

The 2014 Judicial Activity of the International Court of Justice

Author(s): Christine Gray

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## CURRENT DEVELOPMENTS

### THE 2014 JUDICIAL ACTIVITY OF THE INTERNATIONAL COURT OF JUSTICE

*By Christine Gray\**

The three disparate cases decided by the International Court of Justice (Court or ICJ) in 2014 may not contribute much to the development of substantive international law, but they are instructive about the operations of the Court. Perhaps the Court was not at its finest in terms of coherent legal reasoning in these three cases; it certainly avoided difficult questions in all of them. Yet each of the three cases had significant numbers of separate and dissenting opinions, which sometimes reveal more about the Court's reasoning than is apparent from the judgment or order itself.

#### I. THE COURT'S JUDICIAL ACTIVITY

*Questions Relating to the Seizure and Detention of Certain Documents and Data* (Timor-Leste v. Australia)

On December 3, 2013, members of the Australian secret service, acting under a warrant issued by the Australian attorney general, raided the Australian office of a lawyer working for Timor-Leste and seized documents and computer data. On December 17, 2013, in response, Timor-Leste brought a case against Australia before the Court for a declaratory judgment that the seizure and continued detention of the documents and data were a violation of its sovereignty and property rights.<sup>1</sup> On the same day, it requested provisional measures: that all the documents and data seized be sealed and delivered into the custody of the Court; that Australia provide a list of all the documents and data that it had disclosed and transmitted, and the names of any persons to whom it had transmitted the material; that it destroy any copies of the documents and data; and that it give an assurance to not intercept communications between Timor-Leste and its legal advisers.<sup>2</sup> Given these allegations, it was not surprising that the Court ordered provisional measures on March 3, 2014, to protect Timor-Leste's rights.<sup>3</sup>

\* Professor of International Law, University of Cambridge.

<sup>1</sup> Application Instituting Proceedings (Timor-Leste v. Austl.), para. 3 (Int'l Ct. Justice Dec. 17, 2013). All the materials of the Court cited in this report are available on its website, <http://www.icj-cij.org>.

<sup>2</sup> Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl.), Request for the Indication of Provisional Measures Submitted by the Government of Timor-Leste, para. 10 (Int'l Ct. Justice Dec. 17, 2013).

<sup>3</sup> Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl.), Provisional Measures, para. 55 (Int'l Ct. Justice Mar. 3, 2014) [hereinafter *Seizure and Detention*]; see also Ronald J. Bettauer, Case Report: Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures Order, 108 AJIL 763 (2014).

But the case was more complicated than that. The Australian lawyer whose office was raided by the Australian secret service was working for Timor-Leste on another case involving the actions of the Australian secret service, a case brought on April 23, 2013, by Timor-Leste against Australia before an arbitral tribunal under the auspices of the Permanent Court of Arbitration (PCA).<sup>4</sup> That case was an attempt by Timor-Leste to challenge the validity of the 2006 Treaty on Certain Maritime Arrangements in the East Timor Sea (2006 Treaty).<sup>5</sup> The 2006 Treaty was one of a series of agreements elaborating on the Timor Sea Treaty.<sup>6</sup> The Timor Sea Treaty—agreed to on May 20, 2002, the day of Timor-Leste's independence—had not established a maritime boundary between Timor-Leste and Australia, but instead it established a joint petroleum development zone on Timor-Leste's side of the median line between the two states.<sup>7</sup> The 2006 Treaty revised some of the arrangements on the sharing of resources between the two states; it also froze the parties' maritime boundary claims for fifty years.<sup>8</sup> Moreover, to prevent litigation on the question of boundary delimitation, in 2002 (just before Timor-Leste's independence), Australia had made new reservations excluding boundary disputes from the ICJ's jurisdiction.<sup>9</sup>

Timor-Leste's position before the PCA was that the 2006 Treaty was invalid because Australia had spied on the government of Timor-Leste during the negotiations and thus had not conducted the negotiations in good faith. A whistle-blower, who was a former Australian secret agent, had informed Timor-Leste that Australia had bugged its cabinet office during the treaty negotiations.<sup>10</sup> That is, Australia had spied on Timor-Leste to find out its position during the 2006 Treaty negotiations.<sup>11</sup> When Australia's behavior was revealed to Timor-Leste by the former Australian secret agent and made public, Australia raided the office of Timor-Leste's lawyer and seized the documents that revealed Australia's espionage.<sup>12</sup> This seizure apparently included material given to Timor-Leste by the whistle-blower agent.<sup>13</sup>

But Australia did not accept that it was guilty of any wrongdoing. It refused to return the documents when asked to do so by Timor-Leste. In its pleadings before the ICJ, Australia tried

<sup>4</sup> Case View, Arbitration Under the Timor Sea Treaty (Timor-Leste v. Australia) (Perm. Ct. Arb. 2013), at <http://pcacases.com/web/view/37> (providing general overview, including arbitrators and counsel, but no specific details about the case).

<sup>5</sup> Treaty on Certain Maritime Arrangements in the Timor Sea, Timor-Leste–Austl., Jan. 12, 2006, 2483 UNTS 359 (entered into force Feb. 23, 2007) [hereinafter 2006 Treaty].

<sup>6</sup> Timor Sea Treaty, E. Timor–Austl., May 20, 2002, [2003] Austl. TS 13, 2258 UNTS 3 (entered into force Apr. 2, 2003).

<sup>7</sup> *Id.*, Art. 3.

<sup>8</sup> 2006 Treaty, *supra* note 5, Art. 12.

<sup>9</sup> This reservation was invoked by Japan in the *Whaling in the Antarctic* case, see *infra* text accompanying notes 82–83.

<sup>10</sup> Verbatim Record (corrected), Seizure and Detention, ICJ Doc. CR 2014/1, at 17–18 (Jan. 20, 2014) [hereinafter Verbatim Record, CR 2014/1] (statement of Elihu Lauterpacht, counsel for Timor-Leste); Kate Mitchell & Dapo Akande, *Espionage and Good Faith in Treaty Negotiations*, EJIL: TALK! (Jan. 20, 2014), at <http://www.ejiltalk.org/espionage-fraud-good-faith-in-treaty-negotiations-east-timor-v-australia-in-the-permanent-court-of-arbitration> (noting that “Australian intelligence services inserted listening devices into the wall of Timor-Leste’s negotiating room under the guise of an Australian aid program concerning renovation and construction of cabinet offices”).

<sup>11</sup> Seizure and Detention, *supra* note 3, para. 27.

<sup>12</sup> See Verbatim Record, CR 2014/1, *supra* note 10, at 19.

<sup>13</sup> See Verbatim Record (corrected), Seizure and Detention, ICJ Doc. CR 2014/2, at 16–17 (Jan. 21, 2014) [hereinafter Verbatim Record, CR 2014/2].

to challenge the narrative of Timor-Leste and to portray itself as the real victim.<sup>14</sup> It invoked national security as justification for its actions, although it did not specify the nature of the threat to its national security until a late stage of the proceedings when it asserted its concern that a former intelligence officer may have disclosed national security information.<sup>15</sup> It also said that the lives of Australian nationals—those agents who had carried out the bugging of Timor-Leste's offices—might be in danger.<sup>16</sup> This type of reliance on vague national security arguments to avoid scrutiny is familiar but, as Michael Wood, the former principal legal adviser to the UK Foreign and Commonwealth Office, argued for Timor-Leste, “[N]ational security and the enforcement of criminal law are not some magic wand that makes the rights and obligations of States under international law vanish.”<sup>17</sup> As explained below, the Court did not accept Australia's position that it would be justified in using the seized material for national security purposes.

This case is a strange one, with a rather novel subject matter, closely tied to proceedings in another tribunal. It is hard to avoid the inference that Australia's position in the 2014 provisional measures case before the ICJ was driven by the PCA arbitration and, in particular, by Australia's desire to resist any renegotiation of the 2006 Treaty and to prevent any boundary delimitation between itself and Timor-Leste, especially as this outcome might lead to demands by Indonesia for the renegotiation of its own boundary agreements with Australia.

Timor-Leste began its oral argument by referring to the history of relations between the two states.<sup>18</sup> Australia's record in its relations with Timor-Leste is undoubtedly less than admirable. In 1989, Australia had concluded the Timor Gap Treaty with Indonesia on the exploitation of seabed resources in the seas between what is now Timor-Leste and Australia,<sup>19</sup> thus implicitly acknowledging Indonesia's title to Timor-Leste. The attempt in 1991 of Portugal, as the former colonial power in Timor-Leste, to bring an action against Australia for violating international law notoriously failed because Indonesia was not included as a party to the case.<sup>20</sup> Today, the legal duty of states not to recognize as lawful the illegal seizure of territory is even clearer in light of Article 41 of the International Law Commission's 2001 Articles on Responsibility of States for Internationally Wrongful Acts.<sup>21</sup> This article provides that no state shall recognize as lawful a situation created by a serious breach of an obligation arising under a peremptory norm of general international law and that it should not render aid or assistance

<sup>14</sup> Written Observations of Australia on Timor-Leste's Request for Provisional Measures, Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl.) (Int'l Ct. Justice Jan. 13, 2014).

<sup>15</sup> Seizure and Detention, *supra* note 3, paras. 36, 46; Verbatim Record (corrected), Seizure and Detention, ICJ Doc. CR 2014/4, at 10, 13–14 (Jan. 22, 2014) [hereinafter Verbatim Record, CR 2014/4].

<sup>16</sup> See Verbatim Record, CR 2014/2, *supra* note 13, at 15, 20; Verbatim Record, CR 2014/4, *supra* note 15, at 14–18.

<sup>17</sup> See Verbatim Record, CR 2014/1, *supra* note 10, at 45.

<sup>18</sup> *Id.* at 13–15, 17–20.

<sup>19</sup> Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia [Timor Gap Treaty], Austl.-Indon., *opened for signature* Dec. 11, 1989, 1654 UNTS 105 (entered into force Feb. 9, 1991).

<sup>20</sup> Verbatim Record, CR 2014/1, *supra* note 10, at 13–14, *see also* East Timor (Port. v. Austl.), 1995 ICJ REP. 90, paras. 20, 21, 35, 38 (June 30); Application Instituting Proceedings (Port. v. Austl.) (Int'l Ct. Justice Feb. 22, 1991).

<sup>21</sup> Articles on Responsibility of States for Internationally Wrongful Acts, Art. 41, *in* Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001).

in maintaining that situation.<sup>22</sup> In the *Wall* advisory opinion, the Court reaffirmed this fundamental principle.<sup>23</sup>

The Court has over time evolved a clear framework for decisions on provisional measures within the provisions of Article 41 of its Statute and Articles 74–75 of its Rules of Court. Some of the applicable rules are long-standing; others, such as the requirement that the applicant's claim be plausible, are more recent. First, the Court must have *prima facie* jurisdiction on the merits.<sup>24</sup> This assessment was straightforward on the facts of the case as both parties had made declarations under the "optional clause," Article 36(2) of the ICJ Statute.<sup>25</sup> However, the Court noted that Australia had reserved its right to raise questions of jurisdiction and admissibility at the merits stage.<sup>26</sup> Australia apparently envisaged that it might later rely on its reservation to the optional clause, excluding disputes that it had agreed to settle by other means, that is by resort to the PCA.<sup>27</sup> Australia was technically entitled to do so,<sup>28</sup> and the Court has, in the past, come to a different conclusion on jurisdiction on the merits from its finding on *prima facie* jurisdiction at the provisional measures stage—most famously in the *Georgia v. Russia* case.<sup>29</sup> In that case, it found *prima facie* jurisdiction at the provisional measures stage<sup>30</sup> but later held that it had no jurisdiction to decide on the merits.<sup>31</sup> In a related argument, Australia suggested in its pleadings that the ICJ should defer to the PCA, arguing that the claims for provisional measures made by Timor-Leste were not a matter for the ICJ to resolve.<sup>32</sup> This argument was rejected by the ICJ without discussion, as was Australia's lengthy argument that Timor-Leste should have resorted to Australian domestic remedies.<sup>33</sup>

Second, the Court may only indicate provisional measures where (1) the rights asserted by the requesting party are "plausible," and (2) a link exists between the rights that form the subject matter of the merits and the provisional measures being sought.<sup>34</sup> This rather opaque requirement that the rights asserted be "plausible" is a relatively recent addition to the Court's framework on provisional measures. It was first stipulated by the Court in *Belgium v. Senegal*

<sup>22</sup> *Id.*

<sup>23</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ REP. 136 (July 9).

