

# Japan's Whaling Plans Risk Int'l Trade Pushback

By **Timothy Nelson** (May 30, 2019, 5:41 PM EDT)

In late December 2018, Japan announced that it was withdrawing from the International Whaling Commission, and would "resume commercial whaling" from July 2019.[1] On its face, the announcement seemed to defy the last half-century's trend of international opinion strongly disfavoring whale hunting. Indeed, the withdrawal from the IWC meant Japan would no longer be bound by the IWC's longstanding moratorium on whaling.

Japan's announcement contained an important caveat, however. According to its spokesman, once it withdraws from the IWC, it will "cease the take of whales in the Antarctic Ocean/the Southern Hemisphere," meaning that its whaling would be limited to its own territorial waters.[2] This means that the most controversial activity by Japan's whaling fleet — the hunting of minke and humpback whales in the Southern Ocean — may actually stop. If so, then some credit may be due to the last decade's international litigation efforts.



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## The IWC Ban on Commercial Whaling

Although there exists today a treaty framework for the protection of whales, it did not originate with an anti-whaling treaty. Rather, in 1946, a number of states entered the International Convention for the Regulation of Whaling, for the stated purpose (among other things) of "establish[ing] a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stock[.]"[3]

The organization created by this treaty, the IWC, was set up as a governing body. Although some of its goals were environmental (e.g. the "conservation" of whale stock would involve establishing catch quotas to limit hunting of whales), the Whaling Convention had many of the features of an industry regulation agreement.

Before long, however, the IWC faced calls to end whaling altogether — not least because certain whale species were becoming gravely endangered. Meanwhile, and despite the greatly increased capacity and lethality of whaling vessels (which, of course, contributed to the species endangerment), whaling's utility had become questionable. In its heyday, whaling had generated byproducts such as whale oil, which had been used for fuel. Modern fuels had rendered this totally obsolete.

Only in a few places was whale meat used as food, and with one notable exception, these were largely aboriginal communities. Moreover, the postwar years brought a heightened understanding of how intelligent whales are; this introduced a new ethical dimension to the debate (and set it apart from fishing).

In the same period, several countries (including the United States) banned whaling in their own waters.[4] Under the auspices of the IWC, however, whaling in international waters continued to be permitted, albeit with reduced quotas as time went on. Only in 1982 was its "industry" function totally eclipsed: The IWC enacted a complete moratorium (or "zero catch" limit) on commercial whaling, effective in 1986.

## The "Scientific Research" Exception Leads to Clashes in the Antarctic

The IWC's ban, in its original form, was far from watertight. To begin with, the IWC itself lacked the practical means to enforce its own measures. Furthermore, the drafting of the Whaling Convention meant that states could suspend the zero-catch limit by the simple expedient of objecting.

Japan (a country where whale meat was eaten) initially objected, thus allowing its commercial whaling fleet to operate in international waters. This gap was closed in 1984, when the United States government persuaded Japan to agree to drop all objections to the IWC zero-catch limit and discontinue "commercial whaling" by 1988.[5] But the cessation of "commercial" whaling only served to reveal another gap in the regulatory system.

Under Article VIII of the Whaling Convention, states remained free to grant "permits" to their own nationals "for purposes of scientific research," subject only to such conditions as a contracting state may impose (and regardless of the IWC's catch limit). In 1987, the Japanese government, purportedly acting under this exemption, enacted "Japan's Whaling Research Program Under Special Permit in the Antarctic," or JARPA, providing for the continued hunting of whales in the Southern Ocean for "scientific research" purposes.

The Southern Ocean is a key ecosystem for blue, minke, humpback and right whales, to name a few of the affected species, and the continuation of whaling in those seas proved highly controversial. The JARPA program continued throughout the 1990s — even after IWC had declared the Southern Ocean a "sanctuary" for whales. Eventually, it led to open challenges, both legal and physical.

In Australia, for example, a federal court judge issued a ruling in 2008 declaring that the whaling fleet had "killed, injured, taken and interfered with Antarctic minke whales," fin whales and humpback whales in the "Australian Whale Sanctuary," in contravention of the Australian legislation, and permanently enjoined such activity.[6] Despite increasing diplomatic pressures, however, this did not bring about a cessation of JARPA.

