The Whaling in the Antarctic case: a landmark judgment and its potential implications

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ABSTRACT
On 31 March 2014 the International Court of Justice issued its long-awaited judgment on the case concerning whaling in the Antarctic, brought before it by Australia over Japan's alleged breach of certain obligations under the International Convention for the Regulation of Whaling (ICRW). The Court's ruling, which held that Japan's Special Permit Whaling under the so-called JARPA II could not be qualified as being conducted "for purposes of scientific research", presents some innovative features that might lead to consider it a landmark in the evolution of environmental dispute settlement. This article tries to break down some of decision's key points from an international law perspective and shares some reflections on aspects of policy, dealing with the potential implications of the dispute for the current whaling regime and beyond.

Keywords: International Law, Environmental Dispute Settlement, IWC, ICJ, Antarctica, Cetaceans

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1. Introduction

The landmark judgment[1] recently issued by the International Court of Justice in the case concerning whaling in the Antarctic has arguably received one of the broadest media coverage in the history of interstate environmental litigation; the Court's verdict in the proceedings put forward by Australia over Japan's alleged breach of its obligations under the International Convention for the Regulation of Whaling (ICRW) has been hailed by conservationists, NGOs and governments as an overwhelming victory for whales and the oceans, and as soon as the news surfaced, virtually every website, television channel and social network in the world erupted with comments and slogans of support. After so much excitement, I will thus try to break down some of decision's key points from an international law perspective, while essentially discussing the question: "are there innovative features to be inferred from the ICJ ruling, with a particular emphasis on its influence on environmental dispute settlement?". Then, I will share some reflections on aspects of policy, dealing with the potential implications of the dispute for the current whaling regime and beyond.

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2. Background of the dispute

By way of introduction, I shall present the core passages that led to the litigation, which in general terms concerned the implementation, on the part of Japan, of the so-called JARPA II (Japan's Permit Japanese Whale Research Program under Special Permit in the Antarctic), an alleged research programme aimed at "(1) monitoring the Antarctic ecosystem; (2) modelling competition among whale species and future management objectives; (3) elucidating temporal and spatial changes in stock structure; and (4) improving the management procedure for Antarctic minke whale stocks" (par.113 of the judgment) by authorizing the annual killing, as sample sizes deemed necessary to measure all the targeted trends, of 850 minke whales, 50 fin whales and 50 humpback whales within the Southern Ocean Sanctuary. JARPA II supplanted Japan's former programme, JARPA, commenced during the 1987-1988 season with the purpose of collecting scientific data to contribute to the review of the moratorium on commercial whaling (adopted in 1982 by the International Whaling Commission) and implemented until the 2004-2005 season, after which the former came into effect. The legal basis for the issuance of special permits by one of the parties to the ICRW lies in Article VIII of the Treaty, which allows a Contracting Government to authorize any of its nationals "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", thus providing an exception to the operation of the Convention, but not a total exemption from its other provisions.

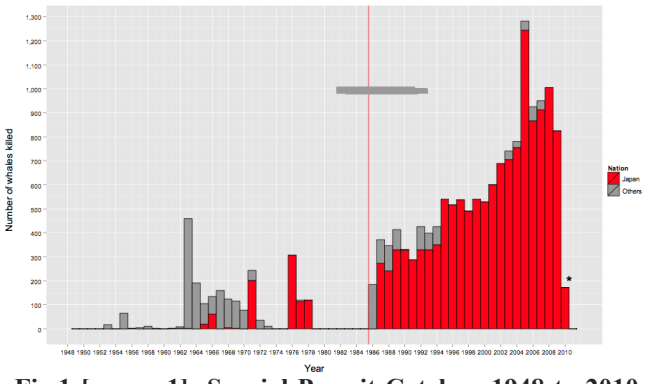

Fig.1 [annex 1]: Special Permit Catches, 1948 to 2010. Source: Memorial of Australia, Vol.I, p.38

As a consequence, any whaling occurring under a Special Permit shall be conducted 'for purposes of scientific research' in order to be exempted from obligations (contained in the Schedule which forms an integral part of the ICRW) concerning, *inter alia*, the moratorium on the catching of whales for commercial purposes and the commitment not to undertake commercial whaling in the Southern Ocean Sanctuary (in this specific case, Japan had lodged an objection to the Treaty with regard to the catch of minke whales and was thus not bound by the

entire ban). It is worth to remember that, according to Art.VIII of the Convention and paragraph 30 of the annexed Schedule, no power is attributed to the Scientific Committee of the International Whaling Commission with regard to the assessment of the proposed Special Permits: while a member State is under obligation to submit its proposals to the Committee for review, in no way are such reviews binding for the final decision, which constitute an exercise of its discretion.

Ever since it was first authorized by Japan back in the '80s, it was widely assumed by the international community that JARPA was meant to provide a cover for the continuation of the Japanese whaling industry, which the country's government was seeking to sustain for commercial as well as cultural reasons. But it was only after JARPA II was launched that Australia, itself party to the ICRW, submitted an application to the International Court of Justice, complaining about the former's alleged breach of obligations to:
(a) observe the zero catch limit in relation to the killing of whales for commercial purposes in paragraph 10 (e) of the Schedule; (b) refrain from undertaking commercial whaling of fin whales in the Southern Ocean Sanctuary in paragraph 7 (b) of the Schedule; (c) observe the moratorium on taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships in paragraph 10 (d) of the Schedule,

on the ground that Japan's Special Permit whaling was indeed commercial whaling in disguise (another asserted violation regarded non-compliance with procedural obligations under paragraph 30 of the Schedule). Japan, on its part, sought to dismiss claims by contesting both the jurisdiction of the Court and the content of the allegations. Intervening in the proceedings was New Zealand.

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3. The Court's judgment

The Court started its reasoning by addressing the issue of jurisdiction, contested by Japan because of a possible interpretation of Australia's declaration of acceptance under Article 36, paragraph 2, of the ICJ Statute, which excludes jurisdiction for "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". Japan suggested that, since Australia considers the maritime zone involved (or an area adjacent to such zone) part of its Exclusive Economic Zone, due to "purported sovereignty over a large part of the Antarctic continent", the latter's reservation was operating in the dispute. However, it was easily demonstrated by the judges that, as inferred by the wording's correct interpretation and the context of the declaration, "the existence of a dispute concerning maritime delimitation between the Parties is required according to both parts of the reservation" in order for jurisdiction to be excluded (par.37); this requirement did not occur in the case, as Australia had never been in litigation with Japan over maritime delimitation in the area. Furthermore, the Court noted that Australia had not contended that JARPA II was unlawful because the whaling activities envisaged in the programme were taking place "in the maritime zones over which Australia asserts sovereign rights or in adjacent areas", but rather because of certain breaches under the ICRW regime, proving the nature and extent of the claimed maritime zones were "immaterial" to the dispute (par.40). This last point represents a major feature which I will discuss later.

