

**Between law and science: Some considerations
inspired by the *Whaling in the Antarctic* judgment**

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1. *An attitude of reluctance*

The judgment rendered on 31 March 2014 by the International Court of Justice (ICJ) on the *Whaling in the Antarctic* case (*Australia v Japan; New Zealand intervening*)¹ raises the issue of scientific or technical matters in the proceedings before the ICJ. Usually guidance on such issues is given by experts. They can be appointed by the Court and, if so, are required to be as impartial and independent as the Court itself. They can also be provided by the parties and included in their delegations in charge of the discussion of the case.

So far, the ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), have been rather reluctant in making use of Article 50 of the Statute, which gives them a broad margin of discretion in appointing experts² that can be entrusted to clarify scientific questions or determine specific issues of fact:

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¹ Text available at <<http://www.icj-cij.org/docket/18146.pdf>>.

² See G White, 'The Use of Experts by the International Court of Justice', in V Lowe, M Fitzmaurice (eds), *Fifty Years of the International Court of Justice – Essays in Honour of Sir Robert Jennings* (CUP 1996) 528; C Foster, *New Clothes for the Emperor? Consultation of Experts by the International Court of Justice* (2014) 5 J Intl Dispute Settlement 139; F Romanin Jacur, 'Remarks on the Role of Ex Curia Scientifica Experts in International Environmental Disputes', in N Boschiero, T Scovazzi, C Pitea, C Ragni (eds.), *International Courts and the Development of International Law – Essays in Honour of Tullio Treves* (TMC Asser 2013) 441; D Peat, 'The Use of Court-Appointed Experts by the International Court of Justice' (2014) 84 British YB Intl L 271.



‘The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion’.³

Experts have been appointed by the ICJ or the PCIJ in only four instances to date, namely:

a) in *The Factory at Chorzów* case (*Germany v Poland*), where the PCIJ arranged for an enquiry, to be entrusted to a committee of three experts, on the value at a certain date of an undertaking for the manufacture of nitrate products, on the financial results which would probably have been given by that undertaking during a specified period of time, as well as on the value at the date of the judgment of the same undertaking if it had remained in the hands of its previous owner;⁴

b) in *The Corfu Channel* case (*United Kingdom v Albania*), where the ICJ appointed a committee of three experts to answer questions relating to the laying of a minefield in the waters of a strait, in particular ‘the possibility of mooring those mines with those means without the Albanian authorities being aware of it, having regard to the extent of the measures of vigilance existing in the Saranda region’;⁵

c) again in *The Corfu Channel* case, where the ICJ appointed two experts to examine the figures and estimates of a claim relating to the loss of a warship and damage to another;⁶

³ See C Tams, ‘Article 50’, in A Zimmermann, C Tomuschat, K Oellers-Frahm (eds), *The Statute of the International Court of Justice – A Commentary* (OUP 2006) 1109. In this paper no distinction will be made between individuals, bodies, bureaus, commissions or organizations entrusted with the task of making an enquiry or giving an opinion. They will be all called ‘experts’.

⁴ See *Case Concerning the Factory at Chorzów (Germany v Poland)* (Judgment) PCIJ Series A No 17, 51. The parties settled by agreement the question of the damage before the delivery of the report by the committee of experts.

⁵ See *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 21. The committee was composed of Commodore J Bull of the Royal Norwegian Navy, Commodore SA Forshell of the Royal Swedish Navy and Lieutenant-Commander SJ Elfferich of the Royal Netherlands Navy (ibid 9). After a first report, the committee made a visit to Saranda and in the second report stated that ‘if a normal look-out was kept at Cape Kiephali, Denta Point, and St. George’s Monastery, and if the look-outs were equipped with binoculars as has been stated, under normal weather conditions for this area, the minelaying operations (...) must have been noticed by these coastguards’ (ibid 21).

⁶ See *Corfu Channel Case (UK v Albania)* (Assessment of the Amount of Compensation) [1949] ICJ Rep 247. The experts were Rear-Admiral JB Berck and Mr G de Rooy, both of the Royal Netherlands Navy.



d) in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case (*Canada v United States*), where the parties agreed in advance that the ICJ Chamber to which the dispute was brought would have appointed an expert to assist it ‘in respect of technical matters and, in particular, in preparing the description of the maritime boundary and the charts’.⁷

In fact, the work of the court-appointed experts had an important influence on the final decision only in the *Corfu Channel* case. In other instances where scientific and technical questions were at issue the ICJ preferred not to make use of Article 50. The reluctance of the ICJ to appoint experts has been the subject of proposals for amendments to Article 50,⁸ as well as of criticism by dissenting judges and writers.

