

CIL Fireside Chat Series
Whaling in the Antarctic (Australia v. Japan):
International Law, Science and the Environment
Friday 19 September 2014, 4:30–6:30 pm

THE AUSTRALIAN PERSPECTIVE

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Introduction – Overview

- ▶ Australia was an active whaling nation, and the last to stop commercial whaling among English-speaking nations
- ▶ UK and New Zealand ceased whaling in mid-1960s
- ▶ US, Canada & S Africa ceased in early 1970s.
- ▶ Australia stopped whaling in 1978 following the Frost Inquiry into Whaling (Sir Sydney Frost, former CJ of Papua New Guinea)
- ▶ Australian Whale Sanctuary established in 1999, under the Environmental Protection & Biodiversity Conservation Act (EPBC Act).

Australia's new objectives re: Whaling

Australia today is against whaling & seeks to:

- ▶ Establish a global whale sanctuary
- ▶ Impose a 50 year moratorium on whaling
- ▶ Remove the exception in the Whaling Convention that allows whaling for scientific research
- ▶ Promote whale watching as a viable economic alternative to whaling

Humane Society International v Kyodo Senpaku Kaisha Ltd

NSD 1519 OF 2004; [2008] FCA 3

- ▶ Action brought by HSI against Japanese whaling company KSK for an Injunction to stop whaling within the Australian Whale Sanctuary.
- ▶ Rejected at first instance but granted by Federal Court, applying the EPBC Act.
- ▶ Criticised by academics on the grounds that :
 - it is unenforceable against foreign nationals in the Australian Whale Sanctuary in the EEZ of the Australian Antarctic Territory
 - Problems with Australia proclaiming EEZ and whale sanctuary in the Antarctic
 - whaling is not an issue that can be dealt with by domestic courts

International Convention for the Regulation of Whaling, 1946 (wef 1948)

- ▶ This established the International Whaling Commission – one member from each state
- ▶ Also established a Scientific Committee
- ▶ Any state is allowed to withdraw from the Convention by giving requisite notice
- ▶ 88 state parties today, many are non-whaling nations
- ▶ Public awareness on environmental issues has grown, starting from 1972 with the Stockholm Conference on the Human Environment
- ▶ 1986 – IWC imposed zero catch limits for commercial whaling, opposed by Norway and Japan
- ▶ NGOs protesting against whaling – Greenpeace and Sea Shepherd – see “Whale Wars” on tv.

- June 2010 – Australia brought case before ICJ against Japan
- November 2012 – NZ intervened to give its observations on the construction of the Convention
 - 31 March 2014 – Judgment of ICJ

- ▶ Article VIII, paragraph 1, of the Convention
- ▶ 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.
- ▶ KEY ISSUE in Case: construction/interpretation of the Scientific Whaling Exception in Article VIII

Australia claims that Japan has violated its international obligations under the Whaling Convention, arguing that:

- ▶ Japan must respect moratorium for zero catch limits for commercial whaling
- ▶ Article VIII must be read in the context of the Convention as a whole, which emphasizes conservation and sustainable exploitation
- ▶ The issue of a whaling permit to its nationals by a state must be tested objectively and should not be at the sole discretion/perception of that state
- ▶ Thus, the court should have regard to objective elements in evaluating whether such permit was granted for scientific research, particularly re: “design and implementation of the whaling program as well as the results obtained”.

Australia also argued on meaning of “for purposes of scientific research” in Art. VIII

- ▶ The 2 elements are cumulative – “for purposes of” and “scientific research”
- ▶ Special permits are authorised only when non-lethal methods are not available
- ▶ The quantity of whale meat generated in the course of a research permit can cast doubt on whether the killing/taking was for purposes of scientific research, as the meat is then sold to consumers
- ▶ JARPA II was conceived in order to continue commercial whaling under the guise of scientific research
- ▶ JARPA II was launched without waiting for the results of the Scientific Committee’s final review of JARPA
- ▶ Japan took 853 whales during its first year of JARPA II, much higher than under JARPA (average 400 per year).
- ▶ 3,600 minke whales killed but little scientific output, hardly any cooperation with other research institutions

Australia alleged Non-Compliance with Paragraph 30 of Schedule

- ▶ Paragraph 30 of Schedule requires that states make the proposed permits available to the IWC Secretary before they are issued, and give sufficient time for review and comment by IWC Scientific Committee
- ▶ It also requires that these proposed permits specify the number, sex, size and stock of the whales to be taken; opportunities for other scientists to participate in the research and the possible effects on the conservation of the stock.
- ▶ Note – Court found that Japan has met the requirements here.

Decision of the ICJ

- ▶ Article VIII is an integral part of the Convention and must therefore be read in light of the object and purpose of the Convention
- ▶ It expressly authorises the killing & taking of whales “for purposes of scientific research”.
- ▶ Lethal methods can have a place in scientific research. The standard of review is an objective one. The Court will therefore look to that state which granted the permits, to explain the objective and basis for its determination of use of lethal methods in its research.
- ▶ Applying this to JARPA II – the scale of lethal sampling was far more extensive than warranted, little attention was given to the possibility of using non-lethal research methods more extensively; funding considerations rather than strictly scientific criteria played a role in the program’s design.
- ▶ Taken as a whole, the special permits granted by Japan are not “for purposes of scientific research” pursuant to Art VIII.

Comments

- ▶ Ethics and the environment – role of man vis a vis nature –
 - World Charter for Nature
 - Earth Charter
- ▶ Protection of the environment – endangered species, ecosystems & biodiversity – reconciling MEAs eg.
 - CITES (Convention on International Trade in Endangered Species of Wild Flora and Fauna)
 - CBD (Convention on Biological Diversity)
 - CMS (Convention on Migratory Species) – who owns migratory species?
- ▶ The Public Trust and the global commons
- ▶ The “Common Heritage of Mankind” – article 136 UNCLOS
“the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction” but only applies to mineral resources?

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