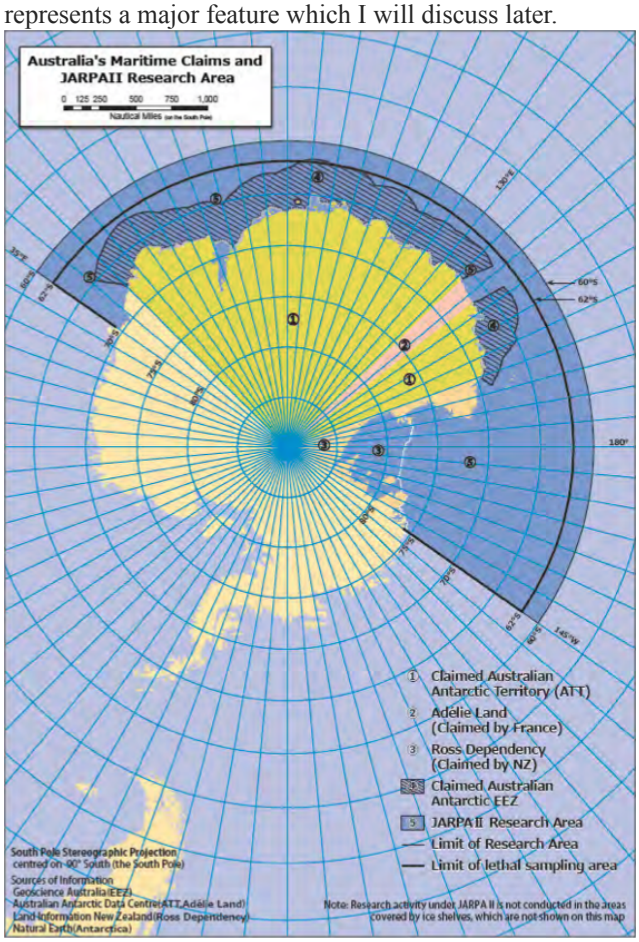

Fig.2: Australia's maritime claims and JARPA II research area. Source: Counter-memorial of Japan, Vol.I, p.39

Turning their attention to the merits, the judges maintained that Article VIII of the ICRW gives discretion to a State party on the issuance of special permits, but considered that "whether the killing, taking and treating of whales pursuant to a requested special permit is for purposes of scientific research cannot depend simply on that State's perception", requiring an objective evaluation instead (par.61). While not in a position to resolve matters of scientific or whaling policy, the Court nonetheless found it had the power to assess whether JARPA II involved scientific research and "if the killing, taking and treating of whales were "for purposes of" scientific research by examining whether, in the use of lethal methods, the programme's design and implementation were reasonable "in relation to achieving its stated objectives" (par.67).
As with the first question, the ICJ came to the conclusion that the research objectives, research period and area,

research methods, sample sizes, and the expected effect on whale stocks outlined in JARPA II could broadly be characterized as scientific research (par.127). However, in order to resolve the dispute, the Court needed to focus on the second issue, and thus examine whether the design and implementation of JARPA II were "reasonable in relation to achieving the programme's stated research objectives", taking into account all of the plan's features. The following steps were discussed by judges.

- ***necessity of lethal methods***

While the use of lethal methods as a means of scientific research, even in the case of availability of non-lethal alternatives, is not enough to exclude Special Permit whaling from the scope of Art.VIII, the Court noted that Japan "should have included some analysis of the feasibility of non-lethal methods as a means of reducing the planned scale of lethal sampling" (par.137); nonetheless, it found "no evidence of studies of the feasibility or practicability of non-lethal methods, either in setting the JARPA II sample sizes or in later years in which the programme had maintained the same sample size targets" (par.141) and no explanation, on the part of Japan, for this lack of evidence. As the judges pointed out, "given the expanded use of lethal methods in JARPA II, as compared to JARPA", Japan should have given due regard to IWC resolutions and Guidelines and its own statements ("that JARPA II uses lethal methods only to the extent necessary to meet its scientific objectives") by conducting analysis of the feasibility of using non-lethal methods; instead, some papers submitted by the country had gone **as** far as to suggest preference for lethal sampling "because it provides a source of funding to offset the cost of the research" (par.144).

- ***the scale of the use of lethal methods***

The sample sizes (that is the number of whales of each species to be killed each year) set by JARPA II stood at 850 minke whales, 50 fin whales and 50 humpback whales (though, with regard to the geographical area, the first two are more precisely referred to as Antarctic minke whales and Southern fin whales, the former defined as a separate species within the genus *Balaenoptera*, forming a clade with its closest relative, the common minke whale,[2] and the latter as a subspecies of fin whale[3]). Fin whales and humpback whales had not been targeted under the original JARPA, while the sample size for minke whales wa**s** approximately double in JARPA II with respect to JARPA's final years (850 to 400), which according to Japan was justified by the "different and more sophisticated" research objectives of the former.

Nonetheless, the Court found "considerable overlap between the subjects, objectives, and methods of the two programmes, rather than dissimilarity", as both described "research broadly aimed at elucidating the role of minke whales in the Antarctic ecosystem", and Japan as well stated that "the research items and methods" of JARPA II were "basically the same as those employed for JARPA", which is why "the explanation for the necessity of lethal sampling provided regarding JARPA also applies to JARPA II". This cast doubts on the reasonableness of the increased sample size for minke whales and the take of two additional whale species, in light of the similarities between programmes. In addition, the judges noted that Japan, in launching JARPA II without waiting for the results of the Scientific Committee's final review, had argued that this was important to keep consistency in data collection, thus confirming overlaps with JARPA and "undermining Japan's reliance on JARPA II's objectives to explain the larger minke whale sample size in JARPA II" (par.151-155).

