

## PROTECTING AUSTRALIA'S MARINE RESOURCES: IS LITIGATION THE ANSWER? Natalie Klein\*

Australia's interest in protecting its marine resources is manifest in Australia's participation in regional fisheries organisation, the assets and personnel deployed for law enforcement and surveillance activities, as well as diplomatic initiatives launched in multilateral fora (seen most recently in Australia's proposal to the International Whaling Commission to regulate scientific whaling more closely). The strength of Australia's conviction has led to it engaging in international litigation as a means of upholding its rights in protecting marine resources. This strategy can be traced to the *Nuclear Tests* cases, but is more recently evident in the *Southern Bluefin Tuna* (SBT) arbitration as well as the threat of litigation in response to Japan's so-called scientific whaling activities. This paper will examine the lessons learned from the *Southern Bluefin Tuna* litigation, the strategies and considerations for pursuing litigation against Japan to protect whale species and in doing so, it will consider the nature and place of litigation in resolving disputes for the protection of marine resources.

### Why litigate over SBT?

In assessing whether states are likely to turn to international litigation as a means of resolving their disputes, a range of factors—legal and non-legal—must inevitably be taken into account:

- **Historically:** Both states and their respective tuna industries have a history of cooperation since their first negotiations over tuna in the late 1960s, including undertaking a joint venture agreement, Australian ports being open to Japanese vessels for repairs and Japan providing advice on tuna fishing practices. In a variety of ways, this cooperation continued up to the time of the SBT litigation.
- **Economic Interests:** A further factor to consider as influencing a decision to pursue international litigation is the financial stakes involved. There are large sums of money at stake when it comes to tuna. The SBT caught off the Australian coast are primarily exported to Japan for sale as sashimi. The value of the commercial SBT harvest ranges up to AUD \$450m after value adding<sup>1</sup> Economic motives also explain aspects of Japan's decision-making in relation to SBT, especially as importers of the fish seek to meet market demands in Japan.
- **Public Interest:** Despite the mass over-fishing of SBT over decades, these fish just fail to capture the public's imagination. It seems difficult to conclude that pressure from the general public was a catalyst or provided additional impetus for Australia to pursue litigation against Japan over SBT. It is perhaps the case that the very absence of general public scrutiny was a conducive factor to pursuing litigation.

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<sup>1</sup> Australian Government, Department of Environment and Heritage, 'Strategic Assessment of the Southern Bluefin Tuna Fishery', (2004), 3  
<<http://www.environment.gov.au/coasts/fisheries/commonwealth/southern-bluefin-tuna/pubs/southern-bluefin-tuna-assessment.pdf>> at 24 June 2008.

- **National Interest:** The question of national interests raises some of the broader concerns that are at stake. For Australia, it would be concerned about jeopardising its leadership position in the SBT Commission, and perhaps its reputation more broadly when it comes to the management of marine resources. Japan's interests rest in maintaining supply of an important resource, and also in ensuring that precedents are not readily set, whereby a concession in one forum may lead to expectations of concessions in other fora.
- **Scientific Uncertainty:** For SBT, decisions regarding management, conservation and exploitation have been complicated by differing scientific views on the status of the stocks. Scientists from each state have challenged the other's mathematical techniques, as well as the assumptions underpinning research design, and its execution, and disagreed over ecological modeling.<sup>2</sup> These differences motivated Japan to pursue unilaterally its Experimental Fishing Program (EFP), which was the ultimate catalyst for Australia and New Zealand to commence legal proceedings.

It is difficult to predict what weight might be given to any of these national imperatives in decisions regarding how a dispute will be resolved. For litigation, all these factors are played out to varying extents, and with varying degrees of acknowledgement, in the context of specific legal disputes.

### ***SBT Litigation***

The *SBT Case* has been the subject of considerable academic commentary, and it does not need to be revisited in its entirety here.<sup>3</sup> It should just be noted that the arbitral tribunal ultimately decided that it lacked jurisdiction to determine the case on the basis that the dispute settlement procedures in the Convention for the Conservation of Southern Bluefin Tuna (CCSBT) took precedence over those available under the UN Convention on the Law of the Sea (UNCLOS). As a result, no decision was reached on the merits of Japan's EFP.

