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# *Proportionality and Margin of Appreciation in the Whaling Case: Reconciling Antithetical Doctrines?*

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## **Abstract**

*In its decision on the Whaling in the Antarctic case, the International Court of Justice used a sophisticated methodology for assessing the legality of a whaling program allegedly designed to pursue purposes of scientific research. Based on the combination of two instruments – margin of appreciation and proportionality review – this methodology ultimately enabled the Court to reconcile apparently divergent needs: to grant a measure of discretion to states in determining their domestic policy requirements and to exert an international control over discretionary powers. From a theoretical viewpoint, this approach can have far-reaching implications and contribute to untie some still unresolved knots of the proportionality doctrine.*

In a quite enigmatic passage in the *Whaling in the Antarctic* decision, the International Court of Justice (ICJ) interpreted the first part of Article VIII, paragraph 1, of the International Convention for the Regulation of Whaling Convention), which allows the states parties to grant a special permit to kill, take and treat whales ‘for purposes of scientific research’.<sup>1</sup> To interpret these five words, the Court used an analytical method. It first interpreted the notion of ‘scientific research’, and then it passed on to interpret the notion ‘for purposes of’. Ultimately, the Court found that the conduct of Japan pursuant to JARPA II, Japan’s whaling program in the Southern ocean, was not consistent with the Whaling Convention and could not be justified under the exception provided by Article VIII, paragraph 1.

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<sup>1</sup> *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, 31 March 2014, ICJ Reports (2014) 226. International Convention for the Regulation of Whaling (Whaling Convention) 1946, 161 UNTS 72.

## 1 Analytical Interpretation and a Twofold Standard of Review

This analytical approach was aimed to match the strategic lines of Japan's defence. In the course of the proceedings, Japan had strenuously claimed its exclusive competence to issue a special permit to kill, take and treat whales for the purposes of scientific research under Article VIII. This competence was allegedly based on the existence of a 'margin of appreciation'. According to Japan, this doctrine was recognized by every state party to the Convention as the power to determine the scope of the scientific research exception enshrined in Article VIII.<sup>2</sup>

The ICJ did not accept this claim. In a succinct finding, it held that the determination of the terms 'for purposes of scientific research' was part of the interpretation of Article VIII of the Whaling Convention and, therefore, could not be left, in its entirety, to the unilateral determination of one of its parties. In paragraph 61, it stated:

The Court considers that Article VIII gives discretion to a State party to the ICRW to reject the request for a special permit or to specify the conditions under which a permit will be granted. However, 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.

This passage has a central role in the chain of arguments that led to the decision. It is aimed at dismissing the idea that the Whaling Convention granted to its parties the unfettered discretion to determine unilaterally the scope of the scientific research exception. However, while clarifying that the determination of what is necessary and proper for the purposes of scientific research does not depend entirely on the 'subjective perception' of a state, the Court did not identify the appropriate standard for assessing the legality of Japan's conduct.

This standard emerges from paragraph 67, where the ICJ expounded the program of action along which it unfolded its subsequent reasoning:

When reviewing the grant of a special permit authorizing the killing, taking and treating of whales, the Court will assess, first, whether the programme under which these activities occur involves scientific research. Secondly, the Court will consider if the killing, taking and treating of whales is 'for purposes of' scientific research by examining whether, in the use of lethal methods, the programme's design and implementation are reasonable in relation to achieving its stated objectives. This standard of review is an objective one.

These two passages seem to indicate the existence of a double standard of review that is to be applied distinctly to two distinct issues: whether 'the program under which these activities occur involves scientific research' and whether 'the program's design and implementation are reasonable in achieving its stated objectives'.

The difference between the two standards relates to the intensity of review. A looser standard was used by the ICJ to determine the content and scope of the notion of scientific research, which 'cannot depend simply on a State's perception'. A stricter standard was used instead to review whether the activities carried out by Japan were reasonably related to their stated objectives, namely for the purposes of scientific

<sup>2</sup> *Whaling in the Antarctic*, *supra* note 1, paras 59–60.

research. The different intensity of these two standards of review was upheld by the reading of the subsequent parts of the decision. With regard to the notion of 'scientific research', the Court seems to have used a loose standard of plausibility. While maintaining that this notion could not entirely depend on the unilateral determination of a state, it abstained from using sophisticated techniques to interpret it. Quite the contrary, after a lengthy analysis of the positions of the parties to the proceedings, it came to the conclusion that it was not necessary 'to offer a general definition' of that notion.<sup>3</sup> This conclusion paved the way for the qualification of JARPA II as a 'scientific research' project. Absent a uniform meaning of this notion at the international law level, the mere existence of elements of scientific research in the programme – a very faint link indeed – was sufficient for the Court to avoid superimposing its own view on that of the acting state.