- ***determination of species-specific sample sizes***

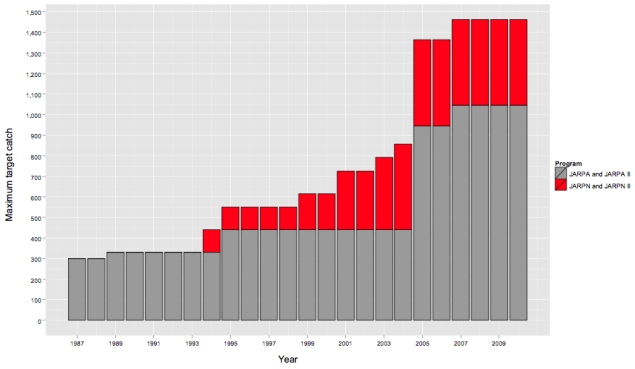

Fig.3 [annex 2]: Japan's 'Scientific' Whaling Maximum Catch Targets, 1987/88 to 2010/11. Source: Memorial of Australia, Vol.I, p.117

What further (and definitely) weakened Japan's assertions, though, was the examination, on the part of the Court, of the determination of sample sizes (which, Australia contended, had been set at 850 minke whales for commercial reasons and then justified as necessary for purposes of scientific research with a 'retro-fitting' of individual sample sizes). According to the former, those sizes had been set up on the basis of selected and universally accepted parameters. In particular, a standard equation had been used to perform a calculation that showed the effect that differences in several variables (i.e. the level of accuracy sought) would have had on sample size. While the Court reiterated that it was not in position to pass judgment on the scientific merit of JARPA II, it also stated that it sought "only to evaluate whether the evidence supports a conclusion that the sample sizes are reasonable in relation to achieving JARPA II's research objectives". Two considerations, in particular, came into play: the relationship between the sample sizes and research period set for fin and humpback whales and those set for minke whales; and the comparison of sample size to actual take.

a) relationship between sample sizes and research period

With regard to the relationship between sample sizes and research period set for different whale species, it should be remembered that fin and humpback whales were initally targeted by JARPA II in light of the proposed research objective of modelling competition among whale species

(which, in turn, was based on the so-called "krill surplus hypothesis"[4]). The Court thus found it unreasonable that the selected research period for fin and humpback whales had been set at 12 years, while JARPA II was otherwise structured with 6-year "research phases", in that this discrepancy was enough to undermine the above-mentioned objective of modelling competition between different species. Moreover, according to Japan's own Research Plan, the sample size of 50 specimens per species did not allow for the measurement of all targeted trends ("in light of the calculations of its own scientists, JARPA II does not appear designed to produce statistically relevant information", par. 179). Finally, while random sampling of individuals is regarded as a necessary element of a programme for purposes of scientific research, it was demonstrated that the taking of fin whales according to this criterion was not possible under JARPA II, the main fin whale population being outside the research area and JARPA II vessels being only able to accommodate the lethal take of smaller fin whales.

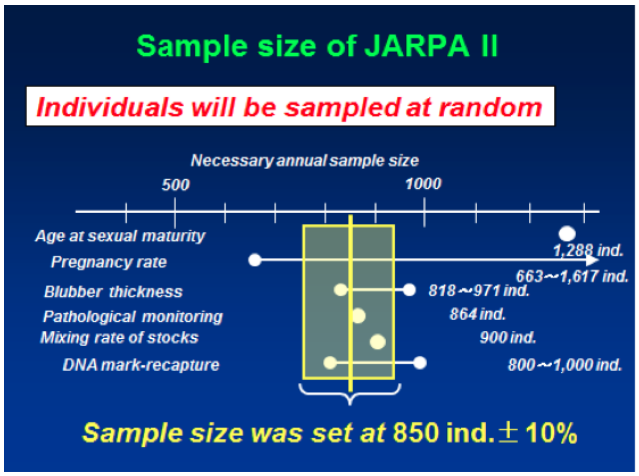

Fig. 4: Sample size of JARPA II for minke whales. Source: Counter-Memorial of Japan, Vol. I, p. 261.

As for the sample size set for minke whales, the Court noted in paragraph 188 that "the evidence shows that the JARPA II Research Plan lacks transparency in the reasons for selecting particular sample sizes for individual research items [...]; the JARPA II Research Plan provides very limited information regarding the selection of a particular value for a given variable. For example [...] there is no consistent effort to explain why, for the various research items relating to the monitoring of biological parameters, JARPA II is designed to detect one particular rate or degree of change over another that would result in a lower sample size. These shortcomings of the JARPA II Research Plan have particular prominence in light of the fact that the particular choices of rate and degree of change consistently lead to a sample size of approximately 850 minke whales per year" (which strongly backed Australia's claim of a 'retro-fitted' plan dictated by a predetermined overall sample size). In addition, the evidence suggested that the programme's capacity to achieve its first two research objectives (see *supra*) had already been compromised because of shortcomings in the programme's design with respect to fin and humpback whales, making it difficult to see how the Research Plan could have provided "a reasonable basis for the target sample size for minke whales in JARPA II" (par.196).

b) comparison of sample size to actual take

Season	Catch	Season	Catch
1987/88	273	1999/00	439
1988/89	241	2000/01	440
1989/90	329	2001/02	440
1990/91	327	2002/03	440
1991/92	288	2003/04	440
1992/93	330	2004/05	440
1993/94	330	**2005/06**	**853**
1994/95	330	**2006/07**	**505**
1995/96	439	**2007/08**	**551**
1996/97	440	**2008/09**	**679**
1997/98	438	**2009/10**	**506**
1998/99	389	**2010/11**	**170**

Table 1: Annual take of minke whales from JARPA and JARPA II (shown in bold). Source: Memorial of Australia, Vol.I, p.317

The final point addressed by judges concerned the "significant gap" that existed between target sample sizes and the actual number of whales killed. Despite the objectives set by JARPA II, in fact, no humpback whale and only 18 fin whales have been taken since the programme was launched; furthermore, the number of minke whales killed has been fluctuating during the same period, consisting of as few as 103 individuals during the 2012-2013 season. Different reasons were alleged by the parties to account for this discrepancy (according to Australia, such a lower take must have been attributed to the reduced internal market demand for whale meat), but what is important is that Japan had never made any consequential changes to the objectives or sample sizes of JARPA II in response to those reasons, thus undermining the latter's position that such sample sizes were necessary to reach the objectives set in the Research Plan.

