CHAPTER 2

From the Requirement of Reasonableness to a ‘Comply and Explain’ Rule: The Standard of Review in the *Whaling* Judgment

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Introduction

In *Whaling in the Antarctic*, the Court found that ‘the special permits granted by Japan in connection with JARPA II do not fall within the provisions of Article VIII, paragraph 1, of the International Convention for the Regulation of Whaling’.

Article VIII(1) provides:

> 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.

Australia argued that ‘Article VIII(1) does not give Contracting Governments a discretion of a unilateral and subjective character as for the issue of a special permit.’ New Zealand considered that ‘[i]t is a discretion to grant Special Permits for purposes of scientific research’, though the words in Article VIII ‘provide a limited discretion for Contracting Governments to issue Special

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2 CR 2013/8, p. 31, para. 17 (Crawford).
Permits for the specific articulated purpose of scientific research.' Japan argued, for its part, that ‘a Contracting Government authorizing a special permit has discretion to do so’, though ‘Article VIII of the ICRW does not establish a completely unreviewable and self-judging right to designate any whaling activity as whaling “for purposes of scientific research”’. On this abstract level, accordingly, there was not much difference between the Parties and the intervening State with respect to the discretion given to the State conducting special permit whaling under Article VIII. Unsurprisingly, the Court, while considering that ‘Article VIII gives discretion’, confirmed 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’. The real problem was therefore how the Court should determine whether Japan exercised the discretion within the limit set forth by the Convention. It is at this point that issues relating to the standard of review come into play.

1 The Genesis of the Concept of Standard of Review in the Whaling Case

The Whaling in the Antarctic is the first case in which the Court employed the term ‘standard of review’, though it is widely used in the WTO dispute settlement procedure and investor-State arbitration. It is therefore necessary to see how the term appeared in the discussion in the Whaling case.

The Memorial of Australia does not employ the term. This is quite understandable, because the Applicant’s basic position defended in the Memorial is that Contracting Governments to the ICRW has no discretion in the determination of whether a whaling operation was carried out ‘for purposes of scientific research’. The term ‘standard of review’ is usually used to describe the degree of scrutiny or level of deference afforded by a court.

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3 Written Observations of New Zealand, 4 April 2013, paras. 38–39.
4 Counter-Memorial of Japan, 9 March 2012, para. 50.
5 Written Observations of Japan on New Zealand’s Written Observations, 31 May 2013, para. 9.
6 Judgment, para. 61.
8 Memorial of Australia, para. 4.116. As indicated above, Australia softened its position at the oral pleadings. See supra note 2.