The considerations developed hereunder are intended to show that judges should not neglect the contribution that can be provided by experts. However scientific and technical elaboration should not take the lead over legal analysis and categorisation. While scientists aim to seize and describe complex realities, lawyers need to simplify the facts in order to adapt and fit them to the models of legal provisions.

2. *General considerations on the use of experts by courts*

The handling of matters of fact is within the typical exercise of the judiciary function, be it in a domestic or in the international legal system. To take a decision, a court is called to determine the relevant facts and to qualify them in connection with the relevant legal provisions (legal categorisation of factual issues). Evidence, especially the documentary evidence, available to the court is not always sufficient to reach a conclusion on the occurrence and causes of certain facts whose deter-

⁷ See *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case (*Canada v United States*) [1984] ICJ Rep 246. The Chamber appointed for this task the British Commander Peter Bryan Beazley (ibid 256).

⁸ See Peat (n 2) 300: ‘The solution, which may be termed “pre-trial procedure”, would involve a separate pre-trial process led by three members of the Court, to determine the facts pertinent to the selection and application of the rules of law necessary for the Court to perform its function in the case at hand. The members of the Court would have an institutionalized framework through which to appoint experts, drawing upon lists of experts maintained by competent specialised international organisations within defined fields’.



mination is needed to decide whether a rule has been violated or complied with (for example, to decide whether the customary rule on the prohibition of transboundary pollution has been violated, a court must be sure that a river is seriously polluted and that the pollution has its source from a given plant). Nor can the members of a court, who are experts in law, be supposed to have a universal knowledge, in order to reach by themselves conclusions that require scientific and technical expertise. Here scientific and technical experts have a role to play.

For example, there is no doubt that naval officers are better suited than anyone else to clarify whether the operation of laying of mines in a given strait by a third subject can be seen and heard by the look-out posts on the coast. Judges sitting in courts are not likely to engage themselves in activities of investigation on moonless nights, such as the test of visibility carried out by the committee of experts in the Strait of Corfu:

‘A motor ship, 27 metres long, and with no bridge, wheel-house, or funnel, and very low on the water, was used. The ship was completely blacked out, and on a moonless night, i.e., under the most favourable conditions for avoiding discovery, it was clearly seen and heard from St. George’s Monastery. The noise of the motor was heard at a distance of 1,800 metres, and the ship itself was sighted at 670 metres and remained visible up to about 1,900 metres’.⁹

Also in cases where it appoints an expert, the court has the power to retain full control over the legal proceeding and the final decision. There is no delegation of power from the judge to the expert. Sometimes, once the factual question has been solved, there is not much room for subsequent legal discussion, as the decision stems almost automatically from the determination of the facts. This happens merely because questions of fact are mostly crucial in certain disputes, while in others emphasis is put on legal questions. However the court retains the power to evaluate the conclusions presented by the expert and to disregard them if for any reason it is not convinced that they are accurate or reliable, to appoint another expert or to adapt the conclusions to the legal provisions that it deems applicable.

⁹ *Corfu Channel Case* (n 5) 21.

For example, in the *Corfu Channel* case, the ICJ asked the committee of experts to make a visit to the locality where the accident occurred and prepare a second report, as the first ‘did not seem entirely conclusive’.¹⁰ During the second part of the same case, the United Kingdom submitted a claim of £700,087 for the total loss of a destroyer of the British navy, while the experts estimated the same damage at a higher amount (£716,780). The Court decided that it could not award more than what was claimed by the party that suffered the damage.¹¹ It chose to apply a legal principle and to partially disregard the experts’ conclusions.

If the expert can play a useful role and does not excessively encroach on the function of the Court, why does the ICJ make use of Article 50 so seldom? Some tentative explanations are provided hereunder.

3. *Tentative Explanations of the Reluctance to Appoint Court-Experts*

Legal tradition could have a role in explaining the infrequent application of Article 50 by the ICJ. As a result of inquisitorial approach to evidence, civil-law jurisdictions make a greater use of court-appointed experts, while common-law jurisdictions, moving from an adversarial approach, often refrain from taking similar action and rely on evidence adduced by the experts of the parties.¹² This could influence the attitude of ICJ judges who come from common-law countries.