In particular, Japan asserted both that the "under-take to date of fin and humpback whales does not preclude existing ecosystem models [...] from being improved by use of data that JARPA II has collected in respect of these species by non-lethal means" and that "the actual take of minke whales does not compromise the programme, because smaller numbers can nonetheless generate useful information, either because the time frame of the research can be extended or because less accurate results could be accepted". However, the Court noted, these statements did nothing but raise further doubts about "whether the target sample size of 850 whales was reasonable in relation to

achieving the stated objectives of JARPA II" (par.208-209), as well as suggesting that no strict scientific necessity existed to use lethal methods in respect of these same objectives.

The judges then concluded that "the fact that the actual take of fin and humpback whales is largely, if not entirely, a function of political and logistical considerations, further weakened the purported relationship between JARPA II's research objectives and the specific sample size targets for each species — in particular, the decision to engage in the lethal sampling of minke whales on a relatively large scale" (par.212)

c) additional considerations

Additional aspects concerning the design and implementation of the programme were taken into account by the Court, specifically the provision of an open-ended research time frame, the scientific output generated by it (Japan pointed to only two peer-reviewed papers that had resulted from JARPA II to date, yet judges found that these papers did not relate to the JARPA II objectives and relied on data collected from respectively seven and two minke whales caught during the JARPA II feasibility study) and the lack of co-operation with other research institutions.

- ***conclusions***

In light of all the considerations evidenced above, the Court considered the target sample sizes in JARPA II "not reasonable in relation to achieving the programme's objectives", as (1) the broad objectives of JARPA and JARPA II overlapped considerably (and Japan could not show the few differences to account for such an increased take); (2) the sample sizes for fin and humpback whales were "too small to provide the information" required; (3) the process used to determine the sample size for minke whales lacked transparency; and (4) "some evidence suggested that the programme could have been adjusted to achieve a far smaller sample size, and Japan did not explain why this was not done" (par.225).

Other doubts were cast by the implementation phase of JARPA II, since "(1) no humpback whales have been taken, and Japan cites non-scientific reasons for this; (2) the take of fin whales is only a small fraction of the number that the JARPA II Research Plan prescribes; and (3) the actual take of minke whales has also been far lower than the annual target sample size in all but one season". The Court noted that, despite these gaps between the Research Plan and the programme's implementation, Japan had maintained its reliance on the JARPA II research objectives (par.226).

In other words, even if Japan's activities could broadly be characterized as scientific research, the evidence did not establish that the programme's design and implementation were reasonable "in relation to achieving its stated objectives". The Court concluded "that the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II were not "for purposes of scientific research" pursuant to Article VIII, paragraph 1, of the Convention" (par.227), declaring the violation, on the part of Japan, of paragraphs 10(e), 7(b) and 10(d) of the Schedule and that the latter should:

"*(a) refrain from authorizing or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII; (b) cease with immediate effect the implementation of JARPA II; and (c) revoke any authorization, permit or licence that allows the implementation of JARPA II*" (par.244).

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4. Some legal considerations

As a general point, it is worth emphasizing that, within a dispute in which Australia's claims had already been regarded as well founded by almost the entire international community (including large parts of the public opinion) on the basis of scientific considerations as well as of animal welfare concerns, it was paradoxically the actual take under JARPA II, ostensibly smaller than the programme's target sample sizes, along with the lack of transparency in the determination of the latter, that played a major role in undermining Japan's assertions (that its whaling was being conducted "for purposes of scientific research"). This is obviously of no legal value, but sheds some light on a few peculiar characteristics of the case's proceedings, that will hopefully prove pivotal for the future activity of the ICJ.

It is to be noted, in fact, that the interpretation of existing international law plays a surprisingly little role with respect to other disputes *lato sensu* concerning environmental issues submitted to the Court, as the questions here are largely ones of fact. Both the issue of jurisdiction and the interpretation of Article VIII of the ICRW, which provides the legal framework for the dispute, are indeed preliminarily addressed in the reasoning, but nonetheless not crucial to the decision, since the latter is primarily concerned with the factual examination of Japan's conduct in light of the requirements set by the above-mentioned Treaty for 'special permit whaling', that -again- is allowed as an exception to the general moratorium on commercial whaling for 'purposes of scientific research' only. Both countries, though providing different interpretations of Article VIII within the broader context of the ICRW (in this perspective, it is interesting to consider that the Memorial of Australia and the Counter-memorial of Japan differ greatly in defining both the scope of the Convention and the general meaning of the notion of 'conservation') and confronting each other on the extent of Australia's reservation to the Statute of the Court, had seemingly accepted that logic and science, rather than clarification of legal precepts, were going to provide the basis for the ruling (it was not by chance that Japan had sought to challenge the ICJ jurisdiction with the argument, put forward in paragraph 65, that "*matters of scientific policy cannot be properly appraised by the Court*"). The judges themselves found it unnecessary to provide a legal interpretation of the phrase 'scientific research', concentrating instead on whether the factual design and

implementation of the programme were objectively reasonable in light of the "research" objectives described in JARPA II.

This is especially important, and in conjunction with the nature of the litigation concurs to explain why the *Whaling* case can already be considered a landmark in the evolution of environmental dispute settlement under the ICJ regime. In fact, all past cases submitted to the Court which presented, in some form or another, environmental considerations, were characterized by elements in whose regard the status of international law is more advanced, if somewhat still in development, and whose appreciation prevented the judges from entering a totally uncharted territory (where the dispute was not settled out of Court), including transboundary harm, questions of maritime or frontier delimitation, shared-resource management through bilateral agreements, notification and impact assessment obligations and so on[5]. For example, the decision in the *Pulp Mills* case revolved around procedural as well as substantive obligations arising out of a bilateral treaty (the 1975 Statute of the river Uruguay) which laid down a "regime for the use of the river" that was to be common to neighboring Uruguay and Argentina. While substantive claims made by the latter with regard to the alleged impact of pulp pollution on the conservation of living resources were indeed addressed in by the judges (even if ultimately dismissed), it was the interpretation and application of Uruguay's procedural obligations to inform and consult with Argentina over the authorization of pulp mills on the river which seemed to present the greatest concern in the dispute: the Court appearently refused to conduce an in-depth evaluation of scientific evidence (and even found unnecessary to turn to experts for assistance) by giving out "formalist replies" to the Parties' arguments on the subject[6], possibly in order to avoid criticism over its lack of scientific knowledge and to anchor the judgment to more solid grounds (a similar, though inconsequential, evidentiary treatment of environmental claims was recently conducted by a WTO Panel in its Report on the *China-measures related to the exportation of rare earths, tungsten and molybdenum* case[7], despite the fact that the appraisal of scientific evidence is already a common feature of dispute resolution under the WTO procedure).
It is to be noted that his methodological approach was indeed censured by Judges Al-Khasawneh and Simma in their joint dissenting opinion, which argued for the necessity of recourse to expert assessment and reproached the Court for "persisting, when faced with sophisticated scientific and technical evidence in support of the legal claims made by States before it, in resolving these issues purely through the application of its traditional legal techniques" even as a growing number of international institutions "have accepted the reality of the challenges posed by scientific uncertainty in the judicial process" and useful assessment instruments are already provided for in the ICJ Statute (see art.50) as well as in the Rules of Court (see artt. 62 and 67).

