MARGIN OF APPRECIATION AND REASONABLENESS IN THE ICJ'S DECISION IN THE WHALING CASE

Enzo CANNIZZARO

Professor of International Law, University of Rome "La Sapienza"

INTRODUCTORY REMARKS

The existence of a margin of appreciation doctrine, its nature, its scope and its very content, still remain a controversial issue. Even the contours of such a doctrine are wrapped in an apparently inextricable mystery (1).

The tendency sometimes emerges to present the margin of appreciation doctrine as a one-fits-all doctrine, applicable whenever the need arises for flexibility and tolerance on the part of the judiciary. Yet, the development of a full-fledged doctrine on the margin of appreciation requires great technical precision accompanied by an equally great sense of systematic coherence.

The very notion of discretion is not easily reconciled with the existence of international obligations, which, by nature, are designed to curtail the otherwise unfettered freedom of States to determine and to implement their course of action. The existence of a measure of discretion has thus the inevitable effect to reduce the scope or the effect of international rules, which have precisely the purpose to govern allegedly discretionary conducts.

There are, notoriously, obligations, which, by their very content, leave a more or less wide room for manoeuvring to their addressees. Such is the case, typically, of obligations of result, obligations to consider in good faith a certain situations, obligations to negotiate, and alike. In these contexts, however, the use of the formula of the margin of appreciation is not much more than a convoluted manner to indicate the indeterminacy of the content of a certain international rule.

The question thus remain, whether the margin of appreciation may play a role even with regard to obligations well determined as to their scope and content. The existence of a margin of appreciation could offset the impetuous growth of the sphere of international obligations, which address

(1) For an overall appraisal, see Y. SHANY, «Toward a General Margin of Appreciation Doctrine in International Law?» 16 *EJIL* (2006), 907; A. LEGG, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality,* Oxford, Oxford University Press, 2012; J.P. COT, "Margin of Appreciation", in R. WOLFRUM (ed.), *The Max Planck Encyclopedia of International Law,* Oxford, Oxford University Press, 2013.

"LIDRIN" — 2014/11/17 — 9:09 — page 450 — #446

pervasively almost all of the social regulations enacted by States'. Appropriately circumscribed as to its legal basis and scope, it could determine an appropriate balance between the uniformity deriving from international law obligations and the diversity of the law and tradition of each single territorial community. Yet, to find the appropriate role of a margin of appreciation doctrine still remains a difficult exercise, both from a technical and a political viewpoint. The search for the appropriate balance between international uniformity and domestic diversity has been, and still is at the basis of the scientific reflection of Prof. Joe Verhoeven, to whom this contribution, included in a collection of writings in his honour, is dedicated (2).

I. – Margin of appreciation in the case law of the ICJ: a short overview

Reactions of international Courts to claims of States pleading for a certain amount of discretion in the implementation of international obligations can be broadly grouped in two categories.

The first group includes cases in which the Court has declined, more or less explicitly, to abide by these claims, finding that a marge of discretion is incompatible with the existence of an international law standard.

The most famous example of this scheme is to be found in the *Oil Platforms* decision (3). In response to a claim of the United States, who argued that "(a) measure of discretion should be afforded to a party's good faith application of measures to protect its essential security interests", the ICJ held:

> "the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any 'measure of discretion'" (4).

In a second group of cases, mostly related to powers exercised by States within their territory or in zones under their jurisdiction, a more liberal approach was adopted. The Court has been more inclined to recognise the power of the territorial State to determine public policy interests which can justify limited forms of interference with international obligations. A paradigmatic example comes from the *Corfu Channel case*, where the ICJ acknowledged the power of Albania to regulate the passage of warships through the Corfu channel, in view of exceptional circumstances, but not to prohibit it (5).

(2) See his seminal lectures "Considérations sur ce qui est commun: Cours général de droit international public", in *Recueil des cours de l'Académie de droit international*, vol. 334, 2002.

(3) Judgement of 6 November 2003, *Oil Platforms (Islamic Republic of Iran v. United States of America), merits, I.C.J. Reports* 2003, p. 161.

(4) *Ibidem*, para. 73.

(5) Judgement of 9 April 1949, *Corfu Channel case, Merits, I.C.J. Reports* 1949, p. 4, at 29.