Another reason could be that the relevant scientific evidence does not exist or, to put it in a less radical way, does not exist in any circumstance.¹³ It is well-known that on some scientific questions of general

¹⁰ *ibid.*

¹¹ *Corfu Channel Case* (Assessment of the Amount of Compensation) (n 6) 248. The amount claimed by the United Kingdom was found to be ‘justified’.

¹² See Peat (n 2) 274. In certain cases before common-law courts, the opposing experts are asked by the court to proceed in a cooperative manner and to present a joint report on points of agreement and points of disagreement.

¹³ See the separate opinion appended by Judge Cançado Trindade to the ICJ judgment on the *Whaling in the Antarctic* (n 1): “Scientific research” is surrounded by uncertainties; it is undertaken on the basis of uncertainties. Suffice it here to recall the legacy of Karl Popper, who used to ponder wisely that scientific knowledge can only be uncertain or conjectural, while ignorance is infinite. Scientific research is a search for truth, amidst conjectures, and, given one’s fallibility, one has to learn with mistakes

character, such as the causes of global warming, different scientists have different opinions. The work of the Scientific Committee established by the International Whaling Commission shows how scientists can disagree on questions relating to the abundance of whale species and the measures needed for their conservation. If disputes relating to global warming or whaling were brought to an international court – as was indeed the case in relation to whaling brought before the ICJ – the choice of experts would become a delicate issue for the court, as their positions could be predictable in advance.

On occasions, especially where the experts of the parties put forward contrary views, the ICJ was not prepared to enter into the discussions of a scientific and technical nature raised by the parties and found them irrelevant for the purposes of its decision.

For example, in the judgment in the *Continental Shelf case (Tunisia v Libya)* of 24 February 1982, the ICJ remarked that the character of the seabed where the delimitation had to be effected was the subject of abundant examination and of detailed scientific studies by the experts of the parties.¹⁴ Both States relied on the assumption that the continental shelf was the ‘natural prolongation’ of their land territory into and under the sea, as held by the ICJ itself in the previous judgment of 20 February 1969 on the *North Sea Continental Shelf cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*.¹⁵ However the experts of the parties reached contrary conclusions on the State to which the natural prolongation of the disputed seabed area was to be attributed.¹⁶ Instead of appointing a court expert

incurred into. One can hope to be coming closer to truth, but without knowing for sure whether one is distant from, or near it. Without the ineluctable refutations, science would fall into stagnation, losing its empirical character. Conjectures and refutations are needed, for science to keep on advancing in its empirical path. As to the *cas d'espèce*, would this mean that whales could keep on being killed, and increasingly so, for “scientific purposes” and amidst scientific uncertainty? I do not think so; there are also non-lethal methods, and, after all, living marine resources are not inexhaustible’ (para 74 of the opinion).

¹⁴ *Continental Shelf case (Tunisia v Libya)* [1982] ICJ Rep 41.

¹⁵ *North Sea Continental Shelf cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 54.

¹⁶ ‘Thus the Court is in effect invited to choose between two interpretations of “natural prolongation” as a geological concept which in fact highlight two aspects of geology as a science. On the one hand, geology involves the study of the components of the earth’s structure as they now are, the analysis and classification of minerals, rocks

to clarify the question, the ICJ held that the geological and geomorphological elaborations of the parties were irrelevant, since for the purposes of a legal delimitation there was a single continental shelf which constituted the prolongation of the territory of both States and which was to be delimited according to other criteria:¹⁷

‘The conclusion which, in the Court’s view, has ineluctably to be drawn from this analysis is that, despite the confident assertions of the geologists on both sides that a given area is “an evident prolongation” or “the real prolongation” of the one or the other State, for legal purposes it is not possible to define the areas of continental shelf appertaining to Tunisia and to Libya by reference solely or mainly to geological considerations’.¹⁸

‘The submarine area of the Pelagian Block which constitutes the natural prolongation of Libya substantially coincides with an area which constitutes the natural submarine extension of Tunisia. Which parts of the submarine area appertain to Libya and which to Tunisia can therefore not be determined by criteria provided by a determination of how far the natural prolongation of one of the Parties extends in relation to the natural prolongation of the other. In the present case, in which Libya and Tunisia both derive continental shelf title from a natural prolongation common to both territories, the ascertainment of the extent of the areas of shelf appertaining to each State must be governed by criteria of international law other than those taken from physical features’.¹⁹

and fossils, the observance of trends and continuities; and in harmony with this approach Tunisia, in so far as it bases its argument on geological considerations, invites the Court to deduce the “natural prolongation” of Tunisia from the identity of deposits in the bed of the Pelagian Sea with those found under the land territory of Tunisia, and the continuation of strata and features from that territory seawards in a generally west-east direction. On the other hand, geology in its historical aspect involves deducing the history of the earth from the physical evidence now present, and ascertaining, so far as human knowledge permits, what were the processes and events which gave rise to the existence of the observed features on and beneath the earth’s surface; and it is in this historical spirit that Libya has pointed to the rifting process which, in Libya’s contention, marked the Pelagian Block with the permanent character of the ‘natural prolongation’ of the African landmass’ *Continental Shelf Case* (n 14) 53.