Meanwhile, the Sea Shepherd Conservation Society, a U.S. organization, fielded its own "eco-warrior" fleet, dedicated to interrupting the "scientific research" whaling fleet and/or other whaling vessels. This conflict, at one time featured on its own cable TV show ("Whale Wars") became so heated that, in 2011, the whaling "research" companies eventually brought suit in the United States District Court for the Western District of Washington, alleging that Sea Shepherd's activities constituted piracy, in contravention of the Alien Tort Act of 1789 and other laws.

Although the research companies' injunction application was declined at first instance,[7] it succeeded on appeal: in December 2012, the United States Court of Appeals for the Ninth Circuit enjoined Sea Shepherd from physically attacking the JARPA fleet.[8]

Effectively, the Ninth Circuit was allowing Japanese whaling vessels to roam without impairment. If nothing else, this might have flummoxed those who criticize that court as excessively "liberal." In any event, the litigation continued; in late 2004, the Ninth Circuit found Sea Shepherd in contempt of its order,[9] and the case reportedly settled in 2016.[10]

### **Australia Brings Suit in the World Court**

Perhaps conscious that the 2008 judgment had not led to a diminution in "scientific" whaling in the Southern Ocean, Australia in 2010 initiated a proceeding against Japan before the International Court of Justice, seeking a declaration that its scientific whaling program (by then known as JARPA II) violated the IWC.

At the public hearings that took place in June and July 2013 at The Hague, Australia and its expert witnesses (as well as New Zealand, which intervened in support) sought to puncture Japan's claim that it was conducting "scientific" exploration. In Australia's submission, the repetitive and sustained nature of the killing, as well as the fact that certain whales (humpbacks and minkes) were being singled out — and then used for the production of meat — suggested there was no genuine scientific objective to the program.

As for the claim that program was yielding "data," Philippe Sands, Q.C.(one of Australia's counsel), countered this with a quote from French scientist-philosopher Jules Henri Poincare: "Science is built

up of facts, as a house is built of stones; but an accumulation of facts is no more science than a heap of stones a house." [11] In other words, mere data collection is not the same as science.

On March 31, 2014, the ICJ issued a judgment that (by a 12-4 majority) upheld almost all of Australia's claims. Its judgment noted that, despite the zero-catch limit imposed by the IWC, a "special permit which meets the conditions of Article VIII [of the Whaling Convention]" would not be subject to the IWC moratorium. [12] Thus, if JARPA II was a valid scientific program, the hunting and killing of whales by the scientific fleet could continue.

But did JARPA II meet the criteria of "scientific research" laid down in Article VIII? In the ICJ's view, the mere fact that Japan had certified the program was not sufficient. Rather, it needed to conduct an "objective" analysis, looking first to "whether the programme under which these activities occur involves scientific research," and second as to whether "the killing, taking and treating of whales [indeed was] 'for purposes of' scientific research." [13]

This called for an analysis of the program's "design and implementation," its scale, and whether its use of lethality on such a scale was "reasonable in relation to achieving its stated objectives." [14] Indeed, even though lethal methods in principle might be acceptable in theory, a program that used those methods on too large a scale might not be viewed as reasonable. [15]

The court acknowledged that, viewed objectively, some of JARPA II's stated research objectives (e.g., examination of internal organs) could only be achieved through lethal methods. [16] For numerous other elements of the program, however, nonlethal sampling methods were available. [17] Yet there was "no evidence" that the framers of JARPA II had given sufficient attention to altering the program to include only nonlethal methods — or for reducing its "lethal take" so as to incorporate nonlethal sampling. [18]

The court was especially critical of the increases in "sample size" (i.e., kill quotas) for particular species, such as minke and humpback whales (the kill targets for one year included 850 minke whales, 50 fin whales and 50 humpback whales). These discrepancies, it held, were so pronounced that they led the court to question whether the kill quotas were in fact driven by scientific requirements. [19] Taking these and other discrepancies together, it concluded:

Taken as a whole, the Court considers that JARPA II involves activities that can broadly be characterized as scientific research ... but that the evidence does not establish that the programme's design and implementation are reasonable in relation to achieving its stated objectives. The Court concludes that the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II are not "for purposes of scientific research" pursuant to Article VIII, paragraph 1, of the Convention. [20]

