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DISCUSSION RESPONSE

Owada and the whale: a Rejoinder

NELSON COELHO — 8 May, 2015

Nelson Coelho

The arguments provided by James Harrison as to why the ICJ conducted an inversion of the burden of proof in the Whaling Case appear sound and conclusive; but they are also widely speculative. As he himself underlines, even though the award of the Court implies an interpretation of the ICRW notwithstanding clause as put forward by one of the parties in trial – namely the applicant – it does not do it expressly and unequivocally. It is precisely because of this lack of acknowledgeable motivation in the text of the award that an interpreter – as any dissenting judge – can criticize the perils of "legal acrobatics" in international justice.

For an inversion of the burden of proof not to lead to an unreasonable rebuttal of the presumption of good faith, the reasoning underlying the decision to do so must be clear and precise; what is more, such a decision must be founded on the merits of an explicit legal argument and not on some implicit references to the WTO Appellate Body interpretation of notwithstanding clauses (even less when it did not have in mind the issues at stake in the ICRW). Failure in exposing this reasoning (or any better one) *prior* to the application of the reasonability test over Japan's program not only allows for speculation in the legal blogosphere. Much more importantly, it also diminishes the full normative effect any legal decision must bear upon the parties involved. Indeed, if the Court had explained the reasoning to its interpretation of the notwithstanding clause, it would have necessarily highlighted the due reverence towards the "obligation in another provision" (EC – Tariff Preferences, Document WT/DS246/AB/R, 2004, §88). We are convinced that by having done so, the Court would have given some substance to the reasons – and the reasonability – underlying its decision to invert of the burden of proof and hence the criticism of Judge Owada would have been unfounded.

In this award, however, the motivations for the inversion of proof provided by the majority are too obscure for, as we submitted, §51-55 provides a very insufficient legal justification for such an important procedural deliberation. This obscurity casts a mantle of doubt over us interpreters – and more importantly over the applicants and the respondent – that should not bear upon any binding legal decision, let alone in international law where the presumption of good faith signifies reverence to national sovereignty. Hence, what can be learned from this award is that a lot remains to be done in international justice at the procedural level, namely in cases involving scientific evidence. Unfortunately, the majority did not take hold of this case as an opportunity to

contribute towards the clarification of the international legal principles of proof bearing. This was surely something this Court could have resolved.

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