NZ INTERNATIONAL LAW

CASE NOTES

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Contents

Australia v Japan: New Zealand intervening (Whaling in the Antarctic)

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Court details: International Court of Justice

Facts:

- Due to the proximity to Antarctica, the government of Australia has been particularly vocal in its opposition to Japan's whaling activity in the Southern Pacific.
- In 1994, Australia claimed a 200-nautical-mile (370 km) exclusive economic zone (EEZ) around the Australian Antarctic Territory, which also includes a southerly portion of the IWC Southern Ocean Whale Sanctuary.
- On May 31, 2010, the Australian Government lodged formal proceedings against Japan in the International Court of Justice.
- The New Zealand government lodged a "Declaration of Intervention" with the ICJ on February 6, 2013, in which it deemed Japan as ineligible for a Special Permit that would allow whaling on the basis of scientific research
- As a result of the Australian government's 2010 application, a court case was heard at the ICJ. The hearing ran from June 26, 2013, until July 6, 2013.
- In its deposition to the ICJ, the Australian government has claimed that Japan "has breached and is continuing to breach" its obligations under the international convention, and further asserted that Japan has refused to accept IWC recommendations. Solicitor-General of Australia Justin Gleeson appeared for Australia before the ICJ.
- Japan articulated in certain terms its intentions in the Southern Ocean: "the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry", further explaining that a whale must be killed to obtain certain types of information, such as the collection of ear plugs to estimate the age of a whale.
- During the week beginning July 8, 2013, New Zealand delivered its intervention, in which it provided a history of the origin of the 1946 Whaling Convention and Australian Attorney-General Mark Dreyfus affirmed that his nation had not "colluded" with New Zealand to launch the ICJ proceedings. Dreyfus concluded Australia's contribution by emphasizing the friendship shared by Australia and Japan, and stated: "Australia respectfully requests the Court to bring Japan’s whaling program to an end."
- The ICJ's 16-judge bench received and then decided upon the case.

Issue:

- The issue revolved around whether Japan's whaling in the Antarctic waters was for scientific or commercial purposes.

Reasoning / Decision (Commentary):

- On March 31, 2014, the ICJ ruled that Japan's whaling program was not for scientific purposes.
- The Court ordered that "Japan revoke any extant authorisation, permit or licence to kill, take or treat whales" and refrain from granting any further permits.
- The court's judges agreed with Australia that the number of Japanese scientific research publications were not proportionate to the number of animals killed.
- The decision of the ICJ is final and the right of appeal does not apply in this context.

Ratio:

"The Court finds that the use of lethal sampling per se is not unreasonable in relation to the research objectives of JARPA II. However, as compared to JARPA, the scale of lethal sampling in JARPA II is far more extensive with regard to Antarctic minke whales, and the programme includes the lethal sampling of two additional whale species. The Court thus considers that the target sample sizes in JARPA II are not reasonable in relation to achieving the programme's objectives. First, the broad objectives of JARPA and JARPA II overlap considerably. To the extent that the objectives are different, the evidence does not reveal how those differences lead to the considerable increase in the scale of lethal sampling in the JARPA II Research Plan. Secondly, the sample sizes for fin and humpback whales are too small to provide the information that is necessary to pursue the JARPA II research objectives based on Japan's own calculations, and the programme's design appears to prevent random sampling of fin whales. Thirdly, the process used to determine the sample size for minke whales lacks transparency, as the experts called by each of the Parties agreed. Fourthly, some evidence suggests that the programme could have been adjusted to achieve a far smaller sample size, and Japan does not explain why this was not done. The evidence before the Court further suggests that little attention was given to the possibility of using non-lethal research methods more extensively to achieve the JARPA II objectives and that funding considerations, rather than strictly scientific criteria, played a role in the programme's design.

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