



**EXAMINATION IN THE COURSE
ENVIRONMENTAL LAW AND LAW OF THE SEA
JUR-3603**

Spring 2007
23rd -27th April

The Southern Champion Case

Factual background

In the fall of 2006, the newly fitted Australian fisheries enforcement vessel *Southern Champion* left the port of Fremantle in Australia for an inspection cruise of the Southern Ocean. The *Southern Champion* first heads out in a southwesterly direction towards Heard Island and McDonald Islands. Sovereignty over these islands has been claimed by Australia without publicly stated protest by other States.

Prior to entering the exclusive economic zone (EEZ) of Heard Island and McDonald Islands, the *Southern Champion* receives a report by an Australian surveillance aircraft that it has spotted two vessels in the northwestern part of the EEZ and that it has informed these vessels that they are suspected of illegal fishing in the Australian EEZ and that they will be boarded by Australian enforcement officials. While one of the vessels - the transshipment vessel *Washington* flying the flag of the United States - maintains its position, the other vessel - the fishing vessel *Lomé* flying the flag of Togo - immediately heads in a northerly direction towards Kerguelen, which is claimed as French territory. This claim has not been protested by other States. The *Southern Champion* starts hot pursuit and the aircraft circles above the spotted vessels while constantly maintaining visual contact.

The *Southern Champion* eventually intercepts the *Lomé* in the territorial sea of Kerguelen. France and Australia have entered into an agreement permitting Australia to pursue vessels into the territorial sea of Kerguelen. Australian enforcement officials board the vessel and order it to proceed to Fremantle. Subsequently, the *Southern Champion* returns to the *Washington*, deploys a boarding party and ensures that that vessel also heads to Fremantle.

The *Southern Champion* then sets course for the Antarctic continent. Part of the Antarctic continent is claimed by Australia. While some States recognize that claim - especially some of the other claimants - the majority of the international community of States does not. Article IV of the 1959 Antarctic Treaty resolves this problem by means of an agreement to disagree on the sovereignty question. In 1994 Australia claimed an EEZ off its Australian Antarctic Territory (AAT). According to section 225 of the Environment Protection and Biodiversity Conservation (EPBC) Act of Australia, the Australian Whale Sanctuary also applies to the

EEZ off the AAT and also to foreigners. All types of whaling are prohibited in the sanctuary. This part of the Australian Whale Sanctuary is well within the boundaries of the Southern Ocean Sanctuary established under the International Convention for the Regulation of Whaling (ICRW) in which commercial whaling is prohibited (Schedule, III. Capture (b)).

In the EEZ off the AAT, the *Southern Champion* locates two vessels that are engaged in whaling for Southern right whales. One is the *Tokyo* - flagged to Japan - and the other is the *Oslo* - flagged to Norway. Both vessels are informed to stop, are boarded by an enforcement party and are directed towards the port of Hobart, Australia. The Australian enforcement officials find no evidence of scientific research on board of the whaling vessels.

Legal claims:

Australia informs the governments of Togo and the United States that the *Lomé* and the *Washington* are charged with illegal fishing in the Australian EEZ pursuant to the 1991 Fisheries Management Act of Australia. The vessels, cargo and equipment are seized and the captain and crew are in custody in connection with the institution of criminal proceedings.

The government of Japan and Norway are informed that the *Tokyo* and the *Oslo* are charged with violating Section 225 of the EPBC Act. The vessels, cargo and equipment are seized and the captain and crew are in custody in connection with the institution of criminal proceedings.

Togo vs. Australia:

In response, the government of Togo maintains that the arrest of the *Lomé* was in violation of international law because:

1. The hot pursuit was not carried out in accordance with the requirements laid down in Article 111(3) of the United Nations Convention on the Law of the Sea (LOS Convention). The fact that Australia and France had agreed by means of a treaty to give each other prior consent to continue hot pursuit in their territorial seas is irrelevant;
2. Togo does not recognize Australian sovereignty over Heard Island and McDonald Islands;
3. Even if Australia would have sovereignty over Heard Island and McDonald Islands - which the government of Togo rejects - Australia is not entitled to establish an EEZ around them as they should be regarded as rocks within the meaning of Article 121 of the LOS Convention.

Togo demands that Australia immediately releases the vessel and crew:

4. Since the arrest was illegal there is no requirement of posting a bond pursuant to Articles 73 and 292 of the LOS Convention.
5. Even if the arrest was legal, Australia is obligated to release the vessel promptly and before the vessel arrives in Fremantle on posting a bond pursuant to Articles 73 and 292.

USA vs. Australia:

The United States also maintains that the arrest of the *Washington* was contrary to international law because:

6. The *Washington* was not engaged in fishing as it was merely provisioning the *Lomé* and Article 56 of the LOS Convention does not give coastal States sovereign rights for the purpose of provisioning. The situation is thus similar to the *Saiga* (No. 2) case from 1999 before the International Tribunal for the Law of the Sea (ITLOS), where the ITLOS ruled that the relevant coastal State did not have jurisdiction to regulate bunkering in the EEZ;
7. Even if provisioning could be classified as fishing activity - which the government of the United States rejects - the activities of the *Washington* took place within the geographical scope of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR Convention). As the United States is a contracting party to that Convention, its vessels are allowed to engage in fishing activity within the geographical scope of the CCAMLR Convention.

The United States also requests Australia to:

8. Release the vessel and crew pursuant to Articles 73 and 292 of the LOS Convention before arriving in Fremantle.

Japan vs. Australia:

Japan argues that the arrest of the *Tokyo* violated international law because:

9. The agreement to disagree laid down in the Antarctic Treaty does not allow Australia to exercise sovereign rights in maritime zones off the Antarctic continent;
10. Japan opted out of the Southern Ocean Sanctuary established under the ICRW;
11. The *Tokyo* was engaged in scientific research.

Norway vs. Australia:

Norway argues that the arrest of the *Oslo* violated international law because:

12. The agreement to disagree laid down in the Antarctic Treaty does not allow Australia to exercise sovereign rights in maritime zones off the Antarctic continent;
13. Norway opted out of the moratorium on commercial whaling established under the ICRW.

Question:

How would you advise the Australian government to respond to these legal opinions and requests? In your advice, you have to verify if the States referred to are parties to the relevant treaties.

.....

Det er valgfritt om besvarelsen skrives på norsk eller engelsk.

Tre eksemplarer av oppgaven leveres i ekspedisjonen innen fredag 27. april 2007 klokken 15.00. Et eksemplar sendes på e- post til følgende adresse; elektronisk_innlevering@jus.uit.no
Foreløpig sensur faller tirsdag 12. juni klokken 14.00 og kunngjøres på fakultetets oppslagstavle utenfor ekspedisjonen.

Muntlig eksamen for de som består den skriftlige delen, finner sted onsdag 13. juni. Eksamen finner sted på rom 4.404 og starter ca klokken 10.00. Kandidatene får den endelige karakteren opplyst umiddelbart etter den enkeltes muntlige prøve.

.....

Three copies of the paper must be submitted to the reception for students, 2nd floor by Friday 27th April at 15.00 h at the latest. One copy of the paper must be sent by email to the following address: elektronisk_innlevering@jus.uit.no

Preliminary examination results will be published at 2 p.m on Tuesday 12th June at the reception for students, 2nd floor. Oral examination of candidates who passed the written examination, will take place Wednesday 13th June in room 4.404 at 10.00 a.m. The examination will take approximately 30 minutes.

Tromsø 23rd April 2007


Per Christiansen
eksamensleder