¹⁷ It is beyond the scope of this short paper to elaborate on what the other criteria were.

¹⁸ *ibid* 53.

¹⁹ *ibid* 58.



As the ICJ remarked, ‘the function of the Court is to make use of geology only so far as required for the application of international law’.²⁰ Indeed the technical complications of the case contributed to a substantive change in the rule that the ICJ decided to apply to maritime delimitations. Without saying it in the judgment, the Court probably realised that the assumption that the continental shelf is the natural prolongation of the land territory of State was wrong, as far as maritime delimitations are concerned. Yet such an assumption takes for granted that States negotiate their land boundaries on the basis of the geology and geomorphology of the seabed adjacent to the coast, which is a highly unlikely event.

The ICJ confirmed its position in the judgment of 3 June 1985 on the *Continental Shelf* case (*Libya v Malta*). Facing again a situation of strong disagreement between the experts of the parties, the ICJ declined to adjudicate on scientific questions, as they were irrelevant for the purpose of effecting a legal delimitation:

‘The Court is unable to accept the position that in order to decide this case, it must first make a determination upon a disagreement between scientists of distinction as to the more plausibly correct interpretation of apparently incomplete scientific data; for a criterion that depends upon such a judgment or estimate having to be made by a court, or perhaps also by negotiating governments, is clearly inapt to a general legal rule of delimitation’.²¹

‘(...) since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims’.²²

²⁰ ‘The function of the Court is to make use of geology only so far as required for the application of international law. It is of the view that what must be taken into account in the delimitation of shelf areas are the physical circumstances as they are today; that just as it is the geographical configuration of the present-day coasts, so also it is the present-day sea-bed, which must be considered. It is the outcome, not the evolution in the long-distant past, which is of importance’ (ibid 54).

²¹ *Continental Shelf case (Libya v Malta)* (Judgment) [1985] ICJ Rep 36.

²² ibid 35.

In these kind of situations, where it is possible to simplify excessively complex questions for the sake of legal clarity, one cannot but agree with the approach taken by the ICJ in disregarding scientific discussions and experts' elaborations – be they appointed by the parties or by the Court.

In other cases that involved scientific and technical questions, the ICJ held that the parties were under a legal obligation to negotiate in good faith to find an equitable solution to the technical aspects of their differences.

For example, in deciding on 25 July 1974 the merits of the two *Fisheries Jurisdiction* cases (*United Kingdom v Iceland; Federal Republic of Germany v Iceland*), the ICJ held that the parties were 'under mutual obligations to undertake negotiations in good faith for the equitable solution of their differences concerning their respective fishery rights', taking into account a number of factors, such as the preferential rights of the coastal State, the established rights of the fishing States, the interests of other States, the need for conservation and development of fishery resources and the obligation of the parties to keep under review such resources.²³ The ICJ found that 'the obligation to negotiate thus flows from the very nature of the respective rights of the Parties; to direct them to negotiate is therefore a proper exercise of the judicial function in this case'.²⁴

Also in the judgment of 25 September 1997 on the *Gabcikovo-Nagymaros Project* case (*Hungary v Slovakia*) the ICJ concluded that the parties were under an obligation to negotiate in good faith in the light of the prevailing situation and to take all necessary measures to ensure the achievement of the objectives of a treaty in force for them and relating to the construction and operation of a barrage.²⁵

²³ *Fisheries Jurisdiction cases (United Kingdom v Iceland; Federal Republic of Germany v Iceland)* [1974] ICJ Rep 34, 205.

²⁴ *ibid* 32, 201.

²⁵ *Gabcikovo-Nagymaros Project case (Hungary v Slovakia)* [1997] ICJ Rep 83. 'For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabcikovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river. It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and inte-

It is beyond the scope of this paper to discuss whether and to what extent a court, to which the litigants present themselves precisely because they are not able to reach an agreement, is empowered to oblige them to conclude an agreement. It is sufficient to remark that, if such an approach is taken, there is no need to enter into scientific and technical elaboration and appoint experts.