The second standard is the much stricter standard of proportionality, which emerges from the passages in which the ICJ engaged in a punctilious interpretation of the terms 'for purposes of'. According to the Court, the assessment of whether the elements of a programme's design and implementation are reasonable to achieve its scientific research objectives required a close consideration of the various elements of the programme, including 'decisions regarding the use of lethal methods; the scale of the programme's use of lethal sampling; the methodology used to select sample sizes; a comparison of the target sample sizes and the actual take; the time frame associated with a programme; the programme's scientific output; and the degree to which a programme co-ordinates its activities with related research projects'.<sup>4</sup>

The closing, enlightening passage of this part of the decision contains a magisterial depiction of the difference between a subjective and an objective test:

An objective test of whether a programme 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 programme 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 programme 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 programme that uses lethal sampling on a larger scale than is reasonable in relation to achieving the programme's stated research objectives. The research objectives alone must be sufficient to justify the programme as designed and implemented.<sup>5</sup>

Having clarified the difference between a subjective test and an objective test, this reasoning proceeded inexorably to its final outcome. The ICJ concluded that the JARPA II programme could fall within the scope of the notion of 'scientific research' under Article VIII of the Whaling Convention; nonetheless, by virtue of 'its design and implementation', it could not be considered 'reasonable in achieving its stated scientific research objectives'.<sup>6</sup>

<sup>3</sup> *Ibid.*, in particular, para. 86.

<sup>4</sup> *Ibid.*, para. 88.

<sup>5</sup> *Ibid.*, para. 97.

<sup>6</sup> *Ibid.*, para. 227.

This twofold conclusion raises a number of issues. Why has the analysis of the scientific research exception been split into two distinct assessments? Did the qualification of JARPA II as a ‘scientific research’ project amount to a silent application of the margin of appreciation doctrine? Does the interpretation of the notion ‘for purposes of’ amount to an assessment of proportionality? And, in the case of positive answers to the two previous questions, how should one reconcile the doctrine of the margin of appreciation with the doctrine of proportionality? How, in other words, should one reconcile a doctrine aimed at granting a measure of discretion to states in implementing their international obligations, such as the margin of appreciation doctrine, with a doctrine whose *raison d’être* seems precisely to rely on the need to curtail the margin of appreciation of states and to impose an international supervision of the exercise of discretionary powers?

Even if not engaging in a close discussion of these two doctrines, which has provided the subject for an abundant flow of scholarly inquiries, a study of the *Whaling in the Antarctic* decision may nonetheless provide for an opportunity to observe how they interrelate in a particular case. The philosophical implications of this analysis, which touch upon more general conceptions about international law and about the limits to sovereign powers, fall well beyond the limited scope of the present contribution.<sup>7</sup>

## 2 Is There a Margin of Appreciation Doctrine?

Often invoked but rarely applied, at least outside specific contexts, the very existence of a margin of appreciation doctrine appears highly controversial.<sup>8</sup> Even logically, it is not easy to admit that states have a measure of discretion about how to implement their international obligations. In the general theory of law, the notion of obligation is precisely aimed to curtail the discretion of their addressees. If one remained in this quite formal conceptual perspective, there would be little space, if any, for a margin of appreciation doctrine. There is no need to develop a new legal doctrine to contend that states can freely act outside the scope of their international obligation.

Apparently, this argument was used by the ICJ in *Oil Platforms*. In response to a claim of the United States, who argued that ‘(a) measure of discretion should be afforded to a party’s good faith application of measures to protect its essential security interests’.<sup>9</sup>

<sup>7</sup> Interesting pages about the relations between margin of appreciation and proportionality, as ‘techniques’ of global constitutionalism, have been written by Klabbers, ‘Setting the Scene’, in J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law* (2009) 32. See also Cannizzaro and Bonafè, ‘Beyond the Archetypes of Modern Legal Thought: Appraising Old and New Forms of Interaction between Legal Orders’, in M. Maduro, K. Tuori and S. Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (2014) 78.