<sup>24</sup> See Seizure and Detention, *supra* note 3, para. 18.

<sup>25</sup> *Id.*, para. 19 (citing ICJ Statute, Art. 36(2)).

<sup>26</sup> *Id.*, para. 20.

<sup>27</sup> Australia made this argument even though it was contesting the jurisdiction of the PCA Tribunal. See Verbatim Record, CR 2014/2, *supra* note 13, at 40.

<sup>28</sup> Timor-Leste argued that Australia's position showed a certain lack of respect for the Court. Verbatim Record (corrected), Seizure and Detention, ICJ Doc. CR 2014/3, paras. 8–10 (Jan. 22, 2014) [hereinafter Verbatim Record, CR 2014/3].

<sup>29</sup> Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, 2011 ICJ REP. 70 (Apr. 1) [hereinafter *Georgia v. Russia*, Preliminary Objections].

<sup>30</sup> Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Provisional Measures, 2008 ICJ REP. 353, para. 149 (Oct. 15).

<sup>31</sup> *Georgia v. Russia*, Preliminary Objections, *supra* note 29, paras. 115–84.

<sup>32</sup> See Verbatim Record, CR 2014/2, *supra* note 13, at 43–47.

<sup>33</sup> In an earlier order dated January 28, 2014, the Court had already rejected Australia's claim for a stay of proceedings until the PCA tribunal could decide the *Arbitration Under the Timor Sea Treaty* case. Question Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl.), Fixing of Time Limits (Int'l Ct. Justice Jan. 28, 2014); see also Seizure and Detention, *supra* note 3, paras. 16–17.

<sup>34</sup> See Seizure and Detention, *supra* note 3, paras. 22–23.

in 2009.<sup>35</sup> But it seems that the Court in that case simply made express what had formerly been an unacknowledged factor in the Court's decision making on provisional measures.

Was Timor-Leste's claim on the merits that Australia's actions violated its sovereignty plausible? Australia did not accept the principle of the inviolability of a state's communications with its lawyers,<sup>36</sup> and Timor-Leste in its pleadings seemed to have some difficulty as to how exactly to establish this principle. It invoked a range of different arguments, including property rights, immunity, confidentiality as a general principle of law, and the equality of states.<sup>37</sup> Not surprisingly, little specific authority exists on this central point because it is not something that had been doubted before this case. The Court said very briefly that Timor-Leste had a plausible case.<sup>38</sup> Its right to communicate with its lawyers in a confidential manner with regard to issues forming the subject matter of pending arbitral proceedings and future negotiations "might be derived from the principle of the sovereign equality of States . . . [as] reflected in Article 2, paragraph 1 of the Charter of the United Nations."<sup>39</sup> Only Australian Judge *ad hoc* Ian Callinan expressed doubt on this central issue.<sup>40</sup> In his dissenting opinion, Judge Christopher Greenwood was critical of the Court's approach, preferring to base the right on a general principle of law.<sup>41</sup>

The Court held that the "provisional measures requested . . . [were] aimed at preventing further access by Australia to this seized material . . . and at ensuring the non-interference of Australia in future communications between Timor-Leste and its legal advisers."<sup>42</sup> These measures were intended to protect the rights at stake in the merits of the case: the rights of Timor-Leste to conduct arbitral proceedings and negotiations without interference by Australia. Therefore, a link existed between the provisional measures sought and the rights sought on the merits.<sup>43</sup>

The most controversial part of the order was the Court's consideration of whether the provisional measures were urgently required to prevent "irreparable prejudice" to the rights in the dispute.<sup>44</sup> A striking feature of the Court's order was its refusal to accept Australia's assurances that the confidentiality of the seized documents would be safeguarded as meaning that there was no need to indicate provisional measures.<sup>45</sup> Such a refusal was unprecedented. The Court had accepted a respondent state's assurances as to its future behavior in cases such as *Great Belt*<sup>46</sup> and *Belgium v. Senegal*<sup>47</sup> as removing any risk of irreparable harm.<sup>48</sup> The Court's unwillingness to do so here indicated its mistrust of Australia.

<sup>35</sup> Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Provisional Measures, 2009 ICJ REP. 139, paras. 57–60 (May 28) [hereinafter *Belgium v. Senegal*].

<sup>36</sup> Seizure and Detention, *supra* note 3, para. 25.

<sup>37</sup> Application Instituting Proceedings, *supra* note 1, para. 10.

<sup>38</sup> Seizure and Detention, *supra* note 3, para. 28.

<sup>39</sup> *Id.*, para. 27.

<sup>40</sup> *Id.*, Diss. Op. Callinan, J. *ad hoc*, paras. 25–28.

<sup>41</sup> *Id.*, Diss. Op. Greenwood, J., para. 12 (noting "a general principle of law").

<sup>42</sup> *Id.*, para. 30 (Order).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*, paras. 31–48.

<sup>45</sup> *Id.*, paras. 38, 42, 47.

<sup>46</sup> Passage Through the Great Belt (Fin. v. Den.), Provisional Measures, 1991 ICJ REP. 12 (July 29).

<sup>47</sup> *Belgium v. Senegal*, *supra* note 35.

<sup>48</sup> For a strong argument against this practice, see Seizure and Detention, *supra* note 3, Sep. Op. Cançado Trindade, J., paras. 13–25.



But the Court's approach was not surprising. Australia's undertakings had shifted over time. The final written undertaking was provided by the Australian attorney general during the oral proceedings on January 21, 2014.<sup>49</sup> The impression given by the attorney general was that Australia sought to preserve its position by a clever choice of words. Australia was pressed by certain members of the Court on the exact meaning of its assurances.<sup>50</sup> And, crucially, Australia in its undertaking still reserved the right to use the data for national security purposes, including potential law-enforcement referrals and prosecutions (apparently aimed at the whistleblower).<sup>51</sup>

The Court took the view that Timor-Leste's right "to conduct arbitral proceedings and negotiations without interference could suffer irreparable harm if Australia failed to immediately safeguard the confidentiality of the material seized by its agents."<sup>52</sup> There could be a very serious detrimental effect on Timor-Leste's position in the Timor Sea Treaty arbitration and in future maritime negotiations with Australia should the seized material be divulged. Because Australia reserved the right to use the seized material for national security purposes, the written undertaking did not remove the risk of irreparable prejudice.<sup>53</sup> The written undertaking of January 21, 2014, made a significant contribution towards mitigating the imminent risk of irreparable prejudice to Timor-Leste's rights but did not remove this risk entirely.<sup>54</sup>

The Court accordingly exercised its power under Article 75(2) of the Rules of Court to order provisional measures that were in whole or in part other than those requested.<sup>55</sup> In this case, the Court's order of provisional measures was directed only to Australia<sup>56</sup>—something relatively unusual in the practice of the Court as it usually addresses its orders to both parties so that it appears evenhanded at this stage of the proceedings. By twelve votes to four, it ordered, first, that Australia ensure that the content of the seized material not be used by any person to the disadvantage of Timor-Leste until the present case had been concluded and, second, that Australia keep the seized documents and data under seal.<sup>57</sup> Thus, the Court did not order Australia to surrender the documents to the Court, but only that they be kept under seal.<sup>58</sup> This result was welcomed by the Australian government as a vindication of its position, but it is rather a minor limit on the overwhelming success of Timor-Leste.<sup>59</sup>

These first two provisional measures ordered showed a marked division in the Court. The four dissents came from the judges of Australia, New Zealand, the United Kingdom, and the United

<sup>49</sup> Question Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl.), Written Undertaking by Senator the Hon. George Brandis QC, Attorney-General of the Commonwealth of Australia (Int'l Ct. Justice Jan. 21, 2014) [hereinafter Written Undertaking].

<sup>50</sup> Verbatim Record, CR 2014/4, *supra* note 15; Verbatim Record, CR 2014/3, *supra* note 28.

<sup>51</sup> Written Undertaking, *supra* note 49; *see also* Seizure and Detention, *supra* note 3, para. 45.

<sup>52</sup> Seizure and Detention, *supra* note 3, para. 42.

<sup>53</sup> *Id.*, paras. 47–48.

<sup>54</sup> *Id.*, para. 47.

<sup>55</sup> *Id.*, para. 49.

<sup>56</sup> *See id.*, para. 55.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*, para. 51.

<sup>59</sup> *See* Frank Brennan, *Finding a Just Oil and Gas Settlement Between Australia and Timor-Leste*, EUREKA STREET EXTRA, Sept. 24, 2014, at <http://www.eurekastreet.com.au/article.aspx?acid=42040#.VekH3PIVhBc> ("The day after the decision was delivered, the Australian stable of Murdoch newspapers carried the headline: 'Australia wins East Timor UN court fight.' This was no win for Australia; it was a humiliating defeat.").

States.<sup>60</sup> On the third provisional measure, the judges were almost unanimous, with the exception of the Australian judge *ad hoc*, who focused on Australian law in much of his dissenting opinion.<sup>61</sup> The separate and dissenting opinions indicate that there was agreement that Australia's failure to give any undertaking as to its *future* behavior after the conclusion of the ICJ case meant that it was necessary for the Court to order that Australia should not interfere in future communications between Timor-Leste and its lawyers in connection with the PCA arbitration or with any future bilateral negotiations on maritime boundary delimitation.<sup>62</sup>

The parties subsequently agreed to postpone the ICJ proceedings. Ultimately, the ICJ case may not continue beyond the provisional measures stage.<sup>63</sup>

### *Whaling in the Antarctic* (Australia v. Japan; New Zealand Intervening)

This case marks the first time that Japan has appeared as a party before the ICJ. In these proceedings, Japan was the respondent in a case on a very controversial issue—the legality of Japan's whaling program in the Antarctic.<sup>64</sup> Australia accused Japan of violating the 1946 International Convention for the Regulation of Whaling<sup>65</sup> (Whaling Convention) by its continued pursuit of large-scale whaling in the Southern Ocean of the Antarctic under the guise of scientific research as part of the second phase of its Japanese Whale Research Program Under Special Permit in the Antarctic (JARPA II).

The sensitive nature of the subject matter is apparent in the sometimes intemperate language of the pleadings. Each party tried to portray the other as subverting the Whaling Convention system. The Whaling Convention had been concluded and the International Whaling Commission<sup>66</sup> (IWC) had been established when the advent of long-distance factory fishing had threatened whale stocks. The fifteen founding members were all engaged in whaling. Subsequently, nonwhaling states also became parties to the Whaling Convention, and in 1982, a

<sup>60</sup> It is interesting to note—without, of course, casting any aspersions on the individual judges—that these four states are closely linked in intelligence cooperation. For example, the UK-U.S. Communications Intelligence Agreement (Mar. 5, 1946), *available at* [https://www.nsa.gov/public\\_info/\\_files/ukusa/agreement\\_outline\\_5mar46.pdf](https://www.nsa.gov/public_info/_files/ukusa/agreement_outline_5mar46.pdf), set up an arrangement subsequently joined by Australia, New Zealand, and Canada. This agreement was secret until 2005, and it was published in 2010. National Security Agency/Central Security Service, UKUSA Agreement Release, 1940–1956 (June 24, 2010), *at* [https://www.nsa.gov/public\\_info/declass/ukusa.shtml](https://www.nsa.gov/public_info/declass/ukusa.shtml).