4. *The 'Ghost-Experts'*

However, it is not always possible for a court to achieve a legal simplification of very complex scientific and technical questions. The *Pulp Mills on the River Uruguay* case (*Argentina v Uruguay*) is probably one of the cases where expert advice would have been needed before taking a decision, as remarked upon in the joint dissenting opinion attached by judges Al-Khasawneh and Simma to the ICJ judgment of 20 April 2010:

'Yet, the Court has an unfortunate history of 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; and it has come under considerable criticism in this regard, particularly in very recent scholarly commentary on its working methods (...)'.

'Quite aside from academic criticism, so long as the Court persists in resolving complex scientific disputes without recourse to outside expertise in an appropriate institutional framework such as that offered under Article 50 of the Statute, it willingly deprives itself of the ability fully to consider the facts submitted to it and loses several advantages of such recourse: the interaction with experts in their capacity as experts and not as counsel (...); the advantage of giving the parties a voice in establishing the manner in which those experts would have been used, a chance for the parties to review the Court's choice of experts (and for which subject-matter experts were needed); and the chance for the parties to comment on any expert conclusions emerging from that process. It would also have given the Court the opportunity of combining the rigour of the scientific community with the requirements of the courtroom — a blend which is indispensable for the ap-

grated way, as well as the norms of international environmental law and the principles of the law of international watercourses' (ibid 78).



plication of the international rules for the protection of the environment and for other disputes concerning scientific evidence'.²⁶

Besides stressing the lack of Court-appointed experts, the dissenting judges also referred to cases where experts did participate, but in the form of 'ghosts', to ICJ proceedings. They rightly qualified such a surprising practice as a departure from the principles of transparency, openness and procedural fairness:

'It would not be sufficient if the Court, in disputes with a complex scientific component, were to continue having recourse to internal "experts-fantômes", as appears to have been the case, *inter alia*, in certain boundary or maritime delimitation cases. (...) While such consultation of "invisible" experts may be pardonable if the input they provide relates to the scientific margins of a case, the situation is quite different in complex scientific disputes, as is the case here. Under circumstances such as in the present case, adopting such a practice would deprive the Court of the above-mentioned advantages of transparency, openness, procedural fairness, and the ability for the Parties to comment upon or otherwise assist the Court in understanding the evidence before it. These are concerns based not purely on abstract principle, but on the good administration of justice (...). Transparency and procedural fairness are important because they require the Court to assume its overall duty for facilitating the production of evidence and to reach the best representation of the essential facts in a case, in order best to resolve a dispute'.²⁷

²⁶ *Pulp Mills on the River Uruguay Case (Argentina v Uruguay)* [2010] ICJ Rep 113. The dissenting Judges quote in this regard S Rosenne, 'Fact-Finding before the International Court of Justice' in *Essays on International Law and Practice* (Martinus Nijhoff 2007) 245.

²⁷ *Pulp Mills Case* (n 26) 114: 'The Court's Registrar, Philippe Couvreur, has defined the role of experts retained by the Court for purely internal consultation as that of temporary Registry staff members, entrusted with the giving of internal scientific opinions under the oath of confidentiality demanded of full-time Registry staff. As he explains, their conclusions would never be made public'. The dissenting Judges quote in this regard R Jennings, 'International Lawyers and the Progressive Development of International Law', in J Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer 1996) 416, and P Couvreur, 'Le règlement juridictionnel', in SFDI (ed) *Le processus de délimitation maritime: étude d'un cas fictive* (Pedone 2004) 349, 384.



5. *Whaling 'for the Purposes of Scientific Research'*

It is now time to return – better late than never – to our starting point, which is the *Whaling in the Antarctic* case.²⁸ The main question in discussion before the ICJ was whether the whaling activities under the Second Phase of the Japanese Whale Research Programme under Special Permit in the Antarctic (JARPA II) were carried out ‘for purposes of scientific research’, as permitted by Article VIII, paragraph 1, of the International Convention for the Regulation of Whaling (Washington, 1946),²⁹ or rather for other purposes, specifically commercial purposes. Indeed such a question has little scientific or technical nature – and, in fact, there was no need to engage a court-appointed expert. As emphasised in the dissenting opinion of Judge Yusuf, the definition of a the term ‘scientific research’ used in a treaty provision was a legal question related to the interpretation of an international treaty.³⁰ However

²⁸ To the judgment are appended the dissenting opinions of Judges Abraham, Bennouna, Owada and Yusuf, the separate opinions of Judges Bhandari, Cançado Trindade, Charlesworth, Greenwood, Sebutinde and Xue and the declaration of Judge Keith.

