

Japan's whaling gambit shows it's time to strengthen the rule of science in law



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Earlier this week it was revealed that Japan has prevented the International Court of Justice from hearing cases about its controversial whaling program.

The declaration follows the highly publicised 2014 ruling by the court that Japan's previous scientific whaling program (**JARPA II**) was "not for the purposes of scientific research", making it contrary to international law.² Japan concluded JARPA II and announced a new program, NEWREP-A³ which proposes to kill up to around 4,000 whales over 12 years, beginning this summer.

Japan's declaration effectively stops the International Court of Justice reviewing or ruling on the legality of NEWREP-A in the future, unless Japan consents to a case being brought against it (hint: that's incredibly unlikely).

Is Japan's action legal?

Generally the International Court of Justice can only exercise its power if countries agree to its jurisdiction.⁴ They may do this within a treaty, or agree to the court's power generally, subject to specific limitations.

Japan's declaration⁵ is in the latter category, accepting broad jurisdiction with the exception of "any dispute arising out of, concerning, or relating to research on, or conservation, management or exploitation of, living resources of the sea". This is clearly tailored to the provisions of the *International Convention for the Regulation of Whaling*, but also excludes review by the court of its other fishing programs.

Japan's declaration is therefore permitted by international law. It is also something other nations have done. In fact, Australia made a similar declaration in 2002, limiting the jurisdiction of the court over resource disputes.⁶ This was done to block a potential court challenge to exploitation of oil and gas reserves by Australian companies in contested areas of the Timor Sea.⁷

The *International Convention of the Regulation of Whaling* regulates all forms of whaling and since 1982 has imposed a moratorium on commercial whaling. The exception is Article VIII which allows killing whales "for the purposes of scientific research" and which was the subject of the previous legal challenge against JARPA II in the International Court of Justice.

Japan's declaration doesn't affect previous rulings. However the court's JARPA II ruling specifically avoided addressing questions of "scientific merit or importance" about whaling.⁸ Rather the court restricted its decision specifically to Japan's justification for JARPA II, providing limited guidance on how to demarcate between legitimate and illegitimate scientific claims in international law in the future.

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² Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014, p. 226. See Press, T. "Whaling in the Antarctic: Japan's Scientific Program Illegal" in *The Conversation*, 1 April 2014. <https://theconversation.com/whaling-in-the-antarctic-japans-scientific-program-illegal-23824>

³ For an outline of the program, go to <http://www.jfa.maff.go.jp/j/whale/pdf/outline-of-newrep-a.pdf>

⁴ The Statute of the International Court of Justice, Chapter II

⁵ For the text of the declaration, go to

<https://treaties.un.org/Pages/Declarations.aspx?index=Japan&chapter=1&treaty=311>

⁶ Declaration made 22 March 2002,

<https://treaties.un.org/Pages/Declarations.aspx?index=Australia&chapter=1&treaty=311>

⁷ See Smith, M. 2011. "Australian Claims to the Timor Sea's Petroleum Resources: Clever, Cunning, Or Criminal?". *Monash University Law Review*. Available at <http://www.austlii.edu.au/au/journals/MonashULawRw/2011/28.pdf>

⁸ See Judgment at n2, paragraph 88.



The limited ruling, combined with Japan's limitation on jurisdiction, means we are unlikely to be able to say whether, or when, killing whales in the name of science is truly legal or not.

Weak law, weak science

Japan's actions (and indeed Australia's) points to a wider problem in how international law manages the global commons - resources and regions outside of national jurisdiction, such as the open ocean, the deep sea floor, and Antarctica.

Global treaties have historically assumed that science is a matter of common interest (rather than individual, state interest) and therefore not the source of potential legal disputes. There has been an assumption that the achievement of that common interest will be promoted in a more open, and less prescribed, governance framework. Treaty makers have historically treated science as a discipline which relies on disagreement and self-reform to advance, and hence there has been caution about drafting laws which might interfere with it, or limit its advancement.

This means commons treaties tended towards broad, non-prescriptive definitions of scientific research, leaving states to interpret and apply themselves as science grew and advanced, without interference from other bodies or authorities. While that approach may have been historically justified it is increasingly showing signs of strain.

Whaling is not the only scientific disagreement in contemporary international affairs. The near intractable disagreements about state obligations under the United Nations Framework Convention on Climate Change (**UNFCCC**) are a prime example of that.

Like the Whaling Convention, the UNFCCC is based around broadly defined scientific terminology which states are left to interpret and apply internally to themselves. Like the Whaling Convention, the UNFCCC contains no compulsory arbitration provisions.

Of the three states which produce more than half of the world's carbon emissions (China, the United States and India), only India accepts the compulsory jurisdiction of the International Court of Justice at all, but does so in a way that would prevent the court from reviewing its obligations under a climate change convention.⁹ This has effectively stymied attempts by small island states facing disastrous sea level rise to create certainty about the relationship between science and state obligations under that convention.

Subjecting science to the rule of law

While it is true that Japan may be exploiting an apparent loophole so are many states, including Australia. These matters have much further-reaching consequences than just whaling.

The problem Japan's declaration highlights is not one of law, but one of philosophy; an arguably redundant philosophy which views science as something beyond state self-interest and outside the core competency of international courts. Concerningly, this was a view reflected by the International Court of Justice in the whaling case.¹⁰

Yet that view is not necessarily supported by contemporary scientific or legal practice. Journals use peer review to evaluate the scientific veracity of claims. Similarly, the World Trade Organisation (along with domestic courts) has a legal framework to distinguish the better of two or more competing scientific claims.

Unlike most global commons regimes, the WTO operates on the assumption that scientific claims might be used to undermine the free-trade purposes of the regime and be the source of interstate conflict. Hence it sets out rules to evaluate competing scientific claims, and mandates resolution of scientific disputes by an external body in a manner which cannot be avoided by declaration.

It is time we treated the global commons with the same deference we treat global trade and finance.

⁹ See <https://treaties.un.org/Pages/Declarations.aspx?index=India&chapter=1&treaty=311>

¹⁰ See Gogarty, B and P. Lawrence. "The ICJ Whaling Case: science, transparency and the rule of law" (2014/2015) 23(2) *Journal of Law, Information and Science* 134

Japan's actions serve to highlight the need to subject global commons governance to similar compulsory, objective, external arbitration mechanisms. If science really is the best device to govern such matters, then it must be given the legal traction required to allow it to govern in the first place.