Thus, the court concluded (by a 12-4 vote), all of the activities under JARPA II were subject to — and precluded by — the IWC's moratorium. [21] The court thus issued a declaration [22] that the JARPA II program had violated the IWC moratorium (as well as its prohibition on the use of whaling "factory" ships), and the IWC's Southern Ocean Sanctuary directive. [23] Japan accordingly was directed to revoke any permits that had been given under its JARPA II program. [24]

### **Japan's Exit From the IWC**

In response to the decision, Japan initially halted its "research" fleet for one year, then resumed such whaling during the 2015-16 season with a significantly reduced catch quota (which reflected the terms of a revised submission to the IWC). [25] Meanwhile, emboldened by the court's decision, anti-whaling proponents prepared the text of a declaration that would state, conclusively, that whaling is no longer to be viewed as a necessary economic activity, and establishing the IWC firmly and permanently as a conservation body.

Things came to a head at a meeting of the IWC in Florianopolis, Brazil, in September 2018. At that meeting, the anti-whaling declaration (now known as the "Florianopolis Declaration") was enacted by a 40-27 majority vote. [26]

At the same meeting, a counterproposal by Japan that would have urged "'co-existence' between commercial whaling and conservation" was defeated by the same margin. [27] Japan's withdrawal from the IWC and the Whaling Convention came some months after these defeats.

## The Road Ahead

Although Japan has said that it will only allow commercial whaling in its local waters (thus seemingly ceasing its Antarctic whaling program), the announcement still has potentially important consequences. Whaling, even in those waters, will remain an international concern, because species such as the minke whale are known to migrate through Japanese waters.[28]

Thus, whaling even within a limited zone may pose a risk to the conservation policies animating the IWC's zero-catch limit. And activists who oppose whaling on moral grounds are hardly likely to be silenced because it is only being done locally.

There may also be some trade impact. From a strictly business perspective, the product of resumed commercially whaling (whale meat) is only likely to be sold within Japan's domestic market. While whaling may no longer be a significant direct contributor to world trade, the backlash against whaling might still have international trade effects, initially in the form of consumer boycotts or (conceivably) domestic legislative action.

Already, as has been seen, countries like the United States and Australia have adopted legislation to bar whaling in their own waters or asserted waters. Activists within these and other countries may agitate for some kind of trade retaliation against countries that engage in commercial whaling.

Although the WTO rules do limit the ability of countries to engage in trade sanctions, this did not preclude the European Union from barring the importation of Canadian fur products, in reaction to the periodic hunting and clubbing of seal pups in the Arctic. Indeed, in affirming these measures, a World Trade Organization panel held that the EU could validly bar the importation of Canadian seal fur on grounds that it was "necessary to protect public morals." [29]

Whether this doctrine can be extended further remains to be seen. At the present time, there has been no indication that whale meat will be traded internationally, but if it is, activists may well cite the seal products litigation as a precedent.

There may, however, be a more direct way to reach this issue. Notwithstanding Japan's exit from the Whaling Convention, it is still subject to Article 65 of the Law of the Sea Convention, which obligates coastal states to "cooperate with a view to the conservation of marine mammals and in the case of cetaceans [to] in particular work through the appropriate international organizations for their conservation, management and study." [30]

It has been suggested that the "appropriate international organization[,]" as regards whales, is the IWC. [31] If so, Japan's uneasy relationship with the IWC may continue, and calls to limit commercial whaling (even within its own waters) will also likely continue.

Whatever happens, the continuation of whaling — in any form, and even in a smaller ocean space — will likely prompt further international controversy.

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[1] CNBC, "Japan says it will resume commercial whaling in July 2019," <https://www.cnbc.com/2018/12/26/japan-withdraws-from-iwc-will-resume-commercial-whaling-in-july-2019.html> (Dec. 26, 2018).

[2] Id.

[3] International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72, amended by protocol Nov. 1, 1956, 8 U.S.T. 69. That treaty followed an earlier 1937 agreement,

with a similar stated goal.

[4] Within the United States, this was achieved through the Marine Mammal Protection Act of 1972, 16 U.S.C. § 1361 et seq.