<sup>8</sup> For diverse views, see Benvenisti, ‘Margin of Appreciation: Consensus and Universal Standards’, 31 *New York University Journal of International Law and Politics* (1998) 843; Shany, ‘Toward a General Margin of Appreciation Doctrine in International Law?’, 16 *European Journal of International Law* (2006) 907; A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (2012); Cot, ‘Margin of Appreciation’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2013) 1012.

<sup>9</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, 6 November 2003, ICJ Reports (2003) 161.

The ICJ said: 'the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any 'measure of discretion'<sup>10</sup>.

At first sight, this passage appears to be radically incompatible with the very idea of the margin of appreciation doctrine. A closer analysis suggests, however, a more cautious assessment. In *Oil Platforms*, the ICJ only considered that the existence of a strict international standard of necessity has the effect of ruling out every margin of appreciation of individual states to assess the conditions for resorting to self-defence. One can hardly disagree with the ICJ. Once it had admitted that international law has developed a strict and objective standard of necessity, the conclusion would inevitably ensue that states do not have any measure of discretion in deciding whether the conditions to resort to self-defence are met. This logical conclusion, however, leaves unprejudiced the question of whether states enjoy a larger discretion in the implementation of international norms where a looser international standard applies.

Properly contextualized, *Oil Platforms* seems thus to provide for a clear methodological direction that may be useful to understand the factual and legal premises of the margin of appreciation doctrine.

First, it indicates that a margin of appreciation cannot be determined in the abstract but merely constitutes the possible consequence of the application of the normative standards that assist in the implementation of international rules. In other words, the margin of appreciation doctrine cannot be conceived as a doctrine on judicial adjudication, which is applicable whenever the need arises for flexibility and tolerance on the part of the judiciary. Quite the contrary, it should be considered to be a normative tool that governs the manoeuvring of a state in discharging its international obligations.

Second, it seems to indicate that the margin of appreciation doctrine applies to the secondary level of the normative standards assisting the implementation of primary rules. Consequently, it has little to do with other apparently analogous notions that help to determine the contents of the primary obligation, such as the notion of obligations of result, obligations to negotiate, and the like. The use of the formula of the margin of appreciation in these other contexts is not much more than a convoluted means to indicate the indeterminacy of the content of primary international rules.

A quick glance at the international case law can uphold this conclusion. Even leaving aside the abundant case law developed within specialized sub-systems such as the European Court of Human Rights and the EU legal order, international courts and tribunals have, with relative frequency, recognized that states are granted a certain discretion in selecting and applying public policy measures susceptible to interfere with the implementation of international obligations.

<sup>10</sup> *Ibid.*, para. 73.

### 3 Margin of Appreciation and States' Measures of Public Policy

The theoretical paradigm of this kind of situation can be drawn from a coherent line of cases, distributed along the entire case law of the Permanent Court of International Justice (PCIJ) and of the ICJ.

In *Oscar Chinn*, the PCIJ found that Belgium was empowered to reduce the transport tariffs on the River Congo and, consequently, to produce an adverse effect on the right to navigate and on the commerce of a British company in order to assist trade at a time of economic difficulties.<sup>11</sup> After describing the deep impact of the economic depression and the importance of the fluvial transportation for the economy of the colony, the Court said: 'The Belgian Government was the sole judge of this critical situation and of the remedies that it called for, subject of course to its duty of respecting its international obligations.'<sup>12</sup> This ancient case seems to denote that the discretion of Belgium as 'sole judges of ... critical situation(s)' occurring within their territory and 'of the remedies ... called for' was not absolute but that it ought to be exercised in compliance with Belgium's international obligations. Once it ascertained that the Belgian measures adopted to assist trade in a time of crisis were reasonably related to the exceptional character of the situation, the Court dismissed the British claim.<sup>13</sup>