Whatever counts as a win or loss in the immediate aftermath of a judgment may be a different assessment when the longer term outcomes of the litigation are gauged. The litigation between Japan and Australia and New Zealand over SBT had a range of effects – in relation to resolving the immediate dispute concerning the EFP (and accompanying port ban measures Australia and New Zealand had put in place) and as a more general matter in the relationship between the states parties to the CCSBT. There are still contrasting views on how well this organisation is functioning, however.<sup>4</sup> Although the litigation itself left a variety of legal questions unanswered,

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<sup>2</sup> Richard Tanter, 'Death by Sashimi-the Survival of the Southern Bluefin Tuna' (1999) 14 *Arena Journal* 31, 33.

<sup>3</sup> *Southern Bluefin Tuna Case* (Australia and New Zealand v Japan) (2000) 39 ILM 1359. For academic commentary, see, eg, Natalie Klein, *The Role Of Dispute Settlement in the UN Convention on the Law of the Sea* (2005) 35-43, 64-66, 73-75, 82-83; Barbara Kwiatkowska, 'The Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan Cases)' (2000) 15:1 *International Journal of Marine & Coastal Law* 1; Bernard H Oxman, 'Complementary Agreements and Compulsory Jurisdiction' (2001) 95 *American Journal of International Law* 277.

<sup>4</sup> See, eg, Alastair Cameron, 'Is there Hope for the Fish?: The Post-Arbitration Effectiveness of the Convention for the Conservation of Southern Bluefin Tuna' (2007) 15 *New York University Environmental Law Journal* 247.

several commentators have taken the view that the process itself contributed to the restoration of cooperative relationships in various ways.<sup>5</sup>

What are the broader lessons to be learned from this case for Australia in pursuing litigation in relation to other marine resources? Or are there too many unique features to the pre-litigation and post-litigation setting that minimise its value as a future model for government decision-making on dispute settlement? Two important aspects that may be drawn from the litigation is that even though members of an international organisation sought to involve a third-party in the resolution of their dispute, the dispute was ultimately referred back to the international organisation and was resolved there. Also of note, is that Australia and Japan's overall relationship was strong enough to weather this particular storm.

### **What Can We Learn from Tuna?**

The precedential value of *Southern Bluefin Tuna* can be explored more specifically in relation to Australia's current dispute with Japan over its "scientific" whaling program. How do the factors leading up to the SBT litigation compare to the situation between Australia and Japan when it comes to whales?

- **Historically:** A long history of cooperation does not exist when comparing SBT to whaling. While both states share a history of whaling, their paths diverged in the 1970s when Australia decided that it would cease commercial whaling and advocate for a moratorium on whaling internationally. Japan's interest – and some would say conduct – in commercial whaling has remained consistent over the decades.
- **Economic Interests:** There is now very little commercial demand for whale products and the current argument is that a whale is worth more alive than dead, given the burgeoning whale-watching industry throughout the world. IFAW has reported that: "Whale watching is worth almost AU\$300 million to Australia's economy and an estimated 1.6 million people go whale watching there each year."<sup>6</sup> All the same, since an export industry is not involved, Australia clearly has less to gain (or lose) as a financial matter with respect to whales.
- **Public Interest:** In turning to public interest in tuna and whaling, there is again a contrasting position, but in this instance public interest in whaling far surpasses public interest in the welfare of SBT. This interest has been exemplified in recent months through the considerable media attention devoted to whaling in Australia, particularly in relation to the dramatic clashes between Japan's whalers and the Sea Shepherd Conservation Fund during last season's expedition.

