

# BOFAXE

## THE INTERNATIONAL WHALING REGIME – A LAW WITH NO TEETH?

— Hosting the G20 summit in Osaka, Japan has been at the center of international attention lately. Less prominent than the G20 summit, but not less noteworthy is the reintroduction of commercial whaling in Japan. Beginning on Monday, 01 July 2019, it will be legal to hunt whales for openly economic reasons in Japan's coastal waters and exclusive economic zone (EEZ) for the first time in more than 30 years. While environmental activists have called upon states to condemn Japan's whaling plans, the heads of states have remained silent at the G20 summit. This Bofax considers the legality of Japan's whaling plans under international law.

Whales are known to be important for aquatic ecosystems. As commercial whaling threatened the conservation of whale stocks in the 20th century, whaling became the topic of several international agreements. Whaling is now mainly regulated by the International Whaling Commission (IWC), which was established under the International Convention for the Regulation of Whaling, but also mentioned in the UN Convention on the Law of the Sea (UNCLOS).

The IWC had put a moratorium on commercial whaling in 1982. This, however, did not stop Japan from hunting whales in the past. Moreover, Japan withdrew from the IWC in December 2018, effective Sunday 30 June 2019. Thus, the moratorium does not bind Japan anymore.

Though the IWC moratorium entered into force in 1986, there has since not been a single year in which Japan has not hunted any whales ([https://iwc.int/table\\_permit](https://iwc.int/table_permit)). Officially, Japan claimed that its hunting was justified under an exception clause that allows whaling for purposes of scientific research. As experts challenged the scientific content of Japan's programs, Australia took Japan to court to determine the legality of Japan's scientific whaling program JARPA II. In 2014, the ICJ ruled in favor of Australia, finding that the Japanese program was but a smokescreen to fish for primarily economic reasons (<https://www.icj-cij.org/en/case/148>). Nevertheless, Japan did not cease the whaling and, after four more years of controversy, left the IWC last year in accordance with Art. XI of the Convention.

However, Japan would be obliged to stop whaling, if the prohibition had crystalized into customary international law. While "only" 89 states are members to the IWC and its convention, those include most of the states with direct access to coastal waters. Additionally, though only 89 states are bound by the moratorium, about a dozen states worldwide allow whaling within their coastal waters and EEZ. While this serves as an indicator for the conviction of most states that whaling should be prohibited, there is still contrary state practice and *opinio juris* is difficult to discern. Ultimately, it is the missing outcry by states *vis-à-vis* persisting whaling activities, which demonstrates that the prohibition of whaling has not emerged as a norm of customary international law (on inaction as state practice and *opinio juris* see: third report on identification of customary international law, Sir Michael Wood, <http://legal.un.org/docs/?symbol=A/CN.4/682>).

Another provision that deals with whaling is Art. 65 UNCLOS, which obliges states to cooperate with the appropriate international organizations for the conservation of cetaceans. The article constitutes an exception to the general rule established in Art. 56 UNCLOS that coastal states have the right to exploit natural resources within their EEZ. However, Japan has been a member of the IWC and has for several times tried to negotiate an end of the moratorium, with the last attempt failing in October 2018 and leading to Japan's eventual withdrawal from the IWC. Thus, Japan could argue that it tried to cooperate with the appropriate organization, namely the IWC, but failed to reach a consensus. Additionally, Minke whales, the main target of whaling in Japan, are not classified as endangered by the International Union for the Conservation of Nature (see <https://www.iucnredlist.org/>). This, however, is the result of the very restrictive whaling policy in the last centuries, and a status that might be jeopardized by the reintroduction of commercial whaling. Nevertheless, Japan could plead that the conservation of whale stocks is not immediately threatened and that it complies with its obligations under UNCLOS.

It remains to be seen whether other states will denounce Japan's latest whaling activities, or if the international community will once again wait until the very last moment, which seems to be the usual *modus operandi* in environmental issues – another matter that could be observed during the G20 summit, where climate change was a rather secondary issue, which only found its way into the final declaration under heavy US protest.

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