This paradigm was applied and further refined in the *Corfu Channel* case, where the ICJ found that a state has the power to regulate the passage of warships through a strait for the purpose of security and public order but not to prohibit it.<sup>14</sup> Although it did not unveil every single step of its reasoning, the Court seems to have considered that the coastal states had the power to claim a reasonable degree of security and, to this purpose, to determine the modalities of the passage of warship. It made this decision, however, upon the conditions that these modalities did not impair the rights of passage granted by international law.<sup>15</sup>

An even more liberal approach was taken by the ICJ in *Elettronica Sicula S.P.A.*<sup>16</sup> Italian local authorities had taken control of certain plants owned by US companies, adducing the reason of public policy. Subsequently, the act of requisition was found by Italian judges to be unlawful under Italian law and therefore null and void. The USA then asked the ICJ to find that Italy's conduct was unlawful under a bilateral treaty aimed at protecting the investments of citizens of one country against the arbitrary or discriminating measures of the other. In spite of the declared unlawfulness of the requisition under Italian law, the ICJ found that such a measure did not

<sup>11</sup> *Oscar Chinn Case (Britain v. Belgium)*, 1934 PCIJ Series A/B 63, No. 63.

<sup>12</sup> *Ibid.*, at 79.

<sup>13</sup> *Ibid.*, at 86.

<sup>14</sup> *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, 9 April 1949, ICJ Reports (1949) 4, at 29.

<sup>15</sup> For a general statement, see *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment, 27 August 1952, ICJ Reports (1952) 170: '[T]he power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith.'

<sup>16</sup> *Elettronica Sicula S.P.A. (ELSI), United States of America v. Italy*, Judgment, 20 June 1989, ICJ Reports (1989) 15.

amount to a breach of the treaty. This was explained by the ICJ with the following argument: 'Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law.'<sup>17</sup> In this passage, the Court seems to have contended that measures unlawful under national law, but plausibly related to general interests, fall nonetheless within the realm of domestic public policy and, therefore, could legitimately justify an interference in the implementation of the international obligation of the acting state.

There is a common element in these cases, which are otherwise very different from each other. In all of them, invariably, the judges have recognized the primary competence of states to determine and to implement public policy requirements even at the cost of interfering with their international obligations. Far from upholding the absolute discretion of the claiming states, however, they reasserted that the exercise of these discretionary powers had to be exercised under international control. Although each decision seems to highlight the inherent reasonableness of the measures specifically adopted in the pursuit of legitimate interests, none of them offers a clear explanation of how to reconcile the discretion of states with international control.

This is a difficult problem, indeed. On the one hand, excessive deference to states' discretion in determining the level and intensity of their public policy requirements may deprive of effectiveness the international control over the exercise of discretionary powers. By claiming a particularly high level of environmental protection within its territorial waters, for example, a coastal state may make it particularly difficult or even impossible to exercise the right of innocent passage. On the other hand, objective standards of control over discretionary powers may severely restrict or even nullify the margin of discretion of states. To review measures designed to regulate the navigation in the territorial sea for environmental purposes, an international judge has to determine preliminarily whether the level of protection for the environment claimed by the regulating state is appropriate. In situations such as those described above, the margin of appreciation and the international control over discretionary powers appear to be strictly interrelated, in the sense that the application of the one doctrine may defeat the application of the other.<sup>18</sup>

#### 4 A Way Out of the Dilemma: The Margin of Appreciation as Part of the Assessment of Proportionality

These difficulties may be obviated, to an extent at least, if one considers the margin of appreciation doctrine as a part of the overall assessment of proportionality.

<sup>17</sup> *Ibid.*, para. 128. See C. Henckels, *Proportionality and Deference in Investor-State Arbitration* (2015).

<sup>18</sup> This difficulty emerges from *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, 13 July 2009, ICJ Reports (2009) 249, paras 87ff, 109ff. In this case, the International Court of Justice (ICJ) used reasonableness as a balancing standard to assess that the 'negative impact on the exercise of the rights in question [is] not manifestly excessive when measured against the protection afforded to the purpose invoked'. In this perspective, the level of protection 'afforded to the purpose invoked' by the territorial state determines what is the tolerable impact on the exercise of the rights of another state, with the consequence that, by raising the bar of protection for its public policy interest, the former state can freely impinge upon the rights of the latter. What lacks in the reasoning of the ICJ is precisely an element capable to measure what is an appropriate level of protection for the purposes invoked by the regulating state.