²⁹ Whaling Convention, Art VIII: ‘1. Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national 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, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted. 2. Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted’.

³⁰ *Whaling in the Antarctic* (n 1), para 3 of the opinion. As pointed out in the separate opinion of Judge Sebutinde, ‘whilst I accept that the Court should not attempt a forensic definition of what is or is not “scientific research” (a task more suited to scientists rather than lawyers), in my view, the Court should at least have considered the ordinary grammatical (dictionary) meaning of the phrase, as a basis for the reasoning and analysis that follows in the Judgment. Although the concept of “science” is inherently vague, “scientific research” must, in its most basic sense, involve “a systematic pursuit of knowledge concerning the structure and behaviour of the physical and natural world through observation and experiment” (Oxford Dictionary). In my view, this is a workable definition that could have been adopted as a basis for the Court’s reasoning and analysis’ (para 9).



strange it might seem at first glance, scientists are not in the best position to define what ‘scientific research’ is, at least not when these words are used in a treaty.

While not endorsing the notion of ‘scientific research’ formulated by one of the scientific experts of Australia,³¹ the ICJ did not find it necessary to provide its own definition of the term:

‘(...) the Court is not persuaded that activities must satisfy the four criteria advanced by Australia in order to constitute ‘scientific research’ in the context of Article VIII. As formulated by Australia, these criteria appear largely to reflect what one of the experts that it called regards as well-conceived scientific research, rather than serving as an interpretation of the term as used in the Convention. Nor does the Court consider it necessary to devise alternative criteria or to offer a general definition of “scientific research”’.³²

The lack of a starting point, that is the definition of scientific research for the purposes of the Whaling Convention,³³ may be the reason

³¹ According to the expert, ‘scientific research (in the context of the Convention) has four essential characteristics: defined and achievable objectives (questions or hypotheses) that aim to contribute to knowledge important to the conservation and management of stocks; “appropriate methods”, including the use of lethal methods only where the objectives of the research cannot be achieved by any other means; peer review; and the avoidance of adverse effects on stock’ (*Whaling in the Antarctic Case* (n 12) para 74).

³² *Whaling in the Antarctic Case* (n 1) para 86.

³³ According to Judge Yusuf, the ICJ should have addressed three questions in the following sequence: ‘Is the primary purpose of the special permit issued to JARPA II to undertake scientific research or to facilitate the supply of whale meat to a commercial market? Is there evidence to support that JARPA II was granted special permit for a purpose other than scientific research? What are the criteria for determining whether a programme is for purposes of scientific research under the ICRW?’ (*Whaling in the Antarctic Case* (n 1) para 28 of the dissenting opinion). Judge Yusuf puts the dispute in the perspective of the evolving and presently conservationist objectives of the Whaling Convention: ‘The real issue is whether the evolving regulatory framework of the Convention in setting zero catch limits and establishing the Southern Ocean sanctuary should be taken into account in interpreting Article VIII of the Convention and the legality of the special permits granted by Japan under that provision for purposes of scientific research, and the extent to which Article VIII and the use of lethal methods for purposes of scientific research might have been restricted by the fact that the optimum utilization of whale resources has been set aside as one of the central objectives of the Convention’ (*ibid* para 60). However, the dissenting judge does not provide in the opinion an answer to these crucial questions. For a broad analysis of the case in the perspec-

why the ICJ judgment followed a complex and perhaps convoluted reasoning. The Court assessed JARPA II according to a two-step process (so-called standard of review):³⁴

‘When reviewing the grant of a special permit authorizing the killing, taking and treating of whales, the Court will assess, first, whether the programme under which these activities occur involves scientific research. Secondly, the Court will consider if the killing, taking and treating of whales is “for purposes of” scientific research by examining whether, in the use of lethal methods, the programme’s design and implementation are reasonable in relation to achieving its stated objectives’.³⁵

The two reviews led to different results that seem rather contradictory, as it is hard to understand how something that the ICJ found to be ‘scientific research’ could be carried out ‘not for purposes of scientific research’:

‘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’.³⁶

If whaling is carried out for purposes different from scientific research (what purposes? are they commercial purposes?), how can it be called ‘scientific research’ (and not commercial whaling in disguise)?³⁷

tive of international environmental law, see the separate opinion of Judge Cançado Trindade.