The idea that international law confers to a State the power to determine public policy requirements which can lawfully curtail the scope of its international obligations has emerged periodically, explicitly or implicitly, in a number of judgements (6). In *Oscar Chinn (7)*, the Permanent Court of International Justice found that Belgium was empowered to reduce the transport tariffs on the river Congo, and consequently to produce adverse effect on the business of a British company of navigation, to assist trade at a time of economic difficulties. After describing the deep impact of the economic depression and the importance of the fluvial transportation for the economy of the colony, the Court said: "The Belgian Government was the sole judge of this critical situation and of the remedies that it called for, subject of course to its duty of respecting its international obligations" (8).

An even more liberal approach was taken by ICJ in *ELSI* (9). The Court found that the conduct of the Italian authorities, who had taken control of certain plants owned by two US companies for reasons of public policies, was not inconsistent with the obligation, flowing from a bilateral treaty, to protect US citizens against arbitrary or discriminatory measures, even if under Italian law the requisition had been found to be arbitrary, and therefore null and void. This was explained by the ICJ with the following argument: "Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law". (10) In this passage, the Court seems to contend that measures unlawful under national law, but plausibly related to general interests, fell nonetheless within the realm of national public policy.

Albeit never alluding to the possible existence of a margin of appreciation doctrine, and, quite the contrary, using other, and quite diverse, legal techniques, the ICJ seems, thus, to have silently thrown the seeds for a possible development of such an approach.

II. – The twofold standard of review in the Whaling in the Antarctic case

The margin of appreciation doctrine has been expressly invoked in front of the ICJ by Japan in its dispute with Australia on the *Whaling in the*

(6) For a general statement on the existence of a margin of appreciation in implementing international obligations, limited by reasonableness and good faith, see the Judgment of 27 August 1952, in the *Case concerning rights of nationals of the United States of America in Morocco (France v. United States of America)*, *I.C.J. Reports*, 1952, p. 170: "the power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith".

(7) Judgement of 12 December 1934, No. 63, *Series A/B* 63.

(8) *Ibidem*, at 79.

(9) *Elettronica Sicula S.P.A. (ELSI),* Judgment of 20 June 1989, *United States of America v. Italy, I.C.J.Reports 1989,* p. 15.

(10) *Ibidem*, para. 128.

Antarctic. (11). Japan contended that it possessed the exclusive competence to issue a special permit to kill, take and treat whales for purposes of scientific research under Article VIII, para. 1, of the International Convention for the Regulation of Whaling (ICRW). Allegedly, this competence was based on the existence of a "margin of appreciation", recognised to every State party to that Convention, to determine the meaning of the notion of "scientific research" and the activities related to that purpose.

The Court did not accept this claim. In a succinct finding, it held that the determination of the terms "for purposes of scientific research" is part of the interpretation of Art. VIII of the ICRW and, therefore, cannot be left, in its entirety, to the unilateral determination of one of its parties. In para. 61, it said:

> "The Court considers that Article VIII gives discretion to a State party to the ICRW to reject the request for a special permit or to specify the conditions under which a permit will be granted. However, 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."

This passage has a central role in the conceptual system of the decision. In all appearances, it was meant to dismiss the idea of an unfettered discretion of either party to the ICRW to determine unilaterally the scope of the scientific research exception allowed by Article VIII. This impression is upheld by a number of individual opinions which, with a variety of tones, approved or disapproved the holding of the Court.

A few lines below, however, the Court provided some clarifications on the nature and content of the unilateral assessment allowed by that provision. In para. 67, the Court added:

> "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. This standard of review is an objective one".

In the paragraphs reproduced above, the Court appears to have announced the adoption of distinct standards for the two steps along which the review unfolded. The first relates to whether "the program under which these activities occur involves scientific research". The second relates to whether "the program's design and implementation are reasonable in achieving its stated objectives".

A complex conceptual system seems thus to emerge. In all evidence, the different standards relate to two different logical operations.

A looser standard was used to determine the content and scope of the notion of scientific research, which "cannot depend simply on a State's

(11) *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)*, judgment of 31 March 2014, n.y.r.

perception". A stricter standard was used, in stead, to review whether the activities carried out by Japan were reasonably related to their stated objectives, namely for purposes of scientific research. It was only with regard to this second aspect that the Court proposed to use an objective standard of review.

The reading of the subsequent parts of the decision lends some support to this assumption.