<sup>61</sup> Seizure and Detention, *supra* note 3, Diss. Op. Callinan, J. *ad hoc*.

<sup>62</sup> *See id.*, Sep. Op. Cançado Trindade, J., paras. 46–58; *id.*, Diss. Op. Greenwood, J., para. 30; *id.*, Sep. Op. Donoghue, J., paras. 5, 23.

<sup>63</sup> ICJ Press Release 2014/28, The Court Decides to Grant the Parties' Request to Postpone the Oral Proceedings Due to Open on 17 September 2014 (Sept. 5, 2014); *see also* Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, 1992 ICJ REP. 240 (June 26); ICJ Press Release 93/29, Certain Phosphate Lands in Nauru (Nauru v. Australia): Discontinuance (Sept. 13, 1993) (noting settlement of that case after Australia lost at the preliminary objections stage). [Editor's note: On June 11, 2015, the Court issued an order directing the discontinuance of the case from the Court list, following Australia's return of the seized documents and data to Timor-Leste on May 12, 2015. Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl.), Removal from List (Int'l Ct. Justice June 11, 2015).]

<sup>64</sup> Whaling in the Antarctic (Austl. v. Japan; N.Z. Intervening) (Int'l Ct. Justice Mar. 31, 2014). For an excellent case note, see Sonia E. Rolland, Case Report: Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening), 108 AJIL 496 (2014).

<sup>65</sup> International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 UNTS 74 [hereinafter Whaling Convention].

<sup>66</sup> *At* <https://iwc.int/home>.



moratorium on commercial whaling was agreed to. Japan initially objected to this moratorium, but it withdrew its objection in 1986.<sup>67</sup>

In this case, Japan accused Australia of trying to transform the Whaling Convention into a total ban on whaling.<sup>68</sup> It said that Australia sought to cloak its political and cultural preferences in the lab coat of science. In other words, by instituting these proceedings, Australia had undertaken an emotional antiwhaling crusade. As Japan asserted, "In a world with diverse civilizations and traditions, international law cannot become an instrument for imposing the cultural preference of some at the expense of others."<sup>69</sup> In its turn, Australia accused Japan of bad faith: Japan had accepted the moratorium on commercial whaling but then immediately sought "to continue commercial whaling program under the 'guise' of scientific research."<sup>70</sup> Ostensibly, the case turned on the common legal question of treaty interpretation: the meaning of Article VIII of the Whaling Convention, described below.

The judgment of the Court has many unusual features. Much of it is taken up by a complex analysis of the scientific evidence. The Court followed the format of setting out the parties' arguments on each topic and then setting out its own position. Often it rejected both parties' positions, and, in so doing, it left many questions unanswered. The separate opinions, dissenting opinions, and declarations make clear the rather distracting gaps in the Court's reasoning. The final result was that the Court found that Japan's JARPA II whaling program in the Southern Ocean was not for purposes of scientific research under Article VIII and therefore violated the Whaling Convention provisions establishing the moratorium on commercial whaling, the factory ship moratorium, and the Southern Ocean Sanctuary. But the overwhelming characteristic of the judgment is its caution. It contains little by way of broad statements of principle, and its impact has been less than Australia might have sought.

One of the most striking issues was not actually dealt with by the Court in the judgment: the question of standing and legal interest. Australia challenged the legality of the JARPA II research program in the Southern Ocean Sanctuary, where all commercial whaling was prohibited since 1994. Some of the sanctuary lies within the Australian 200 nautical-mile (nm) zone, but much of it does not. Australia did not bring the action as an injured state, and it did not mention the issue of standing or legal interest until the oral proceedings.<sup>71</sup> It is more surprising that Japan in its counter memorial did not raise this question in order to challenge the admissibility of Australia's claim, apart from a passing mention where it said that "what is in reality a matter of multilateral marine resource management has been disguised as a bilateral legal dispute and brought before the Court while efforts are being made through the proper forum (the IWC) to overcome differences among the Contracting Governments."<sup>72</sup> It was only when Judge Dalveer Bhandari asked a question during the oral proceedings—"What

<sup>67</sup> See Whaling in the Antarctic, *supra* note 64, para. 100.

<sup>68</sup> Verbatim Record (corrected), Whaling in the Antarctic, ICJ Doc. CR 2013/12, at 42, 63 (July 2, 2013).

<sup>69</sup> *Id.* at 63.

<sup>70</sup> Whaling in the Antarctic, *supra* note 64, para. 101; see also Memorial of Australia, Whaling in the Antarctic, para. 5.122 (Int'l Ct. Justice May 9, 2011) ("Japan lacks the requisite good faith in its implementation of Article VIII."); Verbatim Record (corrected), Whaling in the Antarctic, ICJ Doc. CR 2013/11, at 24–40 (June 28, 2013).

<sup>71</sup> See *infra* text accompanying notes 73–74; see also Verbatim Record (corrected), Whaling in the Antarctic, ICJ Doc. CR 2013/18, at 28 (July 9, 2013) [hereinafter Verbatim Record, CR 2013/18].

<sup>72</sup> Counter-Memorial of Japan, Whaling in the Antarctic, para. 13 (Int'l Ct. Justice Mar. 9, 2012).

injury, if any, has Australia suffered as a result of Japan's alleged breaches of the [Whaling Convention] through JARPA II?"<sup>73</sup> —that Australia addressed the issue. It did not claim to be an injured state on the ground that some of the JARPA II killing of whales took place in areas over which Australia claimed sovereign rights. Instead, Australia invoked the Court's radical decision on *erga omnes* obligations in its judgment in *Belgium v. Senegal*: "Every party has the same interest in ensuring compliance by every other party with its obligations under the 1946 Convention. Australia is seeking to uphold its collective interest, an interest it shares with all other parties."<sup>74</sup> Nevertheless, Australia did not challenge Japan's other so-called scientific research program under Article VIII, the second phase of the Japanese Whale Research Program Under Special Permit in the North Pacific (JARPN II).<sup>75</sup>

The Court did not discuss this question of standing or legal interest. Nor do the separate opinions and dissenting opinions address this point. This decision seems to follow the approach in *Belgium v. Senegal*, but without express acknowledgment that it is doing so. In that case, Belgium was allowed to bring a case for violation of the UN Convention Against Torture,<sup>76</sup> and to seek the cessation of wrongdoing by Senegal, on the ground that parties to the Convention had a common interest to ensure the prevention and punishment of torture.<sup>77</sup> That common interest implied that the obligations were owed by any party to all the other parties; they could be defined as obligations *erga omnes partes*. In *Belgium v. Senegal*, the Court did not expressly mention Article 48 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts. It provides for a noninjured state to invoke state responsibility if the obligation breached is owed to a group of states, including that state, and is established for the protection of a collective interest of the group.<sup>78</sup> At the time of the adoption of the Articles, the International Law Commission had said in its commentary that Article 48 involved a measure of progressive development.<sup>79</sup> It seems nevertheless to have been the catalyst that led the Court finally to give practical effect to the famous dictum in the

<sup>73</sup> Verbatim Record (corrected), Whaling in the Antarctic, ICJ Doc. CR 2013/13, at 73 (July 3, 2013).

<sup>74</sup> Verbatim Record, CR 2013/18, *supra* note 71, at 28, 33 (citing *Belgium v. Senegal*, *supra* note 35); *see also* Reservations to the Convention on the Prevention and Punishment of Genocide, Advisory Opinion, 1951 ICJ REP. 15 (May 28). New Zealand intervened under Article 63 of the ICJ Statute as a party to the Whaling Convention, and, in its Written Observations to the Court, it stressed the collective nature of the Convention regime. New Zealand left the IWC in 1968 because of its concern that the IWC was insensitive to conservation; New Zealand rejoined the IWC in 1976. Whaling in the Antarctic, *supra* note 64, para. 44.

<sup>75</sup> This reserve is understandable because of Australia's domestic political focus on the Southern Ocean. Prime Minister Kevin Rudd had given an election pledge to seek the end of Japan's whaling in the Southern Ocean. *See* Tim Stephens, *International Environmental Disputes: To Sue or Not to Sue?*, in LITIGATING INTERNATIONAL DISPUTES 284, 287 (Natalie Klein ed., 2014). The extension of the case to cover JARPN II would also have meant a significantly more preparation. Australia's memorial concerning JARPA II alone was already 1,251 pages long. However, this omission was to have serious consequences, and the exclusive focus on JARPA II weakened Australia's claim to be acting to uphold the collective interest.

<sup>76</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 UNTS 113.

<sup>77</sup> *See* Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 ICJ REP. 422, paras. 68, 69 (July 20).

<sup>78</sup> Articles on Responsibility of States, *supra* note 21, Art. 48.

<sup>79</sup> *See* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 279 (2002).

1970 *Barcelona Traction* case, asserting the existence of *erga omnes* obligations owed to the international community.<sup>80</sup>

The fact that the Court in *Whaling in the Antarctic* followed the approach of *Belgium v. Senegal* seems to indicate that the right of a party to a treaty to bring a legal action before the Court for breach of obligations to all the other parties is now accepted. However, considerable uncertainty still remains about the scope of this right, given the lack of express discussion in *Whaling in the Antarctic*. The subject matter of the treaty in *Whaling in the Antarctic* was very different from that in *Belgium v. Senegal*. Moreover, both decisions concerned a multilateral treaty; it is not clear whether one state could bring an *actio popularis* on behalf of the international community in the absence of a treaty. And the Court did not discuss the appropriate remedies in this type of action. Some of these issues may be raised before the Court in the pending cases brought by the Marshall Islands against certain nuclear-weapons states for violation of the Nuclear Non-proliferation Treaty.<sup>81</sup>

Instead of raising this issue of standing, Japan relied on Australia's 2002 reservation to its acceptance of the "optional clause" in Article 36(2) of the ICJ Statute as the basis for its challenge to the Court's jurisdiction.<sup>82</sup> The reservation excluded 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."<sup>83</sup> As noted, one of the aims behind this reservation was to prevent East Timor, as it was known then, from being able to bring a boundary delimitation case against Australia. This reservation was now invoked against Australia by Japan under the doctrine of reciprocity.

The Australian reservation was not very clearly drafted. Australia argued that it applied only when there was a dispute about overlapping claims to sovereign rights; it had no such dispute with Japan, and, therefore, the Court had jurisdiction.<sup>84</sup> Japan said that the reservation should be interpreted more broadly to exclude disputes about the exploitation of resources in areas having unresolved delimitation issues (as was the case with regard to Australia's possible maritime zones in the Antarctic), even though no overlapping claims existed between the parties to the case before the Court.<sup>85</sup> The Court agreed with Australia on this point. It invoked its earlier jurisprudence on the proper approach to the interpretation of reservations: the Court should interpret them in "a natural and reasonable way . . . , having due regard to the intention [of the reserving state]."<sup>86</sup> That intention could be deduced, not only from the text, but

<sup>80</sup> *Barcelona Traction, Light and Power Company (Belg. v. Spain)*, Second Phase, 1970 ICJ REP. 3 (Feb. 5). Such a right had earlier been rejected by the Court in the *South West Africa* cases brought by Ethiopia and Liberia against South Africa for its violation of the mandate in its treatment of South West Africa (now Namibia). *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Second Phase, 1966 ICJ REP. 6 (July 18).

<sup>81</sup> Application Instituting Proceedings (*Marsh. Is. v. UK*) (Int'l Ct. Justice Apr. 24, 2014) (alleging violations of the Treaty on the Non-proliferation of Nuclear Weapons, July 1, 1968, 21 UST 483, 729 UNTS 161); Application Instituting Proceedings (*Marsh. Is. v. India*) (Int'l Ct. Justice Apr. 24, 2014) (same); Application Instituting Proceedings (*Marsh. Is. v. Pak.*) (Int'l Ct. Justice Apr. 24, 2014) (same).