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<sup>5</sup> See Tim Stephens, 'The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case', (2004) 19:2 *The International Journal Of Marine and Coastal Law* 177, 187; William R Mansfield, 'Note and Comment: Correspondence' (2001) 95 *American Journal of International Law* 624

<sup>6</sup> International Fund for Animal Welfare, *Slaughtering Science: The Case Against Japanese Whaling in the Antarctic* (May 2006), 9  
<[http://www.ifaw.org/ifaw/dimages/custom/whale\\_watching\\_au/pdf/Slaughtering\\_Science.pdf](http://www.ifaw.org/ifaw/dimages/custom/whale_watching_au/pdf/Slaughtering_Science.pdf)> at 24 June 2008.

- **National Interest:** For Australia, questions of issue-linkage and reputation are particularly important with regards to whales. Actions Australia might take against Japan in relation to its research program may have important implications for Australia's position within the Antarctic Treaty system. Featuring strongly in Japan's arguments about its continued desire to re-establish commercial whaling is the national tradition of consuming whale meat and that anti-whaling sentiment is a form of cultural imperialism. Once again, issues of precedent would be of concern for Japan in relation to whales.
- **Scientific Uncertainty:** Japan's current research program in Antarctica is known as JARPA II, and comprises monitoring of the Antarctic ecosystem and development of new management objectives for whale resources. Some scientists within the IWC have argued that this research methodology contains "several unsubstantiated or incorrect assumptions".<sup>7</sup> Another point of controversy regarding the research has been whether lethal research is essential. Similar to SBT, the scientists just don't agree.

#### ***Should Australia follow the SBT precedent and litigate?***

Obviously, there is not a precise match when we consider these particular factors, and it may be that any one of these deviations is enough to warrant Australia avoiding litigation over JARPA II. Nonetheless, it must be noted that there are avenues available to Australia for pursuing litigation and these were explored in the Sydney Panel Report, the Executive Summary of which is available on the IFAW website.<sup>8</sup> In particular, the dispute settlement procedures under UNCLOS are again open to Australia (but without the jurisdictional issue it faced in *SBT*) and so potentially is the International Court of Justice, as Australia and Japan have both accepted the compulsory jurisdiction of this court.

#### ***What would be the likely outcome of litigation over whales?***

The main legal arguments against Japan's scientific whaling allege that JARPA II is not scientific research but is tantamount to commercial harvesting and hence in violation of the ICRW; that Japan has not followed ICRW procedures in issuing permits for JARPA II; and that Japan's actions amount to an abuse of right under the treaty.<sup>9</sup> In addition, it can be argued that the program is in violation of certain provisions of the UNCLOS (and arguably other multilateral treaties).<sup>10</sup>

But the critical question in the end is: Would Australia win? Would Australia gain a ruling that Japan is violating its international obligations through its scientific whaling program? Labelling a win or loss is not an entirely appropriate exercise when it comes to international litigation. What constitutes a "win" is rarely a zero-sum determination and it is often the case that what counts as a "win", especially in

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<sup>7</sup> Scientists comments published in 1(1) *Journal of Cetacean Resource Management* 3-24, 2, cited in Report of the International Panel of Independent Legal Experts On: Special Permit ("Scientific") Whaling Under International Law, (Paris, 12 May 2006), 62, para 134  
<[http://www.ifaw.org/ifaw/dfiles/file\\_647.pdf](http://www.ifaw.org/ifaw/dfiles/file_647.pdf)> at 24 June 2008 (hereafter Paris Report).

<sup>8</sup> International Fund for Animal Welfare, "Australian Government can stop Japan whaling", May 7, 2007, <<http://www.ifaw.org/ifaw/general/default.aspx?oid=212038>> at June 24, 2008.

<sup>9</sup> See arguments in Paris Report, above n 7.

<sup>10</sup> Ibid.

disputes concerning international environmental law, may be a matter of interpretation. Something in between could involve a finding that Japan had not followed correct procedure for commencing JARPA II; that it was entitled to conduct scientific whaling but that the specific program as conceived was not lawful; that JARPA II was lawful but Japan was failing obligations to cooperate in the manner it was being conducted.