Compared to the judgment issued in the *Pulp Mills* case and to proceedings of related disputes, *Australia v. Japan* represents a totally new paradigm in that the issues at its core are essentially environmental (that is, they involve substantial rather than procedural duties), concerning international obligations that find their lone source in a multilateral Treaty (the ICRW) and whose violation is alleged not by a neighboring country, but rather by a country which is a party to that Convention with reference to acts carried out in an area beyond national jurisdiction, for the sole purpose of defending the conservation goals addressed by the instrument and ensuring wildlife protection within the Southern Ocean Sanctuary.
Moreover, with a particular regard to the matters of fact-finding and scientific uncertainty, the Court's reasoning itself, while careful to reassure the Parties of its legal, rather than scientific, standard, showed no fear in dealing with scientific evidence and using it as a basis for the decision, a marked departure from the orientation followed in *Pulp Mills* which is prone to several interpretations that will be examined *infra*. Nonetheless, in doing so the Court did not fully embrace the suggestions put forth by Al-Khasawneh and Simma, and opted for a complex yet autonomous evaluation of the elements provided by the Parties while not making use of its powers to appoint independent experts. This approach will almost certainly lead to criticism, although none of the dissenting opinions attached to the judgment focused on the point, concentrating on alleged flaws in the interpretation of the Convention and in the standard of review applied by the majority instead[8].

On one hand, such remarks concerned the fact that the Court had accepted Australia's contention that the ICRW was to be interpreted in light of subsequent developments in the whaling regime induced by the functions conferred to the IWC which made it "an evolving instrument" (par. 45), thus higlighting the centrality of conservation considerations that have emerged in recent years to the interpretation of all the Convention's provisions and especially of Article VIII, while diminishing the importance of the exploitation purposes stressed by Japan[9]; on the other, they contested the Court's authority to weigh in on the issuance of Special Permits under Article VIII as well as on its competence to answer the question of what constitutes activities conducted "for purposes of scientific research" through the utilization of a paramater of "objective reasonableness", suggesting the existence of a strong presumption in favor of the authorizing State that was for the Applicant to disprove. While beyond the scope of this article, these legal considerations are of great interest and must be borne in mind, as they underline the continuing disagreement that characterizes fact-finding in the environmental dispute settlement field.

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5. Potential implications of the case

The primary importance of the Court's reasoning and the arguments made by the parties (that the nature and interpretation of Japan's obligations were never in doubt, the latter's misconduct being the only controversial issue),

along with the trailblazing scope of Australia's involvement, provide glimpse into the future of compulsory adjudication in environmental dispute settlement, suggesting a potential shift in its characteristics as well as a larger audience of potential actors. As with the former, it is possible that disputes become less legalistic (by which I mean less strictly centered around the interpretation of existing international law) and embrace a type of analysis more similar to the one utilized by national courts, often involving the subsumption of a particular case under the abstract provisions of multilateral and/or bilateral treaties. From the second point of view, a growing number of countries could begin alleging breaches of international obligations even in cases in which they are not directly affected by them. However, whether this proves true will largely depend on several factors, and especially: the extent of specification and clarity reached by international norms, which could reduce loopholes along with the need for repeated interpretation; the provision of environmental treaty clauses that provide for the submission of alleged violations to compulsory adjudication (and a more limited scope of reservations); an increased, shared knowledge of the regional and global impacts that the activities of a single State or a group of countries could produce with regard to shrinking ecosystems and collapsing life support systems; and the consequential adoption of a 'common concern' approach to the protection of natural resources that also involves willingness to seek jurisdictional scrutiny over alleged violations.

By all means, the present case is characterized by particular features which made such a development possible; the fact that these features are not be found easily in other international disputes results in two considerations:

- that disputes which share, at least in part, similarities with the *Whaling* case, will be more likely influenced by the Court's ruling
- that evolution of environmental dispute settlement will probably be slower where such similarities do not occur

The discussed features consists primarily in the broad consent that exists, among the international community and the public opinion, over cetacean conservation, a consent matured throughout the years and sparked not just by science but also by motivations which are not completely scientific, such as the charismatic nature of whales and the idea that they are somewhat worthy of specific consideration among non-human animals due to some form of anthropomorphisation; the particular nature of the geographical area subjected to exploitation (a protected area under the ICRW regime and part of the pristine continent of Antarctica); the long-standing moratorium on commercial whaling, whose rigid provisions and general acceptance reduce the risk of cop-outs; and the possibility to draw a correlation between activities put forward by one of the nationals of a State party (in this case, the Institute for Cetacean Research) and the conduct of that State party (in this case, Japan's issuance of Special Permits and strenuous backing of the whaling industry).

As a consequence, wildlife conservation (and especially conservation of the so-called charismatic megafauna and of critically endangered species, over which a stronger awareness has developed within the international community) could represent the area that proves most susceptible to the above-mentioned innovations, provided that there is an evident connection to be inferred with some form of State responsibility (which is obviously something that does not occur very often). For instance, the continuing issuance of permits to be engaged in the trade of protected species under the CITES regime could in abstract fulfill the adduced requirement, as the conditions under which an export, import or re-export permit shall be granted include, at different degrees for species listed in different appendices[10], an evaluation by both a Scientific and a Management Authority of the State of export, import or re-export; such an evaluation might then represent a potential indicator of non-compliance with obligations set forth by the Convention. By contrast, poaching and other forms of illegal take are usually a result of activities conducted by crime syndicates which rely on groups of individuals and use corruption as a mean of circumventing international obligations, thus making it harder to establish a nexus between those activities and some sort of State consent or support. It should be noted, however, that most environmental treaties attribute a major role, in the control of non-compliance by member States, to Compliance Committees or similar bodies (for CITES, the Standing Committee[11]), discouraging interstate litigation and promoting a political solution to potential disputes.