<sup>82</sup> Counter-Memorial of Japan, *supra* note 72, para. 9.1.

<sup>83</sup> Alexander John Gosse Downer, Minister of Foreign Affairs of Australia, Declarations Recognizing the Jurisdiction of the Court as Compulsory (Mar. 22, 2002), available at <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=AU>.

<sup>84</sup> *Whaling in the Antarctic*, *supra* note 64, paras. 34–35.

<sup>85</sup> *Id.*, paras. 32–33.

<sup>86</sup> *Id.*, para. 36 (quoting *Anglo-Iranian Oil Co. (UK v. Iran)*, Jurisdiction, 1952 ICJ REP. 93, 104 (July 22)).

also from “an examination of the evidence regarding the circumstances of its preparation and the purposes intended to be served.”<sup>87</sup> Australia’s intention stated at that time showed that the reservation was to exclude the Court’s jurisdiction over disputes concerning the delimitation of maritime zones. No such dispute existed between Australia and Japan.<sup>88</sup>

The Court began its consideration of the merits with an examination of the regime established by the Whaling Convention.<sup>89</sup> The Convention included a Schedule—the “substantive provisions regulating the conservation of whale stocks or the management of the whaling industry”—as an “integral part.”<sup>90</sup> This Schedule could be amended by a three-quarters majority of the IWC, made up of representatives of all the contracting governments, but such an amendment could not bind an objecting state.<sup>91</sup> The IWC has amended the Convention many times, and the Schedule now includes three prohibitions on commercial whaling activity: paragraph 7 prohibits all commercial whaling in the Southern Ocean Sanctuary; paragraph 10(d) imposes a moratorium on the use of factory ships, except in relation to minke whales; and paragraph 10(e) provides for a moratorium on commercial whaling.<sup>92</sup>

The IWC was also given the power to pass resolutions and to adopt guidelines to make non-binding recommendations to the contracting governments on matters relating to whales or whaling.<sup>93</sup> According to the Court, “The functions conferred on the [International Whaling] Commission have made the Convention an evolving instrument.”<sup>94</sup> A key issue in the case was what this sentence means in practice. The Court took a strict view; when resolutions “are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule” because they comprise subsequent agreement and practice under Article 31(3)(b) of the Vienna Convention on the Law of Treaties.<sup>95</sup> Australia tried at several points in the case to argue for a more flexible approach to treaty interpretation. It claimed that IWC resolutions urging Japan to reconsider its program of lethal research, even if not adopted by consensus, “must inform” the interpretation of the Whaling Convention.<sup>96</sup> The Court refused to accept this radical approach. Resolutions adopted without the support of all states parties and, in particular, without the concurrence of Japan could not be regarded as subsequent agreement or practice.<sup>97</sup>

The central treaty provision in the case was Article VIII of the Whaling Convention. It provides for a special-permit system to license whaling for purposes of scientific research. Japan had granted such a special permit for its JARPA II whaling program.<sup>98</sup> Australia claimed that Japan’s real purpose was to continue commercial whaling under the guise of scientific research,

<sup>87</sup> *Id.* (quoting Fisheries Jurisdiction (Spain v. Can.), 1998 ICJ REP. 432, para. 49 (Dec. 4)).

<sup>88</sup> *Id.*, para. 39.

<sup>89</sup> *Id.*, paras. 42–47.

<sup>90</sup> *Id.*, para. 45.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*, para. 48.

<sup>93</sup> *Id.*, paras. 46–47.

<sup>94</sup> *Id.*, para. 45.

<sup>95</sup> *Id.*, paras. 46, 83.

<sup>96</sup> *Id.*, para. 79.

<sup>97</sup> *Id.*, para. 83. Judge *ad hoc* Hilary Charlesworth (Australia) agreed with the Court’s position on this point but suggested that resolutions passed by a majority could be “relevant to the duty of co-operation.” *Id.*, Sep. Op. Charlesworth, J. *ad hoc*, para. 4; see also *infra* text accompanying notes 182–83.

<sup>98</sup> See, e.g., Whaling in the Antarctic, *supra* note 64, para. 30.

although it had accepted the moratorium in 1986.<sup>99</sup> This issue was the core of the case. The Court had to decide whether the special permits granted in relation to JARPA II fell within the scope of Article VIII, which provides:

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.<sup>100</sup>

Under the Vienna Convention on the Law of Treaties, Article VIII is to “be interpreted in light of the object and purpose of the [Whaling] Convention.”<sup>101</sup> The parties fundamentally disagreed on what the object and purpose were. Each made very selective use of the preamble in its pleadings. For Japan, the aim of the Convention was “to ‘establish a system of international regulation for the whale fisheries,’”<sup>102</sup> and “the proper conservation of whale stocks . . . [made] possible the orderly development of the whaling industry.”<sup>103</sup> Japan argued 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 . . . under customary international law.”<sup>104</sup> Australia, in contrast, argued that the object and purpose of the Convention was conservation.<sup>105</sup> It called for a restrictive interpretation of Article VIII as “an exception to the general rules of the Convention that give effect to its object and purpose of conservation.”<sup>106</sup>

The Court began its discussion of the object and purpose of the Whaling Convention by recalling that the preamble indicates that the Convention seeks to ensure “the conservation of all species of whales while allowing for their sustainable exploitation.”<sup>107</sup> However, it did not expressly decide this issue of object and purpose. It said only that neither a restrictive interpretation, as argued by Australia, nor an expansive interpretation, as argued by Japan, of Article VIII was justified.<sup>108</sup> Moreover, programs for purposes of scientific research “may pursue an aim other than either conservation or sustainable exploitation of whale stocks.”<sup>109</sup>

The next fundamental disagreement between the parties on the interpretation of Article VIII was on the degree of discretion that it provided to the state granting the special permits for purposes of scientific research. Japan claimed that the state issuing the special permit enjoyed a “margin of appreciation” and, therefore, that the Court’s power of review was limited.<sup>110</sup> Australia and New Zealand said that the requirements for granting a special permit

<sup>99</sup> *Id.*, paras. 100–01.

<sup>100</sup> Whaling Convention, *supra* note 65, Art. VIII (emphasis added).

<sup>101</sup> Whaling in the Antarctic, *supra* note 64, para. 55; Vienna Convention on the Law of Treaties, Art. 31(1), May 23, 1969, 1155 UNTS 331.

<sup>102</sup> Counter-Memorial of Japan, *supra* note 72, para. 2.28 (quoting Whaling Convention, *supra* note 65, pmbl.).

<sup>103</sup> *Id.*, para. 2.29.

<sup>104</sup> Whaling in the Antarctic, *supra* note 64, para. 57.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*, para. 56.

<sup>108</sup> *Id.*, para. 58.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*, para. 59. Japan initially argued that the Court’s power of review was limited “to ascertaining whether the determination was ‘arbitrary or capricious,’ ‘manifestly unreasonable’ or made in bad faith.” *Id.*, para. 65. Judge



were objective.<sup>111</sup> At this point, the Court introduced the concept of the standard of review: the Court may review, on an objective basis, the determination by the state party that the special permit is for purposes of scientific research.<sup>112</sup> The four dissenting judges were all critical of the Court's approach to judicial review of Japan's exercise of its discretion and argued that the Court went too far.<sup>113</sup> This assessment was the central disagreement between the majority and the dissenting judges.

The Court adopted a two-stage approach to the interpretation of Article VIII, as suggested by Australia in its pleadings.<sup>114</sup> First, the Court contemplated whether the program under which the killing, taking, and treating of whales occurred involved *scientific research*.<sup>115</sup> Second, the Court considered whether the killing, taking, and treating of whales was *for purposes of* scientific research by examining whether, in the use of lethal methods, the program's design and implementation were reasonable in relation to achieving its stated objectives.<sup>116</sup> The Court looked to Japan as the "authorizing State" to explain the objective basis for its determination that JARPA II's use of lethal methods was for purposes of scientific research.<sup>117</sup>

Thus, the Court separated its interpretation of the terms *scientific research* and *for purposes of* in the phrase "for purposes of scientific research."<sup>118</sup> This division allowed the Court to say that Japan's JARPA II program was capable of being "scientific research" but that its special permits allowed killing that was not "for purposes of" scientific research. It is hard to make much sense of this distinction. The dissenting judges strongly challenged this approach.<sup>119</sup> The distinction had serious—and unforeseen—consequences on the impact of the judgment. It allowed Japan to claim a legal right to continue whaling under its other special-permit program, JARPN II, in the North Pacific.<sup>120</sup>

Australia put forward its own interpretation of "scientific research," maintaining that it has four essential characteristics: "defined and achievable objectives . . . ; 'appropriate methods,' including the use of lethal methods only where the objectives of the research cannot be achieved

Hisashi Owada (Japan), in his dissenting opinion, said that the Court was wrong to assert that the parties had agreed on the standard of review. He asserted that the Court had adopted a standard of review that was derived from the jurisprudence of the Appellate Body of the World Trade Organization but that the ICJ had gone much further than the Appellate Body and had engaged in a *de novo* assessment of Japan's activities. *Id.*, Diss. Op. Owada, J., paras. 29–48.

<sup>111</sup> *Id.*, paras. 63, 64 (Judgment).

<sup>112</sup> *Id.*, para. 65.

<sup>113</sup> *Id.*, Diss. Op. Abraham, J.; *id.*, Diss. Op. Bennouna, J.; *id.*, Diss. Op. Owada, J.; *id.*, Diss. Op. Yusuf, J.; *see also* Sep. Op. Xue, J., para. 16 (stating that the Court had gone "beyond its judicial purview").

<sup>114</sup> Verbatim Record (corrected), Whaling in the Antarctic, ICJ Doc. CR 2013/8, para. 68 (June 26, 2013). New Zealand took a simpler approach: it asserted that the Court should consider whether whaling is for purposes of scientific research, which could be ascertained from the methodology, design, and characteristics of proposed whaling program. Written Observations of New Zealand, Whaling in the Antarctic, paras. 61–63 (Int'l Ct. Justice Apr. 4, 2013).

<sup>115</sup> Whaling in the Antarctic, *supra* note 64, paras. 73–86.

<sup>116</sup> *Id.*, paras. 87–97.

<sup>117</sup> *Id.*, para. 68.

<sup>118</sup> *Id.*, paras. 70–72.

<sup>119</sup> Judge Owada rejected the Court's approach: "To me such a distinction is so artificial that it loses any sense of reality when applied to a concrete situation." *Id.*, Diss. Op. Owada, J., para. 23. Judge Xue Hanqin (China) declared that the distinction "unduly complicates the meaning of the phrase." *Id.*, Sep. Op. Xue, J., para. 16. Judge Kenneth Keith (New Zealand), in his very clear separate opinion, did not make any use of this distinction. *Id.*, Sep. Op. Keith, J.

<sup>120</sup> *See infra* text accompanying note 199.



by other means; peer review; and the avoidance of adverse effects on stock.”<sup>121</sup> The Court rejected Australia’s position on the basis that it did not serve as an interpretation of the Convention on its own but was rather a reflection, more generally, of “well-conceived scientific research.”<sup>122</sup> The Court stated that it had no need “to offer a general definition of ‘scientific research.’”<sup>123</sup> On substance, the Court determined that “Article VIII expressly contemplates the use of lethal methods.”<sup>124</sup> The Court also indicated that Australia and New Zealand had overstated the legal significance of the recommendatory resolutions and guidelines on which they relied. Some had been adopted without the concurrence of Japan; they could not therefore be regarded as subsequent agreement or practice.<sup>125</sup> And the resolutions that were adopted by consensus did not require that lethal methods be used only when other methods were not available.<sup>126</sup>

Having proposed a separate examination of “scientific research” and “for purposes of,” the Court abandoned any attempt to define the first term.<sup>127</sup> It then considered the meaning of “for purposes of.”<sup>128</sup> It expressly noted that it “need not pass judgment on the scientific merit” of JARPA II’s research objectives; “[n]or is it for the Court to decide whether the design and implementation of a programme [were] the best possible means of achieving its stated objectives.”<sup>129</sup> The Court’s role was to consider “whether the elements of a programme’s design and implementation [were] reasonable in relation to its stated scientific objectives.”<sup>130</sup> This analysis was the core of the case, and, despite its disclaimer, the Court involved itself in what looks like an attempt at a scientific assessment of the merits of the JARPA II program.