The precise findings will depend to a large extent on the forum that hears the case and hence over what submissions that court or tribunal has jurisdiction. Even then, it remains a matter of speculation as to what a court or tribunal would conclude, partially because it will depend on the strength of the evidence available (particularly scientific evidence) and how well that evidence is presented.

Irrespective of whether there is a win for Australia or a win for Japan (or something in between), the matter will inevitably go back to the International Whaling Commission (IWC). The benefits of litigation would be seen if the judgment provides enough guidance on certain questions of interpretation and application so as to break the present impasse in the IWC and indicate how certain differences should be resolved. In particular, some of the most problematic aspects of JARPA II (including the number and species of whales proposed to be taken, as well as its lethal nature) might be resolved. There may be enough of a “win” for both sides that stalled negotiations could be resumed.

### **Is Litigation the Answer?**

Whatever factors ultimately contribute to the decision to litigate, it is at least clear that no government takes this decision lightly.<sup>11</sup> Moreover, when it comes to disputes over marine resources, it is evident that litigation is not the only option available to states for resolving differences. Most commonly, decisions regarding the management and utilization of marine resources that cross international boundaries are now handled within regional or species-specific organisations. These organisations provide a key avenue for airing grievances, developing mechanisms to redress deficiencies in management schemes and committing to new decisions when circumstances demand through a process of negotiation and compromise. The delicate balancing game that has to occur may be sufficient to defuse, even if not settle, particular conflict.

Litigation tends to be avoided, partially because of the perception that international litigation is seen as an adversarial process in which states are compelled to adopt particular postures for the sake of the case. Nonetheless, experience has not so far shown that litigation needs to be avoided at all costs. In the few cases that have addressed fisheries issues, there has been some effort on the part of the relevant court or tribunal to adopt a facilitative approach to dispute resolution. There is no strict win or lose, but each player tends to get some reward in the process. It may instead be the case that the particular marine resource ends up the loser, rather than any particular state. What needs to be borne in mind by decision-makers as they canvas the various options available to them, is that litigation needs to be available as a credible tool to address threats to marine resources. Of course the occasions for its use need to be

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<sup>11</sup> As noted by Australia’s Attorney General in his address to the Annual Conference of the Australian and New Zealand Society of International law, Thursday, 26 June 2008 (copy on file with author).

appreciated within the wider context of diplomatic and political efforts (including the potential for issue-linkage, political priorities of the actors involved, and the possible reputational costs incurred). Nonetheless, it does not need to be relegated as the most extreme response and hence the one least likely to be pursued.

For the moment, it appears that Australia will not be pursuing the litigation option for whaling. This view reflects the fact the discussions are currently underway in the IWC on ways to reform the organisation.<sup>12</sup> Moreover, Australia has also put forward proposals to overhaul some of the most offensive aspects of scientific whaling (including the unilateral aspect of decision-making when it comes to issuing special permits and the use of lethal research).<sup>13</sup> It is obvious that Australia will want to see whether these efforts make any difference before pursuing a more adversarial course of conduct. Australia may need to re-consider this position in a year's time if little or nothing has changed within the IWC, and the Japanese whaling fleet is again about to set sail.

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<sup>12</sup> Dispute settlement experts have been brought into the IWC as a means of finding ways around the current impasse. See Chair's Report of the Intersessional Meeting on the Future of IWC (6-8, March, 2008), IWC/60/7 Agenda item 18 <[http://iwcoffice.org/\\_documents/commission/IWC60docs/60-7.pdf](http://iwcoffice.org/_documents/commission/IWC60docs/60-7.pdf)> at 24 June 2008.

<sup>13</sup> Australian Government, 'Whale Conservation and Management: A Future for the IWC', International Whaling Commission, Intersessional Meeting (March, 2008), IWC/MO8/INFO 11 <[http://iwcoffice.org/\\_documents/commission/IWC60docs/IWC-M08-INFO11.pdf](http://iwcoffice.org/_documents/commission/IWC60docs/IWC-M08-INFO11.pdf)> at 24 June 2008.