[5] This was facilitated, in part, through legislation enacted in the late 1970s that obligated the United States Secretary of Commerce to impose sanctions on any nation which, in his or her opinion, was acting so as to "diminish[] the effectiveness of the [Whaling Convention]." 16 U.S.C. § 1821(e) (2)(A)(i). In a 1984 executive agreement, the United States agreed that it would not "certify" Japan as subject to sanction under this legislation. See *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 234-42 (1986) (explaining background).

[6] *Humane Soc'y Int'l Inc v. Kyodo Senpaku Kaisha Ltd.* (2008) 165 FCR 510, 525–26 (Austl.) This injunction was granted under a special law, the Environment Protection and Biodiversity Conservation Act (Cth) 1999, which purported to regulate activities in those parts of the Southern Ocean designated by Australia as the "Economic Exclusive Zone" of the "Australian Antarctic Territory." Although modern law of the sea recognizes the right of sovereign states to enjoy a 200 nautical mile "exclusive economic zone" or EEZ in waters adjacent to their coastline, and although Australia has a longstanding claim to large tracts of Antarctica, Australia's claim to such territory (and, by extension, its claim to an Antarctic EEZ) has not been recognized by all states. Because the legal platform for the injunction (the land claim) is thus controversial, the 2008 injunction itself will not win automatic worldwide legal recognition.

[7] See *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 860 F. Supp. 2d. 1216, 1224-27 (W.D. Wash. 2012), rev'd 703 F.3d 1099 (9th Cir. 2013).

[8] *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 702 F.3d 573, 573 (9th Cir. 2012).

[9] *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 943-44 (9th Cir. 2014).

[10] *Sea Shepherd US Settles Japan Whaling Case*, BBC Online (Aug. 23, 2016), <https://www.bbc.com/news/world-asia-37162443>.

[11] *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)*, I.C.J., Oral Argument at 19, June 27, 2013 at 19 (Philippe Sands, Q.C.).

[12] *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)*, Judgment, 2014 I.C.J. Rep. 226 ¶ 55 (March 31).

[13] *Id.* ¶ 67.

[14] *Id.*

[15] *Id.* ¶ 94.

[16] *Id.* ¶ 135.

[17] *Id.* ¶ 137.

[18] *Id.* ¶ 141.

[19] *Id.* ¶ 154.

[20] *Id.* ¶ 227.

[21] *Id.* ¶ 232.

[22] *Id.* ¶ 247. Judge Hisashi Owada (a Japanese member of the ICJ) dissented, as did Judge Rony Abraham (of France), Judge Abdulqawi Yusuf (of Somalia) and Judge Mohamed Bennouna (of

Morocco). Judge Kenneth Keith (of New Zealand) and Judge ad hoc Hilary Charlesworth (appointed by Australia) issued separate opinions that were more pointedly critical of JARPA II than the court's main judgment.

[23] Id.

[24] Id.

[25] Japan's Annual Antarctic Expedition Returns With 333 Whale Carcasses, NPR Online (Mar. 31, 2017), available at <https://www.npr.org/sections/thetwo-way/2017/03/31/522170896/japans-annual-antarctic-expedition-returns-with-333-whale-carcasses>. The Japanese government's revised submission to the IWC can be found at <https://www.icrwhale.org/pdf/151127newrep-a.pdf>.

[26] Brazil meeting votes to protect world's whale population, BBC Online, Sept. 14, 2018, <https://www.bbc.com/news/world-latin-america-45516234>.

[27] Id.

[28] See, generally, Rachel Fobar, Japan Will Resume Commercial Whaling. Get the Facts, Nat'l Geographic Online (Dec. 26, 2018), <https://www.nationalgeographic.com/animals/2018/12/japan-considers-leaving-international-whaling-commission/> ("NatGeo 12/26").

[29] See Summary of key findings" of WTO Appellate Body in its 2014 decision in DS400: European Communities — Measures Prohibiting the Importation and Marketing of Seal Products , as summarized at WTO website, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds400\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm).

[30] United Nations Convention on the Law of the Sea,, art. 65 (Dec. 10, 1982). Japan has ratified the Law of the Sea Convention; the United States has not, but has declared its adherence to most of its provisions (including this one).

[31] See NatGeo 12/26 (reporting that this is the view of most "legal scholars").