With regard to the notion of "scientific research", the Court, after a lengthy analysis of the positions taken by the parties to the proceedings, came to the conclusion that it was not necessary "to offer a general definition" of that notion (12). Although maintaining that this notion does not depend entirely on the subjective determination of a State, the Court has, in practice, accepted that the JARPA II programme involved scientific research. This apparent contradiction could be explained if one assumes that no uniform notion of "scientific research" has yet developed at the international law level. As a consequence of the absence of a generally recognised notion, it may seem fair to recognise the primary competence of every State to determine its content, within the general limit of reasonableness.

On the other hand, the Court engaged in a close analysis of the notion of the terms "for purposes of" scientific research. According to the Court, the assessment of whether the elements of a program's design and implementation are reasonable to achieve its stated objectives requires consideration of the various elements of the program, including "decisions regarding the use of lethal methods; the scale of the programme's use of lethal sampling; the methodology used to select sample sizes; a comparison of the target sample sizes and the actual take; the time frame associated with a programme; the programme's scientific output; and the degree to which a programme coordinates its activities with related research projects" (13).

The closing, enlightening passage of this part (14), contains a magisterial depiction of the difference between a subjective and an objective test:

> "An objective test of whether a programme is for purposes of scientific research does not turn on the intentions of individual government officials, but rather on whether the design and implementation of a programme are reasonable in relation to achieving the stated research objectives. Accordingly, the Court considers that whether particular government officials may have motivations that go beyond scientific research does not preclude a conclusion that a programme is for purposes of scientific research within the meaning of Article VIII. At the same time, such motivations cannot justify the granting of a special permit for a programme that uses lethal sampling on a larger scale than is reasonable in relation to achieving the programme's stated research objectives. The research objectives alone must be sufficient to justify the programme as designed and implemented."

The use of that methodology led inexorably to its final outcome. After a close technical analysis of the program carried out by Japan, the Court

(12) *Ibidem.* See, in particular, para. 86.
(13) *Ibidem*, para. 88.
(14) *Ibidem*, para. 97.

concluded that, although that program "can broadly be characterized as scientific research", its design and implementation is not reasonable in achieving its stated scientific research objectives (15).

Concluding remarks

In all appearance, the ICJ has employed different standards in the same case. The absence of an internationally agreed meaning led the Court to adopt a loose standard to interpret the notion of "scientific research". In practice, this entails that States enjoy a broad, albeit not unlimited, margin of manoeuvring to determine the objectives and scope of a research project. A project falls within that notion unless it is not manifestly deprived of any scientific character. However, discretion granted to Japan to determine the objectives of its alleged scientific research, was curtailed by the application of a strict standard to measure the appropriateness of the activities carried out to pursue its stated objectives.

Far from being confined to the case at hand, the approach of the Court may have more general implications. It indicates that, where international law grants to individual States the power to deviate from their international obligations to pursue domestic interests, a dual standard of review applies.

A looser standard applies to the identification of the level of protection of the interests whose pursuit justifies derogation from international obligations. To the purposes of this contribution, it is immaterial to go beyond this observation and to determine more closely whether this standard incorporates a margin of appreciation or rather whether the broader discretion recognised to States is only an optical illusion, and simply reflects the difficulty to univocally interpret ambiguous or undetermined notions.

Be that as it may, this space of manoeuvring is offset by the adoption of a strict standard of review concerning the determination of appropriateness of the means to their stated objectives. The acknowledgement of a measure of discretion in this context would be tantamount to recognising to the State unfettered freedom of action and would ultimately jeopardise the binding effect of international obligations.

One would in vain search in the *Whaling* decision a reference to a balancing test. The reason probably lies in the faith in the virtues of interpretation, which led the Court to ground a sophisticated operation, entirely based on the search of appropriateness between aims and means, on the interpretation of the words "for a purpose of". The functionalising effect of these terms, coupled with the general requirement of reasonableness, ultimately resulted in an effect not dissimilar to that produced by the classical interests-balancing approach, which the Court preferred not to mention explicitly.

(15) *Ibidem*, para. 227.

Yet, the impression remains that, regardless of the terminological option, the entire decision revolves around a balancing operation. It is precisely in this type of contexts that the very idea of a margin of appreciation can have a role. It can make sense of the lack of internationally accepted standards for determining the content of general notions which apply primarily within national legal orders and, by so doing, it can control the interaction between international law and domestic legal orders, whose study constitutes one of the purposes of the present book.