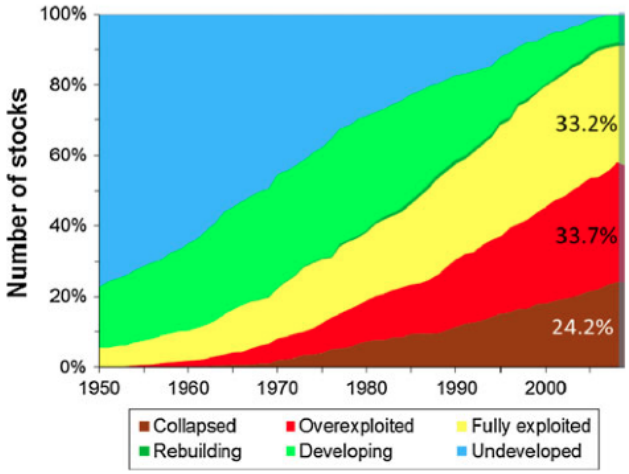

Fig.5: Status of global marine fish stocks, % of total. Source: Froese et al. (2012) What catch data can tell us about the status of global fisheries (Mar Biol, Vol. 159, Issue 6); pp 1283-1292.

Other forms of correlation could be found in the fisheries sector, as the heavily-subsizided nature of the fishing industry and its intrinsic characteristics (i.e. the fixation of fishing quotas for catches, the ecological implications of overexploitation in the marine environment and the surveillance duty imposed on countries) might be enough to establish State responsibility. Moreover, the growing concerns of the international community with regard to overfishing, and especially overfishing in areas beyond national jurisdiction, might lead to an increased commitment of some countries to tackling illegal

practices taking place there by means of litigation, but such an effort would require a parallel evolution in the governance regime of the high-seas which appears unlikely in the short term, despite evidence of an unprecedented collapse of fish stocks worldwide[12] (I will further discuss the issue *infra*).

I shall then conclude this section by noting that, apart from the few optimistic predictions made in the last two paragraphs, it is easy to see how most environmental disputes, at least in the foreseeable future, will continue to be dominated by relatively more developed concepts, like the one of transboundary harm (see section 4), with subsequent limitation of the audience of potential actors to directly affected, neighboring countries, and a resulting difficulty in enforcing provisions dictated for areas beyond national jurisdiction. This will most likely happen with regard to obligations whose source is represented by treaties *lato sensu* concerned with pollution or environmental hazards (here, the unwillingness to engage in judicial or arbitral proceedings derives from the fact that State parties are usually mutually lax in implementing measures in this field). Furthermore, the notion of sovereignty over natural resources, despite having experienced some degree of evolution over the years, will remain an insurmountable barrier for the international protection of ecosystems and the biodiversity they contain, unless the competing concepts of "common heritage" and/or "common concern" gain momentum within the global community. An intermediate situation could instead be configured for Range States[13] in treaties concerned with the conservation of migratory species (i.e. the Bonn Convention on the Conservation of Migratory Species of Wild Animals), which are in a position of need for mutual co-operation in the implementation of action plans or conservation measures: in this case, the emergence of 'champions' for the protection of particular species could be facilitated by the intrinsic nature of the Convention, whenever an effort on the part of a State party is met by non-compliance on the part of another.

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6. What does the future hold?

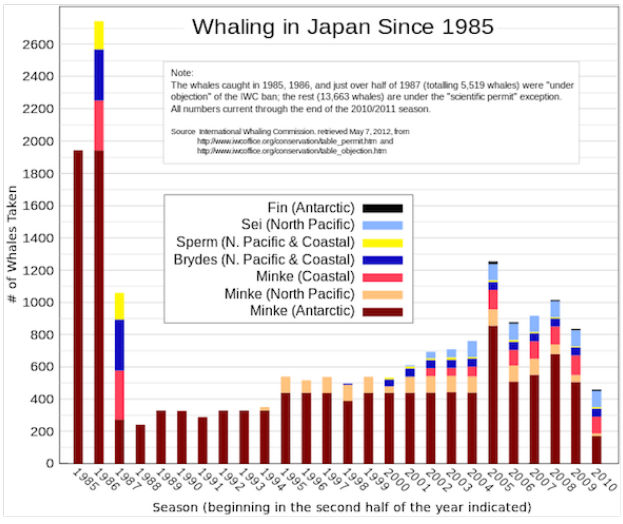

Fig.6: Japan harvest rates 1985-2010, compiled using IWC data and released to the public domain.

On the eve of the Court's adjudication, Japanese officials announced that their country will abide by the ruling, canceling its Antarctic whaling hunt for the first time in more than 25 years[14]. It has also been suggested that a steady decrease in the internal demand for whale meat, coupled with continuing operational losses (despite the industry's heavy reliance on taxpayer subsidies), and growing domestic opposition[15] might have played a role in this conciliatory position[16]. Nevertheless, the scope of the decision remains restricted to activities conducted under JARPA II, leaving Japan free to continue its implementation of similarly controversial JARPN II ('Research Plan For Cetacean Studies In The Western North Pacific Under Special Permit', last reviewed in 2009[17]), which targets common minke whales, Bryde's whales, sperm whales and sei whales in the western North Pacific, while also hypothetically allowing it to restructure its Antarctic programme according to the judges' observations (a strategy that, in light of recent developments, Japan will likely adopt[18]). Whether further proceedings are put forward against Japan with regard to JARPN II could indeed be telling of the actual implications of the ICJ judgment, showing either that it develops into a landmark precedent which encourages other countries to follow suit or that it relied on a peculiar convergence of circumstances that are not to be replicated elsewhere.