An interesting feature of the case was the role of the parties’ experts. They provided reports, took part in the oral proceedings, and were subject to cross-examination and questioning by the judges. The Court made frequent reference to their evidence, especially where the parties’ experts were in agreement or where Japan’s own expert cast doubt on its position. This use of experts was a striking departure from the Court’s past practice. It seems clear that the Court’s experience in the *Pulp Mills* case<sup>131</sup> led to this change of approach. There, the parties’ experts had acted as counsel, and thus cross-examination of their evidence under Article 43 of the ICJ Statute was not possible. In *Pulp Mills*, the Court had commented unfavorably on this practice and had explained that it would prefer that the experts did not in the future act as counsel.<sup>132</sup>

<sup>121</sup> Whaling in the Antarctic, *supra* note 64, para. 74.

<sup>122</sup> *Id.*, para. 86.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*, para. 83.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*, para. 86.

<sup>128</sup> *Id.*, paras. 87–97.

<sup>129</sup> *Id.*, para. 88.

<sup>130</sup> *Id.*

<sup>131</sup> See *Pulp Mills on the River Uruguay* (Arg. v. Uru.), 2010 ICJ REP. 14 (Apr. 20).

<sup>132</sup> *Id.*, para. 167. Judge Christopher Greenwood (United Kingdom), in his separate opinion in *Pulp Mills*, discussed the problems caused by the parties’ use of experts as counsel. *Id.*, Sep. Op. Greenwood, J., paras. 27–28. Judges Awn Shawkat Al-Khasawneh (Jordan) and Bruno Simma (Germany), in their joint dissenting opinion, went further and claimed that the use of experts as counsel had meant that the Court’s method of evaluating the scientific evidence was flawed. *Id.*, Diss. Op. Al-Khasawneh & Simma, JJ., para. 2. They also criticized the Court’s practice of using “experts fantômes” as temporary Registry staff members on grounds of lack of transparency and procedural fairness. *Id.*, para. 14. They called on the Court, in the future, to appoint its own experts under Article 50 of its

The Court's change of approach in the *Whaling in the Antarctic* case is to be welcomed, as it offers the opportunity for a more rigorous treatment of complex scientific evidence.

The Court began its examination of whether the JARPA II program was "for purposes of" scientific research by disposing of two general arguments put forward by Australia.<sup>133</sup> First, Australia argued that the quantity of whale meat generated by JARPA II "cast doubt on whether the killing, taking and treating of whales [was] for purposes of scientific research."<sup>134</sup> However, as the Court stated, Article VIII allows the sale of whale meat, and the sale of whale meat and its use to fund research were not sufficient on their own to cause a special permit to fall outside Article VIII.<sup>135</sup> Second, Australia argued that a state's "pursuit of policy goals such as providing employment or maintaining a whaling infrastructure would indicate that the killing of whales [was] not for purposes of scientific research."<sup>136</sup> The Court held that "a State often seeks to accomplish more than one goal when it pursues a particular policy."<sup>137</sup> As noted, the key question was not the intentions of individual government officials but "whether the design and implementation of a programme are reasonable in relation to achieving the stated research objectives."<sup>138</sup>

In consequence, the Court reviewed the design and implementation of JARPA II.<sup>139</sup> Australia argued that, although Japan withdrew its objection to the moratorium on commercial whaling in 1986, it began its original JARPA program in 1987 "to continue commercial whaling under the 'guise' of scientific research."<sup>140</sup> JARPA had run from 1987 to 2005; it had killed 6,700 Antarctic minke whales.<sup>141</sup> This program was immediately followed by JARPA II,<sup>142</sup> which was the subject of the case before the Court. JARPA II had four stated research objectives: "(1) Monitoring of the Antarctic ecosystem; (2) Modelling competition among whale species and future management objectives; (3) Elucidation of temporal and spatial changes in stock structure; and (4) Improving the management procedure for Antarctic minke whale stocks."<sup>143</sup> It involved three types of whales: the plan was to take 850 minke whales, 50 fin whales, and 50 humpback whales each year.<sup>144</sup> Although the Court had not adopted a general definition of "scientific research," it nevertheless held (without explanation) that "the JARPA II activities involving the lethal sampling of whales can broadly be characterized as 'scientific research.'"<sup>145</sup> Australia argued that JARPA II's use of lethal methods was "merely a guise" for commercial

Statute. *Id.*, para. 8. Judge Keith, in his separate opinion, argued against this suggestion. *Id.*, Sep. Op. Keith, J., paras. 8–11; see also Daniel Peat, *The Use of Court-Appointed Experts by the International Court of Justice*, 2014 BRIT. Y.B. INT'L L. 271.

<sup>133</sup> *Whaling in the Antarctic*, *supra* note 64, paras. 90–97.

<sup>134</sup> *Id.*, para. 91.

<sup>135</sup> *Id.*, para. 94.

<sup>136</sup> *Id.*, para. 95.

<sup>137</sup> *Id.*, para. 97.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*, paras. 98–227.

<sup>140</sup> *Id.*, para. 101.

<sup>141</sup> *Id.*, para. 104.

<sup>142</sup> *Id.*, para. 105.

<sup>143</sup> *Id.*, para. 113.

<sup>144</sup> *Id.*, para. 123.

<sup>145</sup> *Id.*, para. 127.

whaling.<sup>146</sup> But the Court found “no basis to conclude that the use of lethal methods [was] *per se* unreasonable.”<sup>147</sup> However, Japan had carried out little analysis of whether the objectives of JARPA II could have been achieved by making greater use of nonlethal methods.<sup>148</sup> This outcome was “difficult to reconcile with Japan’s obligation to give due regard to IWC resolutions and Guidelines and its statement that JARPA II use[d] lethal methods only to the extent necessary to meet its scientific objectives.”<sup>149</sup> Moreover, the scale of the use of lethal methods in JARPA II was determined by “sample sizes, that is, by the number of whales of each species to be killed each year.”<sup>150</sup>

The Court embarked on its detailed analysis of the scientific evidence, as if determined to demonstrate that it is a suitable forum for cases involving complex environmental issues. It devoted sixty-eight paragraphs to sample sizes, including a table, a diagram, and statistical assessments.<sup>151</sup> The JARPA II program involved a much greater sample size than that of its predecessor, JARPA. Japan justified this increase by reference to the differences between the two programs: the “new objectives” of JARPA II to carry out ecosystem research and to construct a model of multispecies competition called for an increase in lethal sampling.<sup>152</sup> However, the Court concluded that the overall research objectives of JARPA II and its predecessor JARPA had much in common. “These similarities cast doubt on Japan’s argument that the JARPA II objectives relating to ecosystem monitoring and multi-species competition are distinguishing features of the latter programme that call for a significant increase in the minke whale sample size and the lethal sampling of two additional species.”<sup>153</sup> Moreover, Japan had launched JARPA II without waiting for the results of the final review of JARPA by the IWC’s Scientific Committee.<sup>154</sup>

Australia asserted that Japan failed to provide “‘a coherent scientific rationale’ for the JARPA II sample sizes.”<sup>155</sup> It also claimed that Japan “wished to take approximately 850 minke whales for purposes other than scientific research and then ‘retro-fitted’ individual sample sizes to justify the overall sample size.”<sup>156</sup> Japan indicated that its sample sizes were based on a standard scientific formula and on norms used by the IWC’s Scientific Committee.<sup>157</sup> The Court referred to the expert evidence: Japan’s own expert had said that “‘Japanese scientists ha[d] not always given completely transparent and clear explanations of how sample sizes were calculated or determined.’”<sup>158</sup>

The Court could arguably have stopped there, but it then described, in considerable detail, a five-step process of sample-size determination.<sup>159</sup> The Court identified several features of

<sup>146</sup> *Id.*, para. 130.

<sup>147</sup> *Id.*, para. 135.

<sup>148</sup> *Id.*, paras. 136–41.

<sup>149</sup> *Id.*, para. 144.

<sup>150</sup> *Id.*, para. 145.

<sup>151</sup> *Id.*, paras. 145–212.

<sup>152</sup> *Id.*, para. 149.

<sup>153</sup> *Id.*, para. 153.

<sup>154</sup> *Id.*, para. 154.

<sup>155</sup> *Id.*, para. 158.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*, para. 159.

<sup>158</sup> *Id.* (quoting Japan’s expert on this issue).

<sup>159</sup> *Id.*, paras. 160–98.

JARPA II that cast doubt on the reasonableness of Japan's position. Japan employed different research periods for different species of whales; it had "not address[ed] how disparate research time frames for the three whale species [were] compatible with JARPA II's research objectives relating to ecosystem modelling and multi-species competition."<sup>160</sup> In addition, the small sample sizes for fin and humpback whales were not large enough "to produce statistically relevant information."<sup>161</sup> Japan's own expert had raised concerns about this result.<sup>162</sup> As to the increased sample size for high-value minke whales, Australia alleged that "the minke whale sample size was set not for purposes of scientific research, but instead to meet Japan's funding requirements and commercial objectives."<sup>163</sup> The JARPA II research plan provided only limited information about the basis for the calculation of sample sizes, and the parties' experts had agreed on this point.<sup>164</sup> "These shortcomings . . . [were] important to the Court's assessment of whether the overall design of JARPA II [was] reasonable in relation to the programme's objectives. . . ."<sup>165</sup>

Finally, the Court compared sample size to the actual take of whales.<sup>166</sup> Far fewer fin whales were taken than the target set, and no humpback whales were taken.<sup>167</sup> What seems to have weighed heavily with the Court was that Japan had not made any changes to the objectives and target sample sizes, "despite the number of years in which the implementation of JARPA II ha[d] differed significantly from the design of the programme."<sup>168</sup> This inaction "cast doubt on [the] characterization of [JARPA II] as a programme for purposes of scientific research."<sup>169</sup> So did the open-ended time frame and limited scientific output of JARPA II.<sup>170</sup>

Overall, the Court reasoned that JARPA II involved activities that could "broadly be characterized as scientific research . . . , but that the evidence [did] not establish that the programme's design and implementation [were] reasonable in relation to achieving its stated objectives."<sup>171</sup> The special permits were "not 'for purposes of scientific research' pursuant to Article VIII, paragraph 1, of the Convention."<sup>172</sup> The Court then spelled out the implications of this conclusion: JARPA II fell outside Article VIII. Consequently, as Australia had alleged, Japan had violated three provisions of the Schedule: the moratorium on commercial whaling, the factory ship moratorium, and the prohibition of commercial whaling in the Southern Ocean Sanctuary.<sup>173</sup> Here again, the Court was cautious in its pronouncements. It said that there was "no reason to evaluate the evidence" put forward by the parties as to whether JARPA II had "attributes of commercial whaling."<sup>174</sup> And despite all its doubts about the JARPA II program, the Court did

<sup>160</sup> *Id.*, para. 194.

<sup>161</sup> *Id.*, para. 179.

<sup>162</sup> *Id.*, para. 180.

<sup>163</sup> *Id.*, para. 184.

<sup>164</sup> *Id.*, paras. 180–81.

<sup>165</sup> *Id.*, para. 181.

