the State has a certain latitude in defining the purposes of its programmes and in identifying those intended to pursue objectives of scientific research. In other words, JARPA II was regarded as a scientific research programme.

On the other hand, the State is not free to determine whether its conduct is in conformity with the purposes of scientific research. It is for the Court to establish whether

the design and implementation of JARPA II are reasonable in relation to achieving the programme's stated research objectives. Therefore, the second prong of the two-fold analysis – i.e., establishing whether JARPA actually pursued objectives of scientific research, and more generally whether Japan acted in conformity with the substantive obligations of Article VIII – falls under the exclusive control of the Court. In this respect the Court adopted a «reasonableness test» (*idem*, paras. 67, 88, and 127) which is very similar to the proportionality test adopted by other international judges, such as the ECtHR.

As a result, the Court confined the role of the contracting State to setting the objectives that it wants to achieve (*idem*, paras. 113-118) and it maintained an exclusive (judicial) control on the question of whether that State had in fact pursued such objectives, according to an «objective» standard of review.

The conclusion of the Court, after a detailed discussion of the technical aspects of the Japanese programme, was that, when compared to the stated research objectives, JARPA II «involves activities that can broadly be characterized as scientific research (see paragraph 127 above), but […] the evidence does not establish that the programme'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 » (*idem*, para. 227). This means that Japan breached its substantive obligations under the Convention (*idem*, paras. 230-233).

b) The Position of Institutional Bodies

A quick reading of the judgment might give the wrong impression that JARPA was «approved» by the institutional framework established by the 1946 Convention, and that, to a certain extent, the Court's decision is at variance with the «acceptance» of the Japanese programme by the competent bodies, that is, the International Whaling Commission (IWC) and its Scientific Committee.

While the final part of the judgment dealing with Japan's procedural obligations under paragraph 30 of the Schedule makes explicit reference to the criticism raised by a group of scientists inside the Scientific Committee (*idem*, para. 241), the Court did not take into account the position adopted by the IWC when examining the conformity of Japan's conduct with the substantive obligations arising under the Convention.

With respect to procedural obligations, paragraph 30 provides that States parties must submit the «proposed special permits before they are issued and in sufficient time to allow the Scientific Committee to review and comment on them». As specified by the Court, the «Scientific Committee has not been empowered to make any binding assessment in this regard. It communicates to the Commission its views on programmes for scientific research, including the views of individual members, in the form of reports or recommendations. However, when there is a division of opinion, the Committee generally refrains from formally adopting the majority view» (*idem*, para. 47). This means that the timely submission by Japan of the proposed special permits to an institutional body that has no power to approve or to authorise the grant of such permits is sufficient to discharge Japan of its procedural obligations under paragraph 30. And the criticism of some of the Scientific Committee members (see in particular *The Journal of Cetacean Research and*

Management, 8 (Supp.) 2006, p. 48-52 and *The Journal of Cetacean Research and Management*, 10 (Supp.) 2008, p. 58-61) could not alter such a conclusion (*idem*, para. 241).

Interestingly enough, the Court notes in this respect that «the implementation of JARPA II differs in significant respects from the original design» and that «[u]nder such circumstances, consideration by a State party of revising the original design of the programme for review would demonstrate co-operation by a State party with the Scientific Committee» (*idem*, para. 240). Thus, the Court seems to suggest that a violation of Japan's procedural obligations or at least of its «duty of co-operation with the IWC and its Scientific Committee» (*idem*) might have been found if the Scientific Committee had required the submission of additional information concerning the implementation of JARPA II.

With respect to substantive obligations, the part of the judgment dedicated to the interpretation of Article VIII surprisingly makes no mention of a number of resolutions adopted by the IWC that expressed strong criticism of Japan's «research» programme. These are in particular IWC resolutions 2005-1 and 2007-1 where the Commission respectively «*strongly urges* the Government of Japan to withdraw its JARPA II proposal or to revise it so that any information needed to meet the stated objectives of the proposal is obtained using non-lethal means», and «*further calls upon* the Government of Japan to suspend indefinitely the lethal aspects of JARPA II conducted within the Southern Ocean Whale Sanctuary» (for a discussion, see Memorial of Australia, paras. 5.24-5.25).

The Court correctly points out that the IWC has no power to adopt acts binding on the States parties to the Convention. It can adopt amendments to the Schedule but the «amendment does not become effective in respect of th[e] State» presenting an objection (*idem*, para. 45). In the end the abovementioned resolutions clearly have no binding force, and one might consider that the absence of any explicit reference to them is balanced by the fact that the conclusion reached by the Court corresponds to the position of the IWC.

Yet the fact that the judgment includes only an indirect reference to the position of the IWC may be questionable. The Court refused to take into account «many» unspecified «IWC resolutions […] adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan» as elements relevant to the interpretation of Article VIII (*idem*, para. 83). This is because the Court has not regarded such instruments «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» (*idem*).

We may share the view that IWC resolutions adopted by majority vote cannot be regarded as agreements between *all the States parties* to the 1946 Convention or as subsequent practice in the application of the Convention which «establishes the *agreement of the parties* regarding its interpretation». What is less clear is why the Court did not take into account the relevant IWC resolutions at least as an expression of the official position of the supervisory body established by the Convention and therefore as «subsequent practice» *of the organization*, as it did in previous opinions concerning the United Nations (see e.g. among others *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, *I.C.J. Reports* 2010, para. 94). Along with some explanations recently put forward (J. Arato, «Subsequent Practice in the Whaling Case, and What the ICJ Implies about Treaty Interpretation in International Organizations», www.ejiltalk.org/subsequent-practice-in-the-whaling-case-and-what-the-icj-implies-about-

treaty-interpretation-in-international-organizations/#more-10605), the peculiar feature of the *Whaling in the Antarctic* case possibly lies in the fact that the Court had to interpret the content of treaty obligations applicable to a *typical bilateral inter-state relationship* and not obligations concerning the functioning of the institutional framework created by the treaty. The *obiter* reference to the duty of co-operation shows that, with respect to obligations owed by contracting States towards institutional bodies, the Court might have taken into account the position expressed by such bodies in the interpretation of treaty commitments. More generally, the decision of the Court confirms that treaty interpretation essentially rests on objective methods as well as objective standards of review and that a departure from that general rule is justified only under particular circumstances.

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