It shall not be forgotten that whaling under the ICRW regime is also conducted by countries other than Japan, in particular Norway and Iceland (I will not consider that issue of aboriginal subsistence whaling here). Though the latter implemented its own "scientific" programme under a Special Permit from 2003-2007 (in whose regard the IWC Scientific Committee expressed different views and the Commission even passed a resolution that expressed "deep concern" over Iceland's real goals[19]), both countries are now taking whales commercially, either under objection to the moratorium decision or under reservation to it[20], within their Exclusive Economic Zones[21]. From an international law perspective, the ICRW regime, though almost universally accepted as relevant to the parties' respective maritime zones, is thus unable to account for environmental considerations which could arise from such activities, and a similar point (although a political, rather than legal one) can be made for small-type coastal whaling occurring in Japan with regard to small cetaceans, since the jurisdiction of the IWC over such species is unclear (and the IWC itself "has traditionally limited the scope of its regulation, within a few exceptions, to the larger baleen and toothed whales"[22]).

Possible interactions between some stressors and the potential for effects on survivorship.

Stressors	Immune	Reproduction		Neuro-behavioural	Metabolic (liver/kidney)	Nutrition	Hormonal	Parasite load	Skin disease occurrence	Mortality
		ASM	Fecundity							
Noise	X	?	?							X
OCs and POPs	X		X	X	X	X	X		X	X
Heavy metals	X	X	X	X	X				X	X
Biotoxins	X	X	X		X				X	X
Disturbance		X				X				
Novel pathogens	X	X						X	X	
Bycatch										X
Prey availability	X	X				X		X	X	

Table 2 [annex 3]: Possible interactions between some

stressors and the potential for effects on survivorship. Source: Report of the IWC Scientific Committee Workshop on Habitat Degradation (12-15 November 2004). Certosa di Pontignano, University of Siena, Siena, Italy

Furthermore, it is evident that while whale hunting represent one particularly execrable activity (in that its killing methods increasingly raise objections on the ground of animal welfare[23]) which is potentially detrimental to whale species' survival, concurring environmental threats such as ship strikes, entanglement in fishing nets, diseases, chemical pollution, marine debris, habitat degradation, anthropogenic sound, climate change and so on pose equal if not greater risks in this sense, and the issue of of cetacean conservation must thus be addressed in a comprehensive way in order to prevent a further collapse of stocks. From this point of view, sustainable exploitation of whales (itself the original primary focus of the ICRW), especially with regard to subsistence whaling and coastal communities which are dependent on the sector (though whale watching has provided an increasing source of income in recent years[24]) is not to be seen in contrast with international law or marine ecology (and to the extent that non-lethal methods are not viable, it could even provide help in the assessment of whale populations and biology, ecosystems structure, habitat degradation and so on), but should nonetheless be subjected to the strictest control of compliance in order to avoid a continuation of commercial activities or even a surge in the illegal trade of whale meat and by-products.

One final consideration, not directly related to cetacean conservation, regards governance aspects of the areas beyond national jurisdiction (or the so-called high seas), which made up for the geographical context of the present dispute. When asking *"what does the future hold?"* after the Court's ruling, it is in fact inevitable to refer to potential developments on this extremely important issue. Making reference to more extensive dissertations on the subject[25] for further information, it shall be noted that the current system, inspired by the 1982 Law of the Sea Convention and the 1995 Straddling Stocks Agreement, devises a key role for Regional Fisheries Management Organizations (RFMOs), which should provide the main framework for co-operation over the management of high-seas fisheries; however, despite some evolution, non-parties to RFMOs remain free to exploit stocks without having to comply with regulations agreed within these organizations, thus potentially undermining whichever conservation goal is set. Efforts to circumvent or mitigate this situation, such as recent proposals by New Zealand and the USA to create a marine protected area in the Ross Sea within the CCAMLR regime[26] (thus focusing on an ecosystem-based management approach rather than on the protection of a single -or a group of- species) have so long been eluded by the opposition of major fishing countries.

However, forthcoming developments might be anticipated, since during the Rio +20 Summit governments committed to "address, on an urgent basis, the issue of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction including by taking a decision on the development of an international instrument under UNCLOS"[27]. In resolution 68/70, the General Assembly further requested the Secretary-General to convene three meetings of an Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (the first one has already taken place at the UN Headquarters in New York from 1 to 4 April 2014). Such meetings should constitute the basis for the negotiation of the hypothesized instrument, tentatively enabling the Assembly to make a decision "before the end of its 69th session, in September 2015"[28]. Whether this effort translates into a better governance system for the high seas remains to be seen, but the fact that optimism has been voiced by government officials, NGOs and sectors of the civil society gives rise to some hope in this field.

Acknowlegdments

I wish to thank Prof. Riccardo Pavoni (University of Siena, Department of Law) for reviewing this article and providing me with useful suggestions and critiques which helped me better focus its object and scope.

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[3] *Balaenoptera physalus quoyi* (Fisher, 1829)

[4] see Paragraphs 115-116 of the judgment

[5] For a non-comprehensive illustrative purpose, see *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica) application by Nicaragua, 21 December 2011* - proceedings joined *with Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) application by Costa Rica, 18 November 2010*; *Aerial Herbicide Spraying (Ecuador v. Colombia) application by Ecuador, 31 March 2008*; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14*; *Gabc̆ ikovo-Nagymaros Project (Hungary/Slovakia), Judg. 25 Sep.1997 (Reports 1997, p. 7)*