<sup>166</sup> *Id.*, paras. 199–212.

<sup>167</sup> *Id.*, para. 201.

<sup>168</sup> *Id.*, para. 209.

<sup>169</sup> *Id.*, para. 226.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*, para. 227.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*, paras. 228–33.

<sup>174</sup> *Id.*, para. 230.

not accept Australia's allegation that Japan had acted in bad faith; it was not willing to draw this inference based on the evidence before it.<sup>175</sup>

The Court also took a cautious approach as regards Australia's claim that Japan had violated paragraph 30 of the Schedule.<sup>176</sup> This paragraph provides that the IWC's Scientific Committee may review or comment on special permits before they are issued by the states parties under Article VIII. The Scientific Committee conducts its reviews on the basis of guidelines issued by the IWC.<sup>177</sup> Australia argued that Japan had violated its obligation "to make proposed permits available to the IWC Secretary before they are issued, in sufficient time to allow review and comment by the Scientific Committee."<sup>178</sup> Japan did not provide permits before the start of each season, and the annual permits did not contain adequate information.<sup>179</sup> The Court rejected this claim by thirteen votes to three.<sup>180</sup> It held that "the lack of detail . . . [was] consistent with that fact that the programme is a multi-year programme."<sup>181</sup> Nevertheless, it stated that paragraph 30 "must be appreciated in light of the duty of co-operation with the IWC and its Scientific Committee . . . [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."<sup>182</sup> This statement seems to be an implicit rebuke to Japan for its failure to submit a revised research plan when it became apparent that its initial JARPA II program had been adjusted. The three judges who dissented on this point, Judges Bhandari, Julia Sebutinde, and Hilary Charlesworth wanted to read more into paragraph 30, to give a wider content to procedural obligations.<sup>183</sup>

As to remedies, the Court, as too often in the past, did not give any extended consideration to this question.<sup>184</sup> Australia had asked the Court for a declaratory judgment that Japan had violated three paragraphs of the Schedule.<sup>185</sup> The Court, by twelve votes to four, stated that the special permits granted by Japan under JARPA II did not fall within Article VIII and that Japan had "not acted in conformity with its obligations" under the prohibitions on commercial whaling in the Southern Ocean Sanctuary, the moratorium on commercial whaling, and the use of factory ships.<sup>186</sup> The Court further expressed that "JARPA II [was] an ongoing programme . . . [and that] measures that go beyond declaratory relief are warranted."<sup>187</sup> The Court ordered Japan to "revoke any extant authorization, permit or licence in relation to JARPA II, and refrain from granting any further permits under Article VIII in pursuance of that programme."<sup>188</sup> Yet the Court saw "no need to order the additional remedy requested by Australia,

<sup>175</sup> *Id.*, para. 243 (noting that "the Court does not need to address other arguments invoked by Australia in support of its claims").

<sup>176</sup> *Id.*, paras. 234–42.

<sup>177</sup> *Id.*, paras. 47, 234.

<sup>178</sup> *Id.*, para. 234.

<sup>179</sup> *Id.*, para. 236.

<sup>180</sup> *Id.*, para. 247.

<sup>181</sup> *Id.*, para. 239.

<sup>182</sup> *Id.*, para. 240.

<sup>183</sup> *Id.*, Sep. Op. Bhandari, J., paras. 11–19; *id.*, Sep. Op. Sebutinde, J., paras. 15–20; *id.*, Sep. Op. Charlesworth, J. *ad hoc*, paras. 11, 14–17.

<sup>184</sup> *Id.*, paras. 244–47 (Judgment).

<sup>185</sup> *Id.*, para. 244.

<sup>186</sup> *Id.*, para. 247.

<sup>187</sup> *Id.*, para. 245.

<sup>188</sup> *Id.*, para. 247.

which would require Japan to refrain from authorizing or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII.”<sup>189</sup> The Court noted: “That obligation already applies to all States parties. It is to be expected that Japan will take account of the reasoning and conclusions contained in this Judgment as it evaluates the possibility of granting any future permits under Article VIII . . . .”<sup>190</sup>

However, the aftermath throws some doubt on this expectation. The Court’s cautious approach arguably left it open to Japan to pursue its whaling programs. As noted, the Court did not say that Japan was guilty of bad faith. While this hypothesis might seem to be the inference to be drawn from its judgment, as certain judges pointed out, a high standard of proof applies to such a claim.<sup>191</sup> The Court did not expressly assert that the “precautionary principle” accepted by both parties should be applicable to whaling, and it did not support a radical approach to the interpretation of environmental conventions. It did not read a broad duty to cooperate into Article 30’s procedural obligations. Most important, it accepted that JARPA II was broadly scientific research. It did not specifically state that JARPA II was commercial whaling, although that was the inference from its finding that Japan’s killing of whales in the Southern Ocean was not for purposes of scientific research. The Court’s many doubts about Japan’s program led it to this conclusion. But the judgment may well have the perverse effect of guiding Japan as to how to modify its whaling program under the special-permit system to ensure that it will in the future appear to be “for purposes of” scientific research.

The IWC was not able to reach consensus on its response to the ICJ judgment.<sup>192</sup> New Zealand proposed a resolution on the implications of the judgment, designed to make scientific whaling harder in the future, but it, too, could not achieve consensus.<sup>193</sup> By its vote on the resolution, Japan indicated that it would not be bound by its provisions.<sup>194</sup> On the day of the ICJ judgment, Japan stopped JARPA II, and it suspended whaling in the Antarctic for a year, but it appears obdurate in its commitment to whaling.<sup>195</sup> It interprets the significance of the judgment narrowly. It promised to review its research program and to submit a new whaling plan that takes account of the ICJ judgment.<sup>196</sup> It did so in November 2014.<sup>197</sup> It now plans to kill

<sup>189</sup> *Id.*, para. 246.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*, Diss. Op. Owada, J., para. 42; *id.*, Diss. Op. Abraham, J., paras. 28–31; *id.*, Diss. Op. Yusuf, J., para. 54; *id.*, Sep. Op. Greenwood, J., para. 29.

<sup>192</sup> See International Whaling Committee, Chair’s Report of the 65th Meeting, sec. 7.5 (Oct. 31, 2014), *available at* [https://archive.iwc.int/pages/terms.php?ref=3683&search=%21collection49&k=&url=pages%2Fdownload\\_progress.php%3Fref%3D3683%26size%3D%26ext%3Dpdf%26k%3D%26search%3D%2521collection49%26offset%3D0%26archive%3D0%26sort%3DDESC%26order\\_by%3Drelevance](https://archive.iwc.int/pages/terms.php?ref=3683&search=%21collection49&k=&url=pages%2Fdownload_progress.php%3Fref%3D3683%26size%3D%26ext%3Dpdf%26k%3D%26search%3D%2521collection49%26offset%3D0%26archive%3D0%26sort%3DDESC%26order_by%3Drelevance) [hereinafter Chair’s Report] (outlining proposed resolution on whaling under special permit).

<sup>193</sup> International Whaling Commission, Resolution 2014-5, Whaling Under Special Permit 19–21 (2014), *available at* [https://archive.iwc.int/pages/view.php?ref=3600&search=%21collection110&order\\_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=2](https://archive.iwc.int/pages/view.php?ref=3600&search=%21collection110&order_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=2) [hereinafter IWC Resolution 2014-5] (noting passage of Resolution 2014–5 by thirty-five votes to twenty); see also Chair’s Report, *supra* note 192, paras. 141–59, 253.

<sup>194</sup> IWC Resolution 2014-5, *supra* note 193, at 24.

<sup>195</sup> See Anthony Fensom, *Japanese Whaling: The Saga Continues*, DIPLOMAT, Aug. 26, 2014, *at* <http://thediplomat.com/2014/08/japanese-whaling-the-saga-continues>.

<sup>196</sup> Government of Japan Press Release, Policy Towards the Future Whale Research Programs, Statement by Minister for Agriculture, Forestry and Fisheries (Apr. 18, 2014), *at* <http://webcache.googleusercontent.com/search?q=cache:http://www.jfa.maff.go.jp/e/pdf/danwa.pdf>; see also Chair’s Report, *supra* note 192, sec. 15.3.

<sup>197</sup> Justin McCurry, *Japan Likens Anti-whaling Campaign to Attempt to Ban Kimono*, GUARDIAN, Nov. 26, 2014, *at* <http://www.theguardian.com/environment/2014/nov/27/australia-whaling-campaign-likened-to-ban-japan-kimono>.



3,996 minke whales in the Southern Ocean over the next twelve years.<sup>198</sup> Japan has also taken the position that the judgment does not apply to JARPN II in the North Pacific, even though JARPN II resembles JARPA II. Accordingly, it authorized two whale hunts in the North Pacific in 2014.<sup>199</sup> Japan also persists in its attempts to secure authorization for “small-type coastal whaling” to catch minke whales under the exemption provided for aboriginal subsistence whaling.<sup>200</sup> It helped to secure the rejection of the proposal for a South Atlantic Whale Sanctuary.<sup>201</sup> And Japan continues its efforts to secure votes to overturn the moratorium on commercial whaling.<sup>202</sup>

### *Maritime Dispute (Peru v. Chile)*

In 2008, Peru brought a case requesting that the Court determine the course of its maritime boundary with Chile.<sup>203</sup> Peru claimed that the boundary was an equidistance line from the baselines of the two states to a distance of 200 nautical miles (nm) from those baselines.<sup>204</sup> Moreover, beyond the point where the common boundary ended, Peru was entitled to exercise sovereign rights over a further area lying within 200 nm of its baselines (the outer triangle (shown in darker blue on the map below)).<sup>205</sup> Chile’s position was that the maritime boundary had already been delimited by agreement in the 1952 Santiago Declaration and that it followed a parallel of latitude.<sup>206</sup> The map below highlights the big difference between these two claims.

This type of disagreement as to whether a boundary has already been established or whether the Court must determine the boundary is common in such cases. But here the Court’s solution was not to make a simple choice between the two lines. In part, the Court accepted the substance of Chile’s argument that an established boundary along a parallel of latitude already existed,<sup>207</sup> but it did not accept the basis on which Chile relied. Moreover, in part, the Court also accepted Peru’s argument for an equidistance line.<sup>208</sup> As so often in this type of case, the end result looks like a compromise, although it was not openly avowed as such.

The Court’s judgment has many unusual elements. Its reasoning does not seem entirely coherent or compelling, but the end result may well be equitable. This was acknowledged most

<sup>198</sup> *Id.*

<sup>199</sup> Jack Simpson, *Japan Kills 30 Minke Whales in First Hunt Since ICJ Ruling*, INDEPENDENT, June 14, 2014, at <http://www.independent.co.uk/news/world/asia/japan-kill-30-minke-whales-in-first-hunt-since-icj-ruling-9537063.html>.

<sup>200</sup> See International Whaling Commission, IWC/65/09, Agenda Item 5: Japan’s Proposal and Its Background for Schedule Amendment to Permit the Catching of Minke Whales from the Okhotsk Sea-West Pacific Stock by Small-Type Coastal Whaling Vessels (July 14, 2014) (submitted by Japan), available at <https://archive.iwc.int/pages/view.php?ref=3445>. This plan was rejected by thirty-nine against, nineteen in favor, and two abstentions.

<sup>201</sup> International Whaling Commission, IWC/65/08, The South Atlantic: A Sanctuary for Whales (Submitted by Argentina, Brazil, South Africa, and Uruguay) (June 5, 2014), available at <https://archive.iwc.int/pages/view.php?ref=3418>.

<sup>202</sup> See Justin McCurry, *Japan Set to Wade into Diplomatic Row by Bypassing Ban on Whaling*, GUARDIAN, Sept. 4, 2014, at <http://www.theguardian.com/world/2014/sep/04/japan-diplomatic-row-bypassing-whaling-ban-antarctic>.

