

ICJ JURISDICTION (CONTENTIOUS AND ADVISORY) – seminar 20

ISSUE: Does ICJ has jurisdiction over this matter?

RULES FOR CONTENTIOUS CASES

The matter at hand is a contentious case (as opposed to an advisory opinion requested by an authorized body).

preliminary issues

1. **only states can be parties to contentious cases before the ICJ (art. 34).**

2. because [the parties] are UN members, they are ipso facto parties to the ICJ statute and thus have access to ICJ jurisdiction **(art. 93 of UN charter and art. 35(1) of the ICJ statute).**

contentious jurisdiction

1. ICJ jurisdiction on contentious cases are primarily regulated in **arts. 36 and 37 of the ICJ statute.**

2. **there are three ways in which ICJ could gain jurisdiction over contentious cases: special agreement (art.36(1)), treaties (art.36(1)), unilateral declaration (art.36(2)).**

(1) special agreements

- first limb of art.36(1) of ICJ statute provides ‘the jurisdiction of the court comprises **all cases which the parties refer to it...**’.
 - parties’ Ad hoc consent to jurisdiction over a specific dispute

(2) treaties

- second limb of art. 36(1) provides the jurisdiction of the court comprises...all matters specifically provided for **in the UN charter or in treaties and conventions** in force.
- **the ICJ has inherited the jurisdiction provided under treaties to the Permanent Court of International Justice (art.37).**

(3) unilateral declaration

- art. 36(2) provides that ‘state parties may declare they recognize the compulsory jurisdiction of the court, **in relation to any other state accepting the same obligation...**’
 - Article 36(3): declarations may be made unconditionally or on the basis of reciprocity, or for a certain time.
 - Article 36(4): declarations shall be *deposited* with the Secretary-General of the United Nations.
 - Article 36(5): **Declarations made under Article 36 of the Statute of the PCIJ and which are still in force** shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the ICJ for the period which they still have to run and in accordance with their terms.
- parties can make reservations in their declaration. and whether the subject matter of the disputes fall within the reservations depend on interpretation. when interpreting a declaration accepting its compulsory jurisdiction, ICJ “must seek the interpretation which is in harmony with a natural and reasonable way of **reading the text, having due regard to the intention**” of the declaring State’ (*Whaling case*). **The intention of a reserving State may be deduced not only from the text, but also from the context and an examination of evidence regarding the circumstances of its preparation and purposes** intended to be served (*quoting Fisheries Jurisdiction case in Whaling*).
 - reading the text: ordinary meaning; reading the text of the reservation ‘as a unity’ (*Whaling*)
 - looking at the context (including evidence regarding the circumstances of its preparation and purposes intended)
 - considering the intention
 - reach a conclusion of the preferable interpretation.

3. Jurisdictional disputes are ultimately decided by the ICJ (*Art. 36(6)*).

4. ICJ decision on contentious cases are binding (*art.94 of the UN charter*) and only binding on the parties (*art.59 of the ICJ statute*).

Key case: Whaling case (ICJ, 2014)

Facts	<ul style="list-style-type: none"> Australia contended that Japan breached the International Convention on the Regulation of Whaling by issuing special permits to take whales. Japan maintained its special permits were issued for 'scientific research' Australia invoked as the basis for jurisdiction the declarations made under art. 36(2) by both Japan and Australia. But Australia has made a reservation under its Declaration in relation to '(b) any dispute concerning or relating to the delimitation of maritime zones... or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation'. Japan contested jurisdiction on the basis of reciprocity
Issue	Was the dispute captured by the reservation made in Australia's declaration and therefore fall outside the scope of ICJ jurisdiction?
Held	Reservation (b) inapplicable and the court has jurisdiction.
Reasoning	<ul style="list-style-type: none"> 'when interpreting a declaration, it "must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention" of the declaring State' ([36]): The intention of a reserving State may be deduced not only from the text, but also from the context and an examination of evidence regarding the circumstances of its preparation and purposes intended to be served – quoting <i>Fisheries Jurisdiction case</i> Reading the text of the reservation (para 37): Reading the reservation 'as a unity' – disputes to which the reservation refers must concern either maritime delimitation or exploitation of such an area or adjacent area where there are overlapping claims. This interpretation is confirmed by Australia's intention, expressed e.g. by press release from Foreign Minister at the time (para 38). Applying this interpretation to the facts – the dispute is not about maritime delimitation or exploitation of an area subject of a dispute about delimitation, or of an area adjacent to it. The fact that Japan questions those maritime entitlements does not render the delimitation of these maritime areas under dispute as between the Parties ([39]).
Remedies	<p>(1) asking the Court to find that the killing, taking and treating of whales under special permits granted for JARPA II is not for purposes of scientific research within the meaning of Article VIII and</p> <p>(2) that Japan thus has violated three paragraphs of the Schedule</p> <p>Australia asks the Court to adjudge and declare that Japan shall :</p> <p>(3) refrain from authorizing or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII;</p> <p>(4) cease with immediate effect the implementation of JARPA II ; and</p> <p>(5) revoke any authorization, permit or license that allows the implementation of JARPA II.</p> <ul style="list-style-type: none"> The court granted every one of the above except the third claim ([245], [247]).