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DISCUSSION

Owada and the whale: dissenting on the burden of proof before the ICJ

NELSON COELHO — 4 May, 2015

Japan is out whaling again. One year after the ICJ decision that found that Japan's whaling program in the Antarctic was not in accordance with the International Convention for the Regulation of Whaling (ICRW), there is, unsurprisingly, a new push towards that same direction from Japanese authorities. This is the perfect opportunity to take a closer look at 'the unofficial Japanese understanding' of that case: the words of judge Owada in his dissenting opinion. This document provides, in my view, a subtle explanation to why that decision might have been unconvincing for Japanese authorities.

The background of the case can be resumed very briefly: Japan has been whaling in the Antarctic and Australia opposed the legality of Japan's whaling programme (JARPA II). My colleague Natalie Dobson has published some while ago a review on the case where she provided a sound and complete analysis on the essential elements on the reasoning of the Court and critically addressed what she termed as being "a game of musical chairs", i.e., the temptation of the ICJ to play the role of a scientific authority, plus the limitations of that approach. As she underlines, the act of interpreting the ICRW is, if not substantially at least formally, a legal task and therefore the powers of appreciation of the court are not unfounded; hence the ICJ is, according to her analysis, in a position to legitimately interpret that convention. Some grounds of criticism have however been highlighted – for instance the stated objectives, which are left wide open for States to freely set their own policy, or the fragility of the concept of *scientific research* when it becomes the object of the court's reasoning. However, what catches my attention in this case, and which motivates my analysis on Judge Owada's dissenting opinion today, is that the criticism towards the Japanese whaling programme could not *per se* give ground to a decision on its merits in serving "scientific research purposes". This only happened due to a discrete but very relevant inversion of the *onus probandi*, i.e., with the presumption of the court that it was the defendant's duty to present evidence on the reasonableness of its own whaling programme rather than the applicant's duty to present its unreasonableness. Let us take a look at how Judge Owada reached such conclusion and why he deems such an approach unreasonable.

The reasoning of Judge Owada

Judge Owada conservatively stressed that under this regime, that is, as he stated, self-contained, "no power of decision-making by a majority is given to the [International

Whaling Commission] automatically to bind the Contracting Parties, except through a mechanism of consent" (§15). Therefore, the argument advanced by Australia, and accepted by the court, that the convention has gone through an evolution due to the change in the environment is understood by Judge Owada as being "tantamount to an attempt to change the rules of the game" (§16) agreed in 1946. What is interesting to note is that in the same paragraph (but between brackets) he also admits that this conclusion could be different *if* scientific evidence would be provided that whales were being overfished to severe depletion or extinction; arguments that, according to him, the applicant has failed to provide.

He is of the opinion that the grant of permits to kill, take and treat whales for the purposes of scientific research is not just an exception to the regulatory regime of the convention. In fact, he says that it carries "an important function" (§19) within this regulatory regime. Scientific research definition and evaluation is, however, "a discretionary decision of the granting government" (§19). This is a clear assertion of the principle of sovereignty in the reasoning of Judge Owada. As we understand from his reasoning, there is no possibility for the existence of abstract imperative criteria for assessing that concept. In international law, good faith has necessarily to be presumed. For this reason, Judge Owada affirms that the Japanese whaling program's design and implementation should, "by its nature not be the proper subject of review by the Court" (§21) since, as he seems to understand it, this is tantamount to actually infringe that presumption.

The flagrant inversion of the burden of proof is pointed by Judge Owada when he affirms that "[t]he allegations made by the Applicant that the activities were designed and implemented for purposes other than scientific research under the cover of scientific research thus cannot be presumed, and will have to be established by hard conclusive evidence that could point to the existence of bad faith attributable to the State in question" (§22). His critique posits that the Court did not analyse this point under an objective lens and preferred to engage with the science in the manner that this Judge considered "so artificial that it loses any sense of reality when applied to a concrete situation" (§23). Of course, he admits that JARPA II "is far from a perfect programme" (§46) but he follows that by saying that it should have been the applicant to establish that the activities carried out pursuant to this programme were not "reasonable" scientific activities. By actually inverting the *onus probandi*, the court, through its judgement, requires that the party that grants licences assumes the burden to establish if the scale and size of the lethal take envisaged under the programme is reasonable in order for the programme to be qualified as a genuine programme for purposes of scientific research. Not only, as Judge Owada states, is this not "in consonance with the plan and ordinary meaning of Article VIII" (§44), which provides for an unqualified right for the contracting parties to grant special permits, but this also goes against the presumption that nations always act in good faith in international relations.

Finally, Judge Owada also brings arguments that account for the usefulness of the two JARPA programmes in providing "valuable statistical data" (§46), which demonstrates that there was, indeed, a research purpose behind this particular Japanese whaling programme. By failing to present arguments on the contrary, the court actively engaged in an *onus probandi* inversion and, as a consequence, deliberately presumed that the Japanese programme was an act of bad faith and deemed it as unreasonable, according to the Japanese judge under very "unreasonable" grounds.

Final remarks

It is undeniable that whaling raises very passionate reactions. Last year, a resounding part of the world's public opinion perceived the outcome of this case as "a victory for the whales". The political, diplomatic and societal pressure revolving the end of whaling activities contribute to build a global public perception that whales are somehow a community interest, even though the legality of this claim remains to be argued and proven. If it is proven, then a question emerges on whether the presence of such an interest in front of the court gives reason to an inversion of the burden of proof in cases like this one. Unfortunately, Judge Owada does not engage with this discussion. That does not come with surprise if one considers his whole line of argument towards the unreasonableness of the inversion in this particular case and his absolute respect for the tenet that States are presumptively always acting in good faith under international law. Be that as it may, any disagreements towards the conclusion he reaches cannot override the absolute pertinence of the discussion he happens to bring about.

The inversion of the burden of proof by the ICJ, in this case, does appear to necessarily lead to a rebuttal of the presumption of good faith – even though it should be stressed that it is not always so. However, we are willing to argue that such an event does not have necessarily to be unreasonable, not only on this case but also on others to come. The opposite understanding, which Judge Owada sustains in his dissenting opinion, might well explain why, after one year, whaling is back on the Japanese agenda despite the continuous pressure from environmentalist groups and State governments such as the Australian one. However, doubts emerge on whether that controversial part of the ICJ decision was held on purpose or was merely accidental. Did the ICJ actively turned the presumption of good faith into 'dead letter international law' because it deemed that *community interests* were at stake? It is still early to make such an assumption and this blogpost merely aims at starting the debate. One cannot help but to *presume* that it is up to future ICJ decisions to confirm that the decision to invert the burden of proof in the *Whaling in the Antarctic* case represents a cosmopolitan-oriented perspective of international law taken by the majority, based on the commonality of certain goods. This would justify rebutting the operative procedural effects of the presumption of good faith. Otherwise, if this line of jurisprudence is not continued, that decision falls short of being reasonable, giving whales a Pyrrhic victory.

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