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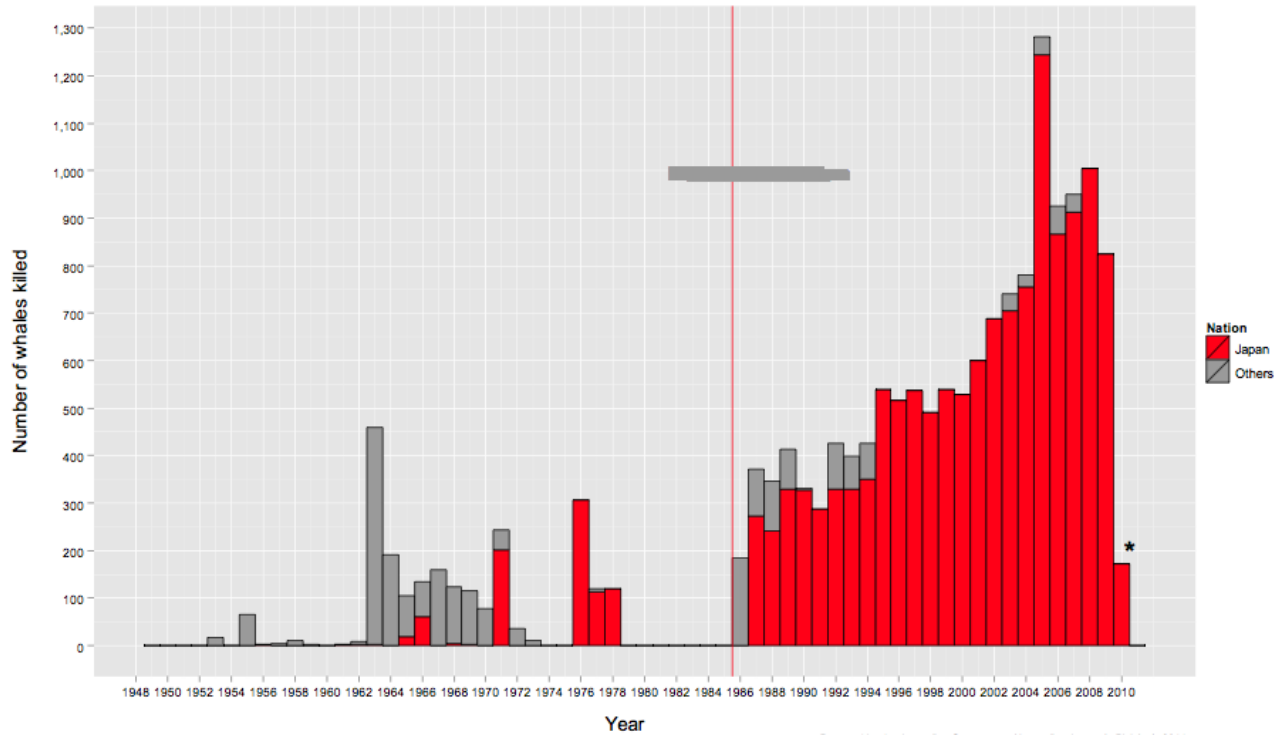
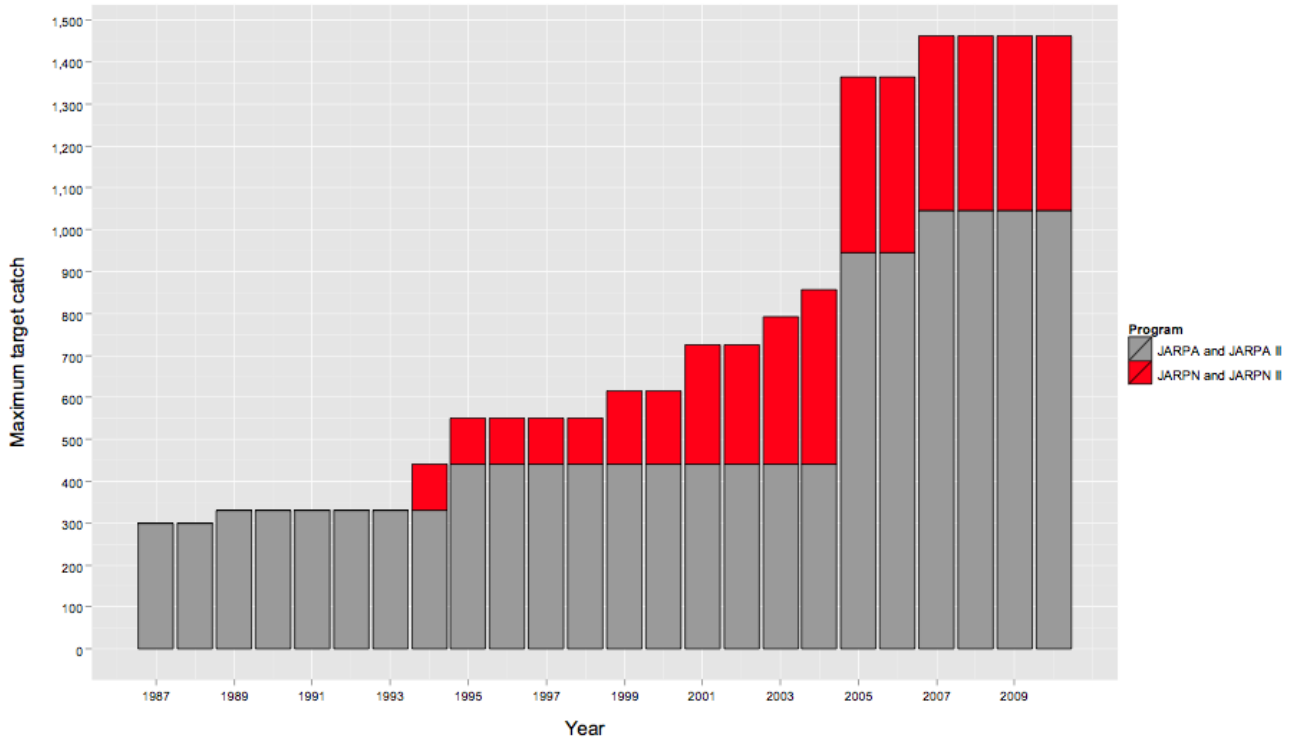
Annex 1 (Fig.1): Special Permit Catches, 1948 to 2010. Source: Memorial of Australia, Vol.I, p.38



Annex 2 (Fig.3): Japan's 'Scientific' Whaling Maximum Catch Targets, 1987/88 to 2010/11. Source: Memorial of Australia, Vol.I, p.117



Annex 3 (Table 2): Possible interactions between some stressors and the potential for effects on survivorship. Source: Report of the IWC Scientific Committee Workshop on Habitat Degradation (12-15 November 2004). Certosa di Pontignano, University of Siena, Siena, Italy

Possible interactions between some stressors and the potential for effects on survivorship.

Stressors	Immune	Reproduction		Neuro-behavioural	Metabolic (liver/kidney)	Nutrition	Hormonal	Parasite load	Skin disease occurrence	Mortality
		ASM	Fecundity							
Noise	X	?	?							X
OCs and POPs	X		X	X	X	X	X		X	X
Heavy metals	X	X	X	X	X				X	X
Biotoxins	X	X	X		X				X	X
Disturbance		X				X				
Novel pathogens	X	X						X	X	
Bycatch										X
Prey availability	X	X				X		X	X	