<sup>203</sup> *Maritime Dispute (Peru v. Chile)*, para. 1 (Int’l Ct. Justice Jan. 27, 2014) [hereinafter *Maritime Dispute*].

<sup>204</sup> *Id.*, para. 14.

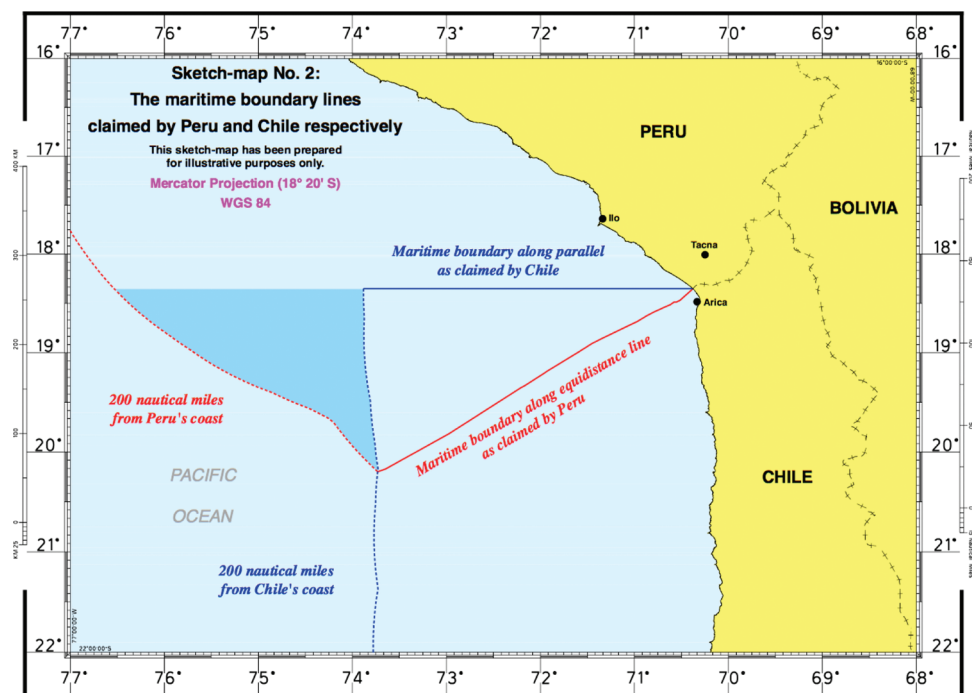
<sup>205</sup> *Id.*

<sup>206</sup> *Id.*, paras. 14, 22.

<sup>207</sup> *Id.*, para. 151.

<sup>208</sup> *Id.*, para. 181.

FIGURE 1. MARITIME DISPUTE BETWEEN PERU AND CHILE



Source: Maritime Dispute (Peru v. Chile), Sketch-Map No. 2, The Maritime Boundary Lines Claimed by Peru and Chile Respectively, at 16 (Int'l Ct. Justice Jan. 27, 2014).

clearly in the one-page declaration of Judge Joan Donoghue, who indicated that she was happy to vote for the judgment because she thought that “it reflects a sound outcome.”<sup>209</sup> However, fundamental differences existed among the members of the Court, with twelve judges expressing their own views in declarations, separate opinions, and dissenting opinions.<sup>210</sup> On the most controversial issues, they were divided by ten votes to six.<sup>211</sup>

As shown in Figure 1, Peru and Chile are adjacent states, and their shared coastline is concave, mostly uncomplicated and relatively smooth. Their land boundary had been fixed in the 1929 Treaty of Lima.<sup>212</sup> In 1947, both parties had unilaterally proclaimed 200 nm zones to protect their fish stocks from foreign fishing boats.<sup>213</sup> One of their main concerns was to look after the interests of their domestic whaling fleets.<sup>214</sup> Chile, Peru, and Ecuador subsequently negotiated a series of instruments on maritime matters in 1952, 1954, and 1967.<sup>215</sup> Chile

<sup>209</sup> *Id.*, Decl. Donoghue, J.

<sup>210</sup> *Id.*, Decl. Tomka, P.; *id.*, Decl. Sepúlveda-Amor, V.P.; *id.*, Sep. Op. Owada, J.; *id.*, Decl. Skotnikov, J.; *id.*, Diss. Op. Xue, Gaja, Bhandari, JJ., & Orrego Vicuña, J. *ad hoc*; *id.*, Decl. Donoghue, J.; *id.*, Decl. Gaja, J.; *id.*, Diss. Op. Sebutinde, J.; *id.*, Decl. Guillaume, J. *ad hoc*; *id.*, Sep. Op. Orrego Vicuña, J. *ad hoc*.

<sup>211</sup> *Id.*, para. 198 (Judgment) (noting votes against the delimitation from President Peter Tomka (Slovakia), Judges Xue, Gaja, Sebutinde, and Bhandari, and Judge *ad hoc* Francisco Orrego Vicuña (Chile)).

<sup>212</sup> For an account of the historical background, see *id.*, paras. 17–21.

<sup>213</sup> *Id.*, paras. 19, 25, 26.

<sup>214</sup> See *id.*, para. 26.

<sup>215</sup> *Id.*, para. 20.

claimed that one of these instruments—the 1952 Santiago Declaration<sup>216</sup>—had established a maritime boundary.<sup>217</sup> It also relied on subsequent agreements as evidence of that boundary.<sup>218</sup> Peru argued that this boundary would be “totally inequitable”: it would give Chile a full 200 nm maritime extension, whereas Peru would suffer “a severe cut-off effect.”<sup>219</sup>

The parties agreed that their 1947 proclamations had not established an international maritime boundary between them.<sup>220</sup> As for the 1952 Santiago Declaration, which was central to Chile’s case, both Chile and Peru no longer contested that it was an international treaty.<sup>221</sup> The main focus of the Santiago Declaration was the preservation of maritime resources. Paragraph IV of the Santiago Declaration was the key provision in this case: it created maritime zones for islands on the basis of a parallel of latitude.<sup>222</sup> Chile argued that this paragraph did not just set up a special regime for islands but that it also made clear that the maritime boundary between Chile and Peru was “the parallel of latitude passing through the point at which the land boundary between [the two states] reach[ed] the sea.”<sup>223</sup> The Court turned to the customary international law of treaty interpretation as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.<sup>224</sup> On the basis of the ordinary meaning, it found that paragraph IV did not establish a general rule.<sup>225</sup> The Court confirmed this conclusion by reference to the object and purpose of the treaty, which was “the conservation and protection of the necessary natural resources . . . through the extension of the maritime zones.”<sup>226</sup> As has been its common practice in recent cases, the Court said that it need not take account of *travaux préparatoires*, but it nevertheless considered the relevant material that confirmed its interpretation.<sup>227</sup>

The Court therefore rejected Chile’s central argument that the 1952 Santiago Declaration had established a maritime boundary on the basis of a parallel of latitude.<sup>228</sup> However, it went on to find that the 1954 Special Maritime Frontier Zone Agreement (1954 Agreement) acknowledged that a maritime boundary between Chile and Peru already existed by its reference in Article 1 to the parallel, which constitutes the maritime boundary: “The Parties’ express acknowledgment of its existence can only reflect a *tacit agreement* which they had reached earlier.”<sup>229</sup> The Court recognized that the 1954 Agreement did “not indicate when and by what means that boundary was agreed upon.”<sup>230</sup> It gave no indication of the nature or extent of the

<sup>216</sup> Declaration on the Maritime Zone, Chile-Ecuador-Peru, Aug. 18, 1952, 1006 UNTS 326 (Santiago Declaration), available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201006/volume-1006-I-14758-English.pdf>.

<sup>217</sup> Maritime Dispute, *supra* note 203, para. 51.

<sup>218</sup> *Id.*, paras. 78–99.

<sup>219</sup> On the positions of the parties, see *id.*, paras. 22–23.

<sup>220</sup> *Id.*, paras. 25–44.

<sup>221</sup> *Id.*, paras. 45–48.

<sup>222</sup> *Id.*, para. 49.

<sup>223</sup> *Id.*, para. 51.

<sup>224</sup> *Id.*, para. 57.

<sup>225</sup> *Id.*, paras. 57–70.

<sup>226</sup> *Id.*, para. 63.

<sup>227</sup> *Id.*, para. 66.

<sup>228</sup> *Id.*, para. 70.

<sup>229</sup> *Id.*, para. 91 (emphasis added).

<sup>230</sup> *Id.*

maritime boundary.<sup>231</sup> The Court nevertheless, on the basis of the context of the 1947 Proclamations and the 1952 Santiago Declaration, agreed with Chile that the boundary was “an all-purpose one,” applicable to the water column and the seabed.<sup>232</sup>

The Court made this central finding by fifteen votes to one. Only Judge Sebutinde dissented. She said that the Court was not justified in finding a “tacit agreement.”<sup>233</sup> As she noted, in the past, the Court had required a “stringent and well-established standard of proof” for the existence of such a tacit agreement in boundary cases.<sup>234</sup> Judges Hisashi Owada and Bernardo Sepúlveda-Amor actually accepted her central point, that the stringent standard had not been met, but they were willing to vote with the majority on the basis of a “tacit agreement”<sup>235</sup> — or the possibility of such a tacit agreement—even though the judgment should have provided a systematic and rigorous analysis of the parties’ conduct.<sup>236</sup>

Thus, Chile was successful in its claim of an existing maritime boundary along a parallel of latitude. The key question then arising was whether this line should extend to 200 nm.<sup>237</sup> If so, it would not only subject Peru to a “severe cut-off effect,” but it would also leave an area beyond the end of the 200 nm shared boundary that would be within 200 nm of Peru’s coast and over which it would have sovereign rights (the outer triangle).<sup>238</sup> The Court then shifted its approach and avoided this potentially inequitable and inconvenient result.<sup>239</sup>

The Court’s reasoning here does not seem consistent with the approach that it had adopted in the first part of its judgment. It no longer focused on the context provided by the 1947 proclamations of the 200 nm zones. Instead, it held that the purpose of the 1954 Agreement was “narrow and specific”: it referred to the existing maritime boundary to establish a “zone of tolerance” for fishing activity by small vessels.<sup>240</sup> The Court took account of the relatively limited extent of such activity in 1954. It said that the all-purpose nature of the maritime boundary could not be “determinative of the extent of that boundary.”<sup>241</sup> The fishing activity and other practices at the relevant time provided some support for the view that, when the parties acknowledged the existence of an agreed maritime boundary, they “were unlikely to have considered that it extended all the way to the 200-nautical-mile limit.”<sup>242</sup> At that time, general acceptance of a 200 nm exclusive economic zone did not yet exist.<sup>243</sup> Subsequent practice did not alter this position.<sup>244</sup> The Court therefore concluded that the agreed maritime boundary

<sup>231</sup> *Id.*, para. 92.

<sup>232</sup> *Id.*, paras. 100–02.

<sup>233</sup> *Id.*, Diss. Op. Sebutinde, J., para. 7.

<sup>234</sup> *Id.*, para. 6 (citing Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), 2007 ICJ REP. 659, para. 253 (Oct. 8)).

<sup>235</sup> *Id.*, Sep. Op. Owada, J., para. 25.

<sup>236</sup> *Id.*, Decl. Sepúlveda-Amor, J., paras. 5, 18.

<sup>237</sup> *See id.*, para. 103 (Judgment).

<sup>238</sup> *Id.*, para. 23.

<sup>239</sup> *Id.*, paras. 103–17.

<sup>240</sup> *Id.*, para. 89.

<sup>241</sup> *Id.*, para. 111.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*, para. 116 (“As the Court has noted previously, in this period the concept of an exclusive economic zone of 200 nautical miles was ‘still some long years away.’”).

