

Review

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Whaling dispute at the crossroads

By Robert Beckman, For The Straits Times

RESEARCH whaling by Japan in the Antarctic has long been a source of contention. In the coming weeks and months, the issue is likely to generate even more publicity. The trial of a leading anti-whaling activist has begun in Japan, and Australia has announced that it will bring a case against Japan to the International Court of Justice (ICJ) next week. In addition, a compromise proposal to end the current stalemate will be considered at the annual meeting of the International Whaling Commission (IWC).

For several years now, the Sea Shepherd Conservation Society has sent ships to disrupt the Japanese scientific whale hunts in Antarctic waters. As a result, Japan's whaling fleet was unable to meet its planned target for harvesting whales during the last whaling season (November to May). The Japanese have described the tactics of the Sea Shepherd group as 'eco-terrorism' and 'piracy'.

The IWC has responded to the actions of the anti-whaling non-governmental organisations (NGOs) by passing a resolution declaring that the IWC and its member governments do not condone any actions that pose a risk to human life and property and the order of maritime navigation. Tokyo has responded by putting pressure on the states where the Sea Shepherd vessels are registered to de-register the vessels.

The Japanese government has also taken legal action in Japanese courts against two key members of the Sea Shepherd Society: New Zealander Peter Bethune, now in Japan's custody, is facing charges for unlawfully boarding a Japanese whaling ship, obstructing commercial activities, vandalism and injuring the crew of the whaling ship by hurling bottles of rancid butter at them. And last month, an arrest warrant was issued for Paul Watson, the founder and president of the Sea Shepherd group, for allegedly ordering the group's members to obstruct the Japanese whaling fleet.

Japan's research whaling has resulted in objections from anti-whaling states such as Australia. The case it has decided to file against Japan before the ICJ next week raises interesting issues as to whether it can successfully bring a claim against Japan on its whaling activities.

Japan's research whaling takes place in the waters off Antarctica where the applicable rules are the rules on high-seas fishing set out in the 1982 United Nations Convention on the Law of the Sea. Its provisions on freedom of fishing give all states the right to the sustainable harvesting of whales in their exclusive economic zones and on the high seas. The Convention does provide that states are to work through the appropriate international organisations for the conservation, management and study of whales.

The appropriate international organisation in the Antarctic region is the IWC, a body established under the 1946 International Convention for the Regulation of Whaling (ICRW). The ICRW envisages the harvesting of whales for commercial, scientific and cultural purposes.

However, starting in the 1970s, anti-whaling states and NGOs pursued a campaign to prohibit the harvesting of whales. As a result, the IWC endorsed a moratorium on commercial whaling that took effect in 1985 to 1986. Critics have argued that the moratorium was based on ethical and political considerations rather than legal or scientific considerations, and that it was inconsistent with the provisions and objectives of the ICRW.

Japan opposed the moratorium, but remained a member of the IWC. It began to harvest a certain number of whales for 'scientific purposes', a permitted exception to the moratorium. Anti-whaling states and groups have argued that Japan has abused the scientific whaling exception, and that it actually harvests whales for commercial purposes.

It may be possible for Australia to successfully bring Japan to the ICJ. Although cases normally cannot be referred to an international court or tribunal without the consent of both parties to the dispute, both Japan and Australia have filed 'optional clause declarations' accepting the jurisdiction of the ICJ. The effect of these declarations is that any dispute between the two states on any issue of international law may be referred to the ICJ unilaterally by either state.

However, Japan may argue that because its whaling activities do not interfere with any right or interest of Australia, Australia is not an injured state and cannot invoke Japan's responsibility before an international court. It may also argue that any issue over an abuse of the scientific whaling exception is a dispute between Japan and the IWC, and that Australia, as a member of the IWC, has no standing to raise the issue.

If Australia brings Japan to the ICJ, it is likely to seek provisional measures and ask the court to order Japan not to engage in scientific whaling until the case has been decided. Since cases before the ICJ take four to five years to be resolved, such a measure could be the end of the Japanese whaling industry. If the ICJ decides to hear the dispute, and if Australia can produce evidence that meat from Japan's research whaling has been sold in Japanese supermarkets, there is a good chance the court will decide that Japan has abused the scientific whaling exception.

In the meantime, an effort at the IWC to bridge the gap between whaling and anti-whaling states appears to have failed. In April, a proposal was presented that would have authorised commercial whaling for the first time in 24 years, in exchange for reducing the number of whales harvested each year. Whalers initially would have been allowed to take 400 Antarctic minke whales, to be reduced to 200 over the next decade. The proposal would have involved Japan not exercising rights under the exception for scientific whaling. It would have also established an international monitoring system to ensure compliance.

If accord can still be reached on the proposal, the IWC would re-establish some of its credibility. A compromise would give Japan a face-saving way to modify a whaling policy that damages its international reputation; and Australia and like-minded states would achieve a significant reduction in whaling and a system for verification of harvests.

However, if Australia brings its case against Japan to the ICJ next week, it is unlikely that a compromise will be reached at the IWC meeting. The focus of attention will then shift to the proceedings at the ICJ.

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