As we all know, proportionality is a legal technique mostly employed to determine the legality of unilateral measures taken by a state to protect certain interests protected by international law on the basis of the detrimental effect produced on other interests that are entitled to legal protection.<sup>19</sup> Yet one of the logical problems surrounding proportionality is how to determine the optimal level of protection for the interests respectively realized and curtailed by unilateral action. The answer may be quite simple if the standard of protection is predetermined by international law. It is much more difficult in those cases in which no international standard is available.<sup>20</sup>

This is precisely the space where the margin of appreciation doctrine has its most natural role. Absent an international standard, each state is obviously entitled to determine the most appropriate standard of protection for its public policy requirements. There must be limits, however, to avoid the unlimited discretion of setting this standard in a way that could excessively compress, or even defeat, the competing rights and interests of others. Reasonableness is a good candidate for this role. It is a loose limit, which does not excessively curtail the sovereign powers of states in regulating social and economic situations occurring within their jurisdiction. At the same time, it can prove able to prevent states from abusively invoking sovereignty as a facile means for evading their international commitments.

The assumption can thus be made that, in principle, a loose limit of reasonableness applies to the discretion of states to determine the level of protection for public policy requirements that may justify an interference in their international commitments. This relative freedom of states, however, is offset by a strict international control on the appropriateness of the means employed to achieve these legitimate purposes and on the appropriateness of the interference produced on other interests equally protected by international law.

This is precisely what the ICJ did in the *Whaling in the Antarctic* case. First, the Court construed Article VIII of the Whaling Convention as a provision conferring on Japan the power to derogate for purposes of scientific research to the moratorium established by the schedule of the Convention. Second, the Court recognized that the legality of these measures could not be determined unilaterally by the acting state but, rather, they were subject to international control. Finally, and more importantly to our aims, it determined that a limited standard of reasonableness applied to the unilateral

<sup>19</sup> For general consideration on the function discharged by proportionality in the international legal order, I refer to my book. E. Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale* (2000).

<sup>20</sup> This issue was discussed at length in the case WTO, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R and WT/DS401/AB/R, 22 May 2014, concerning the consistency with the General Agreement on Tariffs and Trade of a measure banning the importation into the European Union (EU) of seal products for reasons of public morality. In particular, in front of the Appellate Body, Canada argued that the panel was required to 'identify the exact content of the public morality standard' by referring to the 'level of protection' set by the EU 'when responding to similar interests of moral concern' (paras 5.199, 5.198). The Appellate Body rejected Canada's claim, by relying, *inter alia*, on the findings of the Panel, according to which '[m]embers should be given some scope to define and apply for themselves the concept of public moral according to their own system and scales of values' (*ibid.*).



assessment of the notion of scientific research but that a strict standard of proportionality applied to the unilateral assessment of what is necessary and proper for this purpose.

This conclusion is tacitly but inescapably based on the idea that, absent an international law standard, every state party to the Whaling Convention enjoys a certain margin of discretion in the definition of the term 'scientific research'. After refusing, in paragraph 86, to offer a general definition of 'scientific research' and after a lengthy technical analysis of the activities led by Japan, the ICJ concluded, in paragraph 127 and in paragraph 227, that 'the JARPA II activities involving the lethal sampling of whales can broadly be characterized as scientific research'.

## 5 Concluding Remarks

While tacitly dismissing the idea of the margin of appreciation as a doctrine having a general scope, the ICJ seems to have assigned it a narrower role. Limited to its proper context, the margin of appreciation doctrine seems to have gained precision, and has made sense of the claim of states to determine the contents of notions pertaining to domestic policy, in the context of the international control of the exercise of discretionary powers. In spite of its modest tone, therefore, the *Whaling in the Antarctic* decision has implications going far beyond the facts of this particular case. Although presenting its conclusions as the result of a purely interpretative operation, the Court, in fact, has done something more: it has shaped the contours of a sophisticated system of international supervision that incorporates subjective and objective standards; it has shed some light on the logical consecution of the various steps that compose the complex assessment of proportionality and it has unravelled some of the mysteries still lingering around this doctrine.