CHAPTER 11

Science in the Court! The Role of Science in ‘Whaling in the Antarctic’

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The trouble with the whaling industry today is that there are too many damned intellectuals mixed up in it!1

Introduction

‘The Court concludes that the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II are not “for purposes of scientific research” pursuant to Article VIII, paragraph 1, of the Convention’.2

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This paper deals with the way science featured in the case Whaling in the Antarctic (Australia v. Japan: New Zealand intervening). ‘Science’ was invoked by both Australia and Japan (and by New Zealand). The activities carried out under JARPA II and JARPA were portrayed as ‘unscientific’ by Australia and as ‘science’ by Japan. Scientists, as expert witnesses, were called upon to give written and oral evidence (two by Australia and one by Japan) and they were cross-examined in Court, and were questioned by the bench. Australia presented two Expert Witnesses to discuss science, Dr Nick Gales, Chief Scientist of the Australian Antarctic Program, and Professor Marc Mangel of the University of California, Santa Cruz. Japan presented one Expert Witness, Professor Lars Walløe from the University of Oslo.

It is uncommon for scientists to appear as witnesses in the International Court of Justice. In the Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay) the International Court of Justice observed:

Regarding those experts who appeared before it as counsel at the hearings, the Court would have found it more useful had they been presented by the Parties as expert witnesses under Articles 57 and 64 of the Rules of Court, instead of being included as counsel in their respective delegations. The Court indeed considers that those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court.3

Besides being able to be cross-examined and/or questioned by the Court, expert witnesses (as opposed to ‘experts’ as counsel) are less likely to taken as ‘advocates’ for the position of parties to a dispute.4 Foster (2014) in discussing the role of experts in international environment conflicts, wrote that ‘[d]isagreements over science feature with growing regularity in international disputes’.5 Foster went on to consider ‘...the possibility that the Court could additionally decide to appoint its own experts to assist in the resolution of a case...’.6

While the Court did not appoint its own experts in the whaling case, the Judgment deals in detail with the evidence of the expert witnesses from both sides in the case. In doing so, it draws extensively on this evidence in delivering its Judgment. The Court examined the evidence before it about ‘science’ and ‘scientific research’ and ultimately drew its own conclusions as to the veracity of that evidence and its relevance to the case.

I deal with how ‘science’ was used by Australia, Japan and New Zealand to describe the ‘Special Permit whaling’ carried out by Japan in the Antarctic, and how the Court interpreted the ‘science’ before it. Like the Court, I do not attempt to describe what science is, although I will characterise the strength of some of the arguments used in the written and oral evidence in the proceedings.

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3 Judgment, Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), International Court of Justice, 20 April 2010, para 167.
6 Foster 2014, p. 141.