³⁴ According to Judge Yusuf, “the Court does not, however, use that applicable law to evaluate whether the special permits issued by Japan for JARPA II are for purposes of scientific research. Instead of using those parameters, the Court comes up with a standard of review that is extraneous to the Convention” (*Whaling in the Antarctic Case* (n 1) para 12 of the opinion).

³⁵ *Whaling in the Antarctic Case* (n 1) para 67.

³⁶ *Whaling in the Antarctic Case* (n 1) para 227.

³⁷ As stated by Judge Yusuf, ‘it appears to me paradoxical that a programme that is broadly characterized as scientific research is considered by the majority not to be “for

For reasons that are not entirely clear, the ICJ avoided the more straightforward approach that may be found in the opinions of some of its members:

‘The principal reason why Japan is unable to rely upon the exemption conferred by Article VIII, paragraph 1, is that the numbers of whales authorized to be killed under JARPA II are not objectively reasonable in the light of the objectives of JARPA II’.³⁸

‘(...) in response to Australia’s claim that Japan’s real intention in conducting JARPA II is to maintain its whaling operation and that the programme is commercial whaling in disguise, Japan’s rebuttal is weak and unpersuasive’.³⁹

In fact, the ICJ chose not to directly enter into the question of whether JARPA II could be qualified as commercial whaling in disguise⁴⁰ and, consequently as an abuse of right.⁴¹ It preferred to remark, *inter alia*, that there was no evidence of studies by Japan of the feasibility or practicability of non-lethal methods,⁴² that there was no comparison of costs between lethal and non-lethal methods,⁴³ that the decision to proceed with the JARPA II sample sizes prior to the final review of the previous JARPA lends support to the view that Japan’s priority was

purposes of scientific research”’ (*Whaling in the Antarctic Case* (n 1) para 5 of the dissenting opinion). ‘It also gives the impression that serendipity was at work here and that JARPA II, though not designed for purposes of scientific research, accidentally stumbled into scientific research activities’ (ibid 51).

³⁸ *Whaling in the Antarctic Case* (n 1) Separate Opinion of Judge Greenwood, para 24.

³⁹ *Whaling in the Antarctic Case* (n 1) Separate Opinion of Judge Xue, para 27.

⁴⁰ ‘It appears, however, that both the review and the conclusions of the Judgment entail a finding of bad faith which is not explicitly expressed, since JARPA II is considered to be in violation of the commercial whaling provisions of the ICRW’ [the Whaling Convention] (*Whaling in the Antarctic Case* Dissenting Opinion of Judge Yusuf, para 54).

⁴¹ The prohibition of abusing of rights can be considered a general principle of law. Under Art 300 of the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397, ‘States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right’.

⁴² *Whaling in the Antarctic Case* (n 1) para 141.

⁴³ *Whaling in the Antarctic Case* (n 1) para 143.



to maintain whaling operations without any pause,⁴⁴ that the results of a programme which involved the killing of about 3,600 whales in a six-year period were quite modest at the scientific level,⁴⁵ that the Director-General of Japan's Fisheries Agency had stated that the meat of minke whale – *Balaenoptera bonearensis*, the main, if not sole, target of JARPA II – is 'prized because it is said to have a very good flavour and aroma when eaten as sashimi and the like' and that 'the scientific whaling program in the Southern Ocean was necessary to achieve a stable supply of minke whale meat'.⁴⁶

Also in the *Whaling in the Antarctic* case the ICJ took note of the disagreement among the experts of the parties:

'The Court observes that, as a matter of scientific opinion, the experts called by the Parties agreed that lethal methods can have a place in scientific research, while not necessarily agreeing on the conditions for their use. Their conclusions as scientists, however, must be distin-

⁴⁴ *Whaling in the Antarctic Case* (n 1) para 156.

⁴⁵ 'The Court notes that the Research Plan uses a six-year period to obtain statistically useful information for minke whales and a 12-year period for the other two species, and that it can be expected that the main scientific output of JARPA II would follow these periods. It nevertheless observes that the first research phase of JARPA II (2005-2006 to 2010-2011) has already been completed (...), but that Japan points to only two peer-reviewed papers that have resulted from JARPA II to date. These papers do not relate to the JARPA II objectives and rely on data collected from respectively seven and two minke whales caught during the JARPA II feasibility study. While Japan also refers to three presentations made at scientific symposia and to eight papers it has submitted to the Scientific Committee, six of the latter are JARPA II cruise reports, one of the two remaining papers is an evaluation of the JARPA II feasibility study and the other relates to the programme's non-lethal photo identification of blue whales. In light of the fact that JARPA II has been going on since 2005 and has involved the killing of about 3,600 minke whales, the scientific output to date appears limited' (*Whaling in the Antarctic Case* (n 1) para 219).

⁴⁶ *Whaling in the Antarctic Case* (n 1) para 197. However, according to the dissenting opinion of Judge Owada, 'the issue is not whether the programme of JARPA II has attained a level of excellence as a project for scientific research for achieving the object and purpose of the Convention, which is a matter to be considered and examined by the Scientific Committee. It may also be true that the JARPA II programme is far from being perfect for attaining such objective and may need improvements to achieve that purpose. Such criticism of JARPA II could appropriately be valuable in the review process, with a view to remodelling or redesigning these activities in accordance with what the regulatory framework of the Convention prescribes, but this cannot be the ground for the Court to declare that the activities of the programme are unreasonable for purposes of scientific research' (para 49).

guished from the interpretation of the Convention, which is the task of this Court'.⁴⁷

The different opinions expressed by the experts of the parties were evaluated in different ways by the judges who attached their opinions to the decision. Sometimes the views provided by scientists appointed by Japan were met with approval,⁴⁸ while at other times it was those of scientists appointed by Australia.⁴⁹

While not particularly relevant to a deep study in the relationship between law and science, the *Whaling in the Antarctic* judgment is notable for its content. Although not entirely convincing from a logical point of view, the ICJ reached the most credible conclusion, namely that the special permits granted by Japan in connection with JARPA II did not fall within the provisions of Article VIII, paragraph 1, of the Whaling Convention.

The scientific programme in question had, *inter alia*, the purpose of assessing whether certain species of whales, especially minke whale, were today so abundant – also as a consequence of the moratorium on commercial whaling established by the International Whaling Commission⁵⁰ – that they enter into competition with other marine species. In

⁴⁷ *Whaling in the Antarctic Case* (n 1) para 82.

⁴⁸ 'Je n'ignore pas que le professeur Walløe étant un expert cité par l'une des Parties, la Cour ne pouvait pas tenir pour vraies, sans autre examen, toutes ses déclarations, alors même que d'autres experts, cités par la Partie adverse, exprimaient des avis différents. Mais je pense que le fait qu'un homme de science de cette réputation exprime sans ambages son appréciation positive quant à l'intérêt scientifique des recherches conduites dans le cadre de JARPA II et quant au caractère raisonnable des tailles d'échantillons fixées (sauf, a-t-il dit, pour l'espèce des rorquals communs dont le nombre de captures prévues était trop faible pour donner des résultats significatifs) aurait dû peser grandement dans le jugement porté par la Cour sur la nature même de JARPA II' (Dissenting Opinion of Judge Abraham, para 48).

⁴⁹ 'Contrary to the view of the majority, I believe that the conspicuous dearth of peer review by scientists of other nations seriously undermines any conclusion that Japan has complied with its duty to co-operate under paragraph 30 (c) of the Schedule. In this regard I endorse the opinion of the witness-expert for Australia, Professor Mangel, who testified that "scientific opinion can be wrong, but reliable science responds to valid criticism, which is how science advances"' (*Whaling in the Antarctic Case* (n 1) Separate Opinion of Judge Bhandari, para 15).

⁵⁰ 'Notwithstanding the other provisions of paragraph 10, catch limits for the killing of for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a

order to do so, the whales were killed and their stomach was opened and investigated to measure the quantity and type of marine animals that they had eaten. Subsequently, as they were then available, the whales themselves were sold and eaten. The conclusion reached by the ICJ in the *Whaling in the Antarctic* case makes happy those who prefer whale-watching to whale-stomach-watching. This may be a personal and emotional way to intend the judgment of a court of law and I know that law should be separated emotions.⁵¹ But where whales are in sight emotions come and remain.⁵²

comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other limits' (para 10, *e*, of the Schedule, as amended, of the Whaling Convention).

⁵¹ 'Many of us are disturbed by the killing of these iconic and intelligent animals and by the manner in which they are killed. However, these perfectly justified emotional reactions should not make us overlook that it is only by reference to the law that the issues before this Court can be resolved. The judicial settlement of disputes between States cannot be made on emotional or purely ethical grounds' (*Whaling in the Antarctic Case* (n 1) Dissenting Opinion of Judge Yusuf, para 2).

⁵² 'So is this great and wide sea, wherein are things creeping innumerable, both small and great beasts. There go the ships: there is that leviathan, whom Thou hast made to play therein' (*Bible*, Psalm 104).