<sup>244</sup> *Id.*, paras. 119–48.

along the parallel did not extend beyond 80 nm from its starting point.<sup>245</sup> The acknowledgment in 1954 that a maritime boundary existed was “too weak a basis for holding that it extended far beyond the Parties’ extractive and enforcement capacity at that time.”<sup>246</sup> The Court recognized “some uncertainty as to the precise length of the agreed maritime boundary,” but, by ten votes to six, selected the figure of 80 nm.<sup>247</sup> As five dissenting judges pointed out, little compelling evidence justified the choice of this distance, rather than 200 nm.<sup>248</sup>

The Court then established the starting point of the maritime boundary.<sup>249</sup> Although the parties disagreed about the starting point of the land boundary, the Court held that the parties had by their behavior shown agreement on the starting point of the maritime boundary.<sup>250</sup> The Court was almost unanimous on its identification of this point, with the exception of Judge Giorgio Gaja, who was not pleased that its decision meant that the starting point of the maritime boundary could be different from that of the land boundary.<sup>251</sup>

The Court thereafter considered the course of the boundary beyond the 80 nm limit on the parallel of latitude.<sup>252</sup> Chile, but not Peru, is a party to the United Nations Convention on the Law of the Sea (UNCLOS). The Court accordingly proceeded on the basis that UNCLOS Articles 74(1) and 83(1), on the delimitation of the exclusive economic zone and the continental shelf, reflect customary international law.<sup>253</sup> These articles provide for delimitation by agreement in order to achieve an equitable solution. The Court asserted that it “usually” employed a three-stage methodology in maritime boundary cases.<sup>254</sup> In fact, this methodology had only relatively recently been expressly adopted in the *Maritime Delimitation in the Black Sea* case, a unanimous judgment with no separate opinions by any of the judges.<sup>255</sup> Before that judgment, a two-stage approach had been used.<sup>256</sup>

Under the three-stage methodology, the Court first “constructs a provisional equidistance line”; it next “considers whether there are relevant circumstances which may call for an adjustment of that line to achieve an equitable result”; and it then completes the process by conducting “a disproportionality test in which it assesses whether the effect of the line, as adjusted, is such that the Parties’ respective shares of the relevant area are markedly disproportionate to the

<sup>245</sup> *Id.*, paras. 108, 117.

<sup>246</sup> *Id.*, para. 149.

<sup>247</sup> *Id.*, paras. 151, 198.

<sup>248</sup> *Id.*, Diss. Op. Xue, Gaja, Bhandari, JJ. & Orrego Vicuña, J. *ad hoc*, paras. 2, 9, 34; *id.*, Diss. Op. Sebutinde, J., para. 14; *see also id.*, Decl. Tomka, P., paras. 1, 3, 4, 25. Judge Leonid Skotnikov (Russian Federation) said that no evidence supported the 80 nm point, but, because the parties’ treatment of the extent of the maritime boundary lacked “clarity,” he could join the majority. *Id.*, Decl. Skotnikov, J., paras. 6–7.

<sup>249</sup> *Id.*, paras. 152–76 (Judgment).

<sup>250</sup> *Id.*, paras. 164–74.

<sup>251</sup> *Id.*, para. 198; *id.*, Decl. Gaja, J.

<sup>252</sup> *Id.*, paras. 177–95 (Judgment).

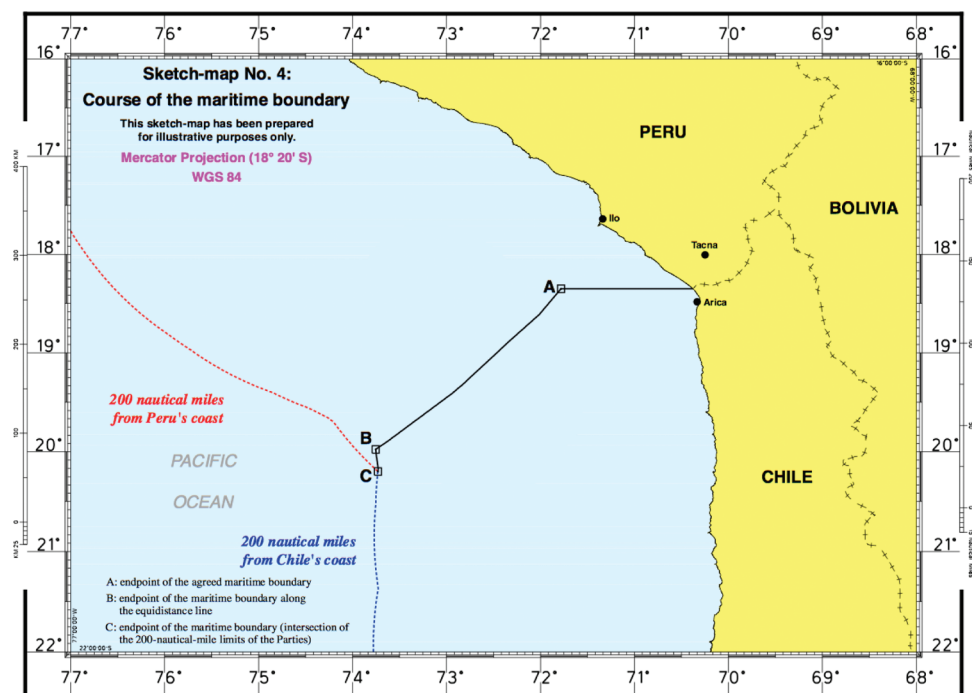
<sup>253</sup> *Id.*, para. 179 (quoting UN Convention on the Law of the Sea, Arts. 74(1), 83(1), *opened for signature* Dec. 10, 1982, 1833 UNTS 397, 21 ILM 1261 (1982)).

<sup>254</sup> *Id.*, para. 180.

<sup>255</sup> *Maritime Delimitation in the Black Sea* (Rom. v. Ukr.), 2009 ICJ REP. 61, paras. 115–22 (Feb. 3) [hereinafter *Black Sea Delimitation*]. In *Territorial and Maritime Dispute* (Nicaragua v. Colombia), 2012 ICJ REP. 624, para. 194 (Nov. 19), the Court said that this three-stage process was not to be applied in a mechanical fashion.

<sup>256</sup> *See Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal* (Bangl./Myan.), ITLOS Case No. 16, paras. 227–34 (Mar. 14, 2012), *available at* [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_16/C16\\_Judgment\\_14\\_03\\_2012\\_rev.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf) (discussing ICJ maritime-boundary jurisprudence).

FIGURE 2. MARITIME DELIMITATION BETWEEN PERU AND CHILE



Source: Maritime Dispute (Peru v. Chile), Sketch-Map No. 4, Course of the Maritime Boundary, at 66 (Int'l Ct. Justice Jan. 27, 2014).

lengths of their respective coasts.”<sup>257</sup> The Court was divided by ten votes to six on the adoption of the equidistance method.<sup>258</sup> Chile had advanced no arguments on the application of the equidistance method because its position all along was that the boundary was the parallel of latitude.<sup>259</sup> Given the Court’s adoption of the equidistance line, it had no need to decide on Peru’s “outer triangle” argument; that area of the sea now lay on Peru’s side of the boundary.<sup>260</sup>

In this case, the delimitation by the Court was to begin, not at the low-water line, but at the 80 nm endpoint of the agreed maritime boundary.<sup>261</sup> This delimitation was not unprecedented: as the Court indicated, other cases had ruled that the delimitation began at a point seaward of the low-water line.<sup>262</sup> However, the Court acknowledged that the situation was “unusual in that the starting-point for the delimitation in this case [was] much further from the coast.”<sup>263</sup> The Court constructed a provisional equidistance line that continued until the

<sup>257</sup> Maritime Dispute, *supra* note 203, para. 180.

<sup>258</sup> *Id.*, para. 198.

<sup>259</sup> *Id.*, paras. 14, 182, 188.

<sup>260</sup> *Id.*, para. 189.

<sup>261</sup> *Id.*, para. 177.

<sup>262</sup> *Id.*, para. 183 (citing Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), 1984 ICJ REP. 246, para. 212 (Oct. 12); Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria; Eq. Guinea Intervening), 2002 ICJ REP. 303, paras. 268–69 (Oct. 10); Black Sea Delimitation, *supra* note 255, para. 218).

<sup>263</sup> *Id.*



200 nm limits measured out from the parties' coasts no longer overlapped.<sup>264</sup> After that point, the line changed direction for a short stretch to follow the Chilean coast. The Court found that there were no relevant circumstances requiring any adjustment of the provisional equidistance line.<sup>265</sup> As for the third stage, the disproportionality test, the Court admitted that it faced an unusual situation in that the equidistance line did not start until the endpoint of the agreed nautical boundary, which was 80 nm from the coast.<sup>266</sup> The disproportionality test had been conceived as applying only in delimitation on the basis of equidistance.<sup>267</sup> Nevertheless, the Court persisted in paying lip service to the three-stage approach. It simply held that "no significant disproportion [was] evident."<sup>268</sup>

This judgment is the latest in a long line of maritime boundary cases decided by the ICJ; given the specific facts of the case, it is unlikely that it will serve as a precedent for the future. One of the peculiar features of the case, though not unique to this case,<sup>269</sup> is that the parties had not presented arguments to the Court on the length of the tacitly agreed boundary. In particular, they were not able to give their views to the Court on the 80 nm limit or on the application of the disproportionality test. Judge Donoghue suggested in her declaration that it might have been advisable to have asked the parties to set out their positions on these points.<sup>270</sup>

## II. CONCLUSION

In all three cases, the Court's reasoning is open to criticism on the grounds of lack of coherence or lack of clarity on central issues, but, in all three cases, the actual conclusions seem reasonable. Those who look for logic in legal reasoning may be disappointed by the Court's approach; others may be content that the results in all these cases appear just. Thus, in *Peru v. Chile*, the Court provided no adequate explanation of its finding of a tacit agreement establishing a maritime boundary along a parallel of latitude; its identification of 80 nm as the end point of that line seems less than convincing; but the final result seems equitable in a way that a more coherent pursuit of the boundary to a 200 nm limit would not have been. In *Whaling in the Antarctic*, the Court held that Japan's JARPA II program was broadly "scientific research" but was not "for purposes of" scientific research; it did not draw the logical inference that the program was commercial whaling. And in *Timor-Leste v. Australia*, the Court accepted as plausible what seemed obvious to everyone except Australia, that it is not lawful for a state to seize documents and data from the lawyers of another (smaller, weaker, and poorer) state. The Court paid lip service to Australia's written undertaking but nevertheless found it necessary (without a full explanation) to order two provisional measures. In both *Whaling in the Antarctic* and *Timor-Leste v. Australia*, the Court avoided direct findings of bad faith against the respondent states.

<sup>264</sup> *Id.*, para. 186.

<sup>265</sup> *Id.*, para. 191.

<sup>266</sup> *Id.*, paras. 192–94.

<sup>267</sup> *Id.*, para. 193.

<sup>268</sup> *Id.*, para. 194.

<sup>269</sup> See, e.g., *Continental Shelf (Tunis/Libya)*, 1982 ICJ REP. 18 (Feb. 24) (noting that the Court created the doctrine of giving half effect to islands without any argument from the parties on this point).

<sup>270</sup> *Id.*, Decl. Donoghue, J.

The impact of the cases on the development of international law is clearly limited. *Timor-Leste v. Australia* raised interesting questions about the scope of the principle of sovereign equality; *Peru v. Chile* confirms the central role of the equidistance line in maritime delimitation. *Whaling in the Antarctic* is obviously the most important, although the Court's understandably cautious approach reduces its general significance. Furthermore, the judgment has not ended the disputes on Japan's use of the special permit system, which has allowed Japan to continue its whale harvests. The main importance of the case lies in incidental matters: the question of standing and legal interest, the Court's use of experts, and its attempt to